A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America

by Caleb Nelson*

In 1832, when Mississippi’s constitutional convention transferred the power to select all state judges from the legislature to the voters, some observers were incredulous. Although Indiana and Georgia had been electing trial judges for years, the election of appellate judges seemed beyond the pale. “Our constitution,” warned a former member of Mississippi’s highest court, “is the subject of ridicule in all the States where it is known. It is referred to as a full definition of mobocracy.”1

If so, most Americans quickly changed their minds. While every state that entered the Union before 1845 had done so with an appointed judiciary, every state that entered between 1846 and 1912 provided for judicial elections. In the more established states, furthermore, all but two of the sixteen constitutional conventions held between 1846 and 1860 called for the popular election of both appellate and inferior judges. As the nation approached the Civil War, two of every three states elected their lower courts and three of every five states elected their supreme courts.

Scholars have offered a variety of explanations for the rise of judicial elections. Most have been disparaging. Echoing the statements of convention delegates who opposed election,2 early twentieth-century writers tagged the reform as the outgrowth of a senseless democracy, an indiscriminate effort to make all governmental institutions fit Jacksonian theories of popular representation. Shaking his head over the reformers’ “frontier logic,” James Parker Hall—then the dean of the University of Chicago Law School—explained in 1915 that the change arose “not on

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*Yale Law School, Class of 1993. The author gratefully acknowledges Michael Les Benedict’s helpful comments and suggestions.

1. THE NATCHEZ, Nov. 9, 1832, quoted in Edwin Arthur Miles, Jacksonian Democracy in Mississippi 42 (1960).

2. See, e.g., 2 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 757 (Boston 1853) [hereinafter MASSACHUSETTS DEBATES] (remarks of Richard Dana, Jr.).
account of any general complaint of the conduct or competency of appointed judges, but simply because a logical extension of the prevailing theory of democracy seemed to require the popular election of all possible officers of government. . . .”3 James Bryce agreed that the elective system was entirely the result of “a wave of democratic sentiment.”4 Learned Hand was almost as dismissive; to him, Mississippi’s reform reflected “a burst of democratic enthusiasm” and New York adopted the reform “under the full tide of Jacksonian democracy.”5 Lesser lights were openly scornful. New York lawyer Albert S. Bard blamed the change on “the theory that the direct vote of the people was a panacea for political ills,”6 and H.S. Gilbertson, assistant secretary of the National Short Ballot Organization, accused “simple-hearted democrats” of entertaining “the old superstition” that popular election cures all evils.7

Subsequent scholars have shared these opinions. James Willard Hurst’s argument that the shift to an elected appellate bench “was based on emotion rather than on a deliberate evaluation of experience under the appointive system”8 reflects a long-dominant view. Indeed, Dorman B. Eaton’s 1873 assertion that the change “floated in on a rush of the stream of revolution”9 may be the most frequently quoted assessment of the reform. According to Kermit Hall, who criticizes both Hurst’s and Eaton’s statements, “most scholars have insisted that emotion prevailed over reason.”10

Many delegates at the state conventions certainly did use the emotional rhetoric of the day to argue their cases, with varying degrees of sophistication. Delegates branded the appointive system “a relic of monarchy”11 and the “last vestige of aristocracy”;12 some delegates

4. JAMES BRYCE, 2 MODERN DEMOCRACIES 92 (1921). “The view has persisted,” Bryce added, “and still governs men’s minds in most states. It is not argued that the plan secures good judges. Obedience to a so-called principle disregards or ignores that aspect of the matter.” Id. at 92-93.
5. Learned Hand, The Elective and Appointive Methods of Selection of Judges, 3 PROC. ACAD. POL. SCI. N.Y. 82, 82 (1913).
6. ALBERT S. BARD, SOME OBSERVATIONS ON THE PRIMARY AND ELECTION LAWS OF THE STATE OF NEW YORK WITH SPECIAL REFERENCE TO THE NOMINATION AND ELECTION OF JUDGES 1 (1914).
11. 2 MASSACHUSETTS DEBATES, supra note 2, at 708, 778 (remarks of Foster Hooper); see also 3 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, HELD IN 1867 AND 1868, IN THE CITY OF ALBANY 2196 (1868) [hereinafter NEW YORK 1867 DEBATES] (remarks of Edward Brown) (referring to “monarchical institutions”).
12. 2 MASSACHUSETTS DEBATES, supra note 2, at 775 (remarks of Samuel French);
referred to "the immortal Jackson," and there was much talk of the need to make the judiciary "consonant with our theory of government." 

But the movement reflected much more than an emotional commitment to the idea that the people should elect all their officers. At least in the early years, opposition to the reform was potent and the arguments on both sides were sophisticated; in several state conventions, in fact, the debates over the elective judiciary were so long that they prompted time limits on speeches. Most delegates clearly had more in mind than merely applying the democratic principle. In Mississippi, for instance, the same delegates who had argued passionately for the right of the people to elect their judges refused to allow the people to vote on the new constitution, despite the spirited objections of those who had favored appointment.

Some of the same commentators who have stressed the delegates' emotional commitment to the elective principle also have offered an alternative explanation for the decline of the appointed bench, arguing that most states mindlessly imitated New York's 1846 decision to elect judges. Frequently advanced by New Yorkers, this theory faces a difficulty: several states had been electing their trial-court judges, and Mississippi had been electing all its judges, well before New York considered following suit. Dorman Eaton, one of the theory's early partisans, simply ignored this fact; in arguing that New York "induced most of the younger and some of the older States to commit themselves to the rash experiment of

see also REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY, 1849-1850, at 297 (Frankfort 1850) [hereinafter KENTUCKY DEBATES] (remarks of Richard Ghoulson) (calling restrictions on election of judges "the last dying kick of aristocracy"). At the Mississippi convention, the faction that favored appointment was known as "the aristocrats." MILES, supra note 1, at 36.

13. 2 MASSACHUSETTS DEBATES, supra note 2, at 816 (remarks of George Hood); see also 3 NEW YORK 1867 DEBATES, supra note 11, at 2194 (remarks of Ezra Graves) (citing Jackson).

14. REPORT OF THE DEBATES AND PROCEEDINGS IN THE NEW YORK STATE CONVENTION, FOR THE REVISION OF THE CONSTITUTION 470 (Albany 1846) [hereinafter NEW YORK DEBATES] (remarks of John Taylor); see also KENTUCKY DEBATES, supra note 12, at 281 (remarks of Larkin Proctor) (asserting duty to make government "harmonise as near as may be with the spirit and genius of the people"); 2 MASSACHUSETTS DEBATES, supra note 2, at 792 (remarks of Benjamin F. Butler) (calling frequent elections to hold the people's agents accountable "a necessity in a republican government").

15. Note in particular the conventions of New York (1846), Illinois (1847), Kentucky (1849-1850), Indiana (1850), Virginia (1850-1851), Ohio (1850-1851), and Massachusetts (1853); all but the last of these conventions adopted the reform. Hurst reserves his harshest words for the post-1850 conventions, and while he seems to draw the line a few years too early, he is certainly correct that election supporters in the later conventions found that many of their battles already had been won for them. They, of course, had the luxury of seeing how election was working in other states.

16. See, e.g., 2 MASSACHUSETTS DEBATES, supra note 2, at 793 (motion of Henry Cushman for half-hour limit).

17. MILES, supra note 1, at 41.
an elective judiciary,” Eaton asserted that until New York set its “hasty example” every state had always appointed all its judges. More accurate commentators, such as Professor Francis R. Aumann, instead have argued that New York’s move gave the reform “widespread acceptance”; states “followed the lead of New York,” not Mississippi.

But if conventions had treated the policies of other states as conclusive, the debates would have been substantially shorter. While there is no doubt that New York helped legitimate the elective system, its change did not carry overpowering weight. The other conventions tended to rely on Mississippi’s experience as much as on New York’s; certainly the Kentucky delegate who referred to the reform’s success in Mississippi “and elsewhere” showed no special confidence in New York. The New York convention, for that matter, also cited the Mississippi experience.

A Partisan Reform?

Writing in 1940, Professor Aumann suggested a different explanation for the movement toward the elective judiciary. While remarking that “the Jacksonians believed there was no office to which the elective principle should not be applied,” he argued that “[p]olitics had a great deal to do with [the reform]. The Jacksonian Democracy like the Jeffersonian Democracy viewed the judicial branch as a bulwark for the opposition group.” Without saying so explicitly, Aumann strongly hinted that the reformers favored the elective system as a way to replace Whig judges with partisans of their own.

18. EATON, supra note 9, at 5.

19. Id. at 1. Later in his pamphlet, Eaton acknowledged that Mississippi had come first “by a few months.” Id. at 30.

20. FRANCIS R. AUMANN, CHANGING AMERICAN LEGAL SYSTEMS 186-87 (1940); see also Niles, supra note 9, at 527 (asserting that New York’s change “had an immediate profound influence in many other states”).


22. KENTUCKY DEBATES, supra note 12, at 277 (remarks of Francis Bristow).

23. NEW YORK DEBATES, supra note 14, at 588 (remarks of Conrad Swackhamer).

24. AUMANN, supra note 20, at 173 n.76.

25. Id. at 187.

26. See id. at 187-89; cf. J.M. Love, The Election of Judges by the People for Short Terms of Office, 3 S. L. REV. (n.s.) 18, 28-29 (1877) (arguing that “the inevitable consequence[s] of making the judiciary subject to popular election” was that “the party caucus of the majority faction” would effectively “appoint the judges of the land” and “use[] the judicial office as a part of its patronage”); Niles, supra note 9, at 529 (“I suspect that the popular election of judges in New York has been retained . . . for the same basic reason that the elective system was thought necessary in 1846. Each wave of immigration has given us a segment of the population that feels entitled to representation in all departments of government, including the judiciary, maybe most especially in the judiciary.”).
To be sure, some convention delegates railed against the political composition of the appointed bench. "How does it happen," Henry Wilson asked the Massachusetts convention, "that only two judges of the supreme court were members of the Democratic party, for more than half a century?"27 Likewise, Thompson Campbell challenged his fellow delegates at the Illinois convention "to point out to him any man that had been elevated to the bench in this state, by the democratic party, whose judicial acts were complained of"; he asserted that Whig judges were the targets of all popular complaints against "wrongs and oppressions inflicted from the bench."28 It is also true that the impetus for the New York convention of 1846 came from Anti-Rentism,29 and judicial hostility toward debtor relief was an issue in other states as well.30 Similarly, in Massachusetts supporters of the elective system condemned the appointed bench for enforcing the Fugitive Slave Law.31

But there are many reasons to doubt that the move to an elected judiciary was chiefly a partisan reform. First, some delegates called for the elective system even while expressing satisfaction with the existing bench. At the Massachusetts convention, for instance, William H. Wood acknowledged that the appointed judiciary was "upright and independent," but gave ultimate credit to the people rather than the governor; the people, after all, took care to pick governors who would make good appointments, and refused to re-elect governors who disappointed them.32 The quality of the Massachusetts bench, his colleague George Hood agreed, "has been owing to the good governor and the good councillors, who were elected by the people. Why not, therefore, be willing to trust the election of judges to the people?"33

Most of the delegates who did condemn the appointed bench for its partisanship, moreover, at least professed opposition to a partisan bench of any sort. Delegate after delegate argued that the appointive system left far more room for the play of partisan politics than the elective system. "Put [judges] where the people cannot get at them," Benjamin Butler told the Massachusetts convention, "surround them with the $400,000,000 of incorporated wealth of the State, put around them a set of partizans, much greater, much more numerous, much more hungry, much more greedy and

27. 2 MASSACHUSETTS DEBATES, supra note 2, at 706. Aumann quoted extensively from Wilson's speech. See AUMANN, supra note 20, at 187-88.
28. ILLINOIS DEBATES, supra note 21, at 477-78.
29. Niles, supra note 9, at 526; AUMANN, supra note 20, at 180.
30. In Kentucky, for instance, the courts' refusal to sanction debtor relief had led the legislature to provoke a crisis in the 1820s, and the Kentucky delegates certainly remembered the incident. See, e.g., Richard L. Mayes's starstruck reference to Judge George Bibb, a principal in the relief movement, in KENTUCKY DEBATES, supra note 12, at 288.
31. See, e.g., 2 MASSACHUSETTS DEBATES, supra note 2, at 773 (remarks of Edward Keyes); id. at 786 (remarks of Rodney French); 3 id. at 193-99 (remarks of Rodney French).
32. Id. at 698-99.
33. Id. at 813.
voracious than are even the partizans of the general government in this State," and one could predict the result.\textsuperscript{34} Even without such influences, Foster Hooper contended, "all men in a community constituted like ours hold political opinions," and "the more independent you make [judges] of the public voice, the more they will be liable to be swayed by such influences." These tendencies would only be aggravated by the fact that "appointments are often confined to cliques and circles of a few politicians" and "are frequently made as rewards for party services."\textsuperscript{35} George Hood asked delegates to reflect upon the governor's incentives to emphasize ideology over competence: "Will there not be a strong temptation for him to appoint some individual who is a rival candidate, whom he may wish to get out of his way, or some friend or favorite of his own, or of some active politician of his party, who will use all his influence against him at the next election, if he does not comply with his desires?"\textsuperscript{36}

Such arguments were ubiquitous. In the Kentucky convention, Squire Turner argued that many appointments gave color to the popular impression that governors simply chose their favorites for the bench,\textsuperscript{37} and Silas Woodson likewise condemned the existing appointive system for partisanship.\textsuperscript{38} Similarly, New York's George Patterson disavowed the "political bench" spawned by the appointive system. "Whichever party had the governor . . . made their caucus nominations," he warned, "and that was virtually an appointment."\textsuperscript{39} William B. Wright echoed the assertion that as a practical matter, "the politicians of a party caucus" selected most of the state's judges.\textsuperscript{40}

Under the elective system, in contrast, "partizan influences never could wholly prevail, nor popular opinion be moulded and controlled by demagogues."\textsuperscript{41} The masses would vote partisan judges out of office because they wanted their judges to be fair and independent. The elective

\textsuperscript{34} Id. at 788. The Massachusetts delegates who attacked the fugitive-slave decisions, for instance, stressed that a neutral judiciary would have found the Fugitive Slave Law unconstitutional, and that only untoward pressures could explain the judges’ decisions. See, e.g., id. at 773 (remarks of Edward Keyes).

\textsuperscript{35} Id. at 700.

\textsuperscript{36} Id. at 817.

\textsuperscript{37} KENTUCKY DEBATES, supra note 12, at 222.

\textsuperscript{38} Id. at 264; see also id. at 179 (remarks of John Taylor). James Guthrie, president of the Kentucky convention, also complained that whoever was governor always chose members of his own party to be judges. Id. at 271.

\textsuperscript{39} NEW YORK DEBATES, supra note 14, at 104.

\textsuperscript{40} Id. at 484; see also id. at 883 (remarks of Conrad Swackhamer).

\textsuperscript{41} Id. at 484. Wright's telling use of the word "wholly" suggests that the supporters of the elective judiciary were not utopians. Delegates in other conventions were similarly moderate in their expectations; as Kentucky's Francis Bristow explained, though party influences could never be entirely eliminated, "the question is how shall we remove the officer farthest from such influences." KENTUCKY DEBATES, supra note 12, at 274; see also infra text accompanying notes 199-200.
system, in Benjamin Butler's words, sent judges the message that "you have nothing to do but to be an upright judge, to deal out justice fairly, to sell it to none, to deny it to none, and the people will stand by you." Foster Hooper agreed that "if you provide that [judges] shall come before the people for reelection, they will take care that their opinions reflect justice and right, because they cannot stand upon any other basis." Likewise, New York's Conrad Swackhamer argued that abolishing the appointive system would end the scramble to get on nominating committees to win well-paying jobs, and would substitute "good men" for "politicians by trade." If only the federal judiciary had been made elective, David Davis told the Illinois convention, the people "would have chosen judges, instead of broken down politicians."

Disavowals of partisanship must be judged skeptically when they come from delegates who owe their offices to partisan elections. But even Richard Dana, an outspoken Massachusetts opponent of the elective system, interpreted the reforms in other states as attempts to decrease the partisanship of judicial selection; he simply alleged that Massachusetts did not suffer from a partisan bench.

What is more, most state conventions backed up their nonpartisan rhetoric with active steps to ensure a politically diverse bench. More than two-thirds of the conventions that adopted the elective system decided to stagger judges' terms, on the theory that staggered terms would make it difficult for one party to sweep the entire bench in a temporary period of excitement. Similarly, half of the conventions that adopted the elective system voted to elect all judges—including those of the highest court—by districts rather than in statewide contests. While voters did not want a partisan bench, they would vote along party lines if they had nothing else to guide them; district elections, the delegates believed, would minimize the influence of party politics because the voters would know more about

42. 2 MASSACHUSETTS DEBATES, supra note 2, at 788. For much the same point, see ILLINOIS DEBATES, supra note 21, at 746 (remarks of William Minshull); KENTUCKY DEBATES, supra note 12, at 270 (remarks of James Guthrie); 3 MASSACHUSETTS DEBATES, supra note 2, at 197 (remarks of Foster Hooper); 2 id. at 698 (remarks of William H. Wood); see also id. at 776 (remarks of Benjamin F. Hallett, proposing Electoral College to select judges) ("[I]f the judges were made elective, and they were found to yield to their private political opinions, and carry out their judgments and decisions against their duty, ... I believe those judges would be hurled from their seats by the people more readily than if they had been guilty of a higher degree of corruption in any other direction; because, I believe the quality which the people most require in a judge is independence.").

43. 2 MASSACHUSETTS DEBATES, supra note 2, at 700. Hooper later remarked that if a judge "is learned and impartial, he can rely with great certainty on a reelection." 3 id. at 197.

44. NEW YORK DEBATES, supra note 14, at 883.

45. ILLINOIS DEBATES, supra note 21, at 462.

46. 2 MASSACHUSETTS DEBATES, supra note 2, at 766.

47. See, e.g., NEW YORK DEBATES, supra note 14, at 541 (remarks of Ansel Bascom).
local candidates than about candidates from hundreds of miles away.48 At the same time, district elections meant that a single party would have to carry every district in the state in order to sweep the bench.49 In the words of W. Penn Clarke, who proposed both staggered terms and district elections in the Iowa convention of 1857, “I am free to say that I never want to see a partisan bench in this State. Where there is more than one judge upon the bench, I should be glad to see it composed of men of opposite political parties, so that, being composed of men of various political opinions, it might command the confidence of all men.”50

It is true that some of the support for such anti-partisan devices came from delegates who had backed an appointive judiciary. But these policies would not have been adopted without the support of many delegates who favored the elective system. Even delegates who opposed these policies, moreover, defended their positions in nonpartisan terms. George Ells told the Iowa convention that statewide elections would permit voters to choose the very best judges, without being restricted to candidates who hailed from their own districts. “I do not care whether they are whigs, or democrats, free soilers or what,” he explained, “if they are only good lawyers, pure, incorrupt, and incorruptible.”51 Other delegates attacked the district system for suggesting that judges were the people’s political representatives.52 Perhaps on the strength of such arguments, several conventions decided to elect their courts of last resort in statewide contests, but still adopted the anti-partisan device of staggered terms.53

48. See, e.g., ILLINOIS DEBATES, supra note 21, at 743-44 (remarks of Archibald Williams); id. at 747 (remarks of William Minshall). This argument attracted adherents even in the states that decided to use statewide contests to elect their courts of last resort. See, e.g., 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF IOWA, 1850, at 953 (Indianapolis 1850) (hereinafter IOWA DEBATES) (remarks of John S. Newman).

49. See, e.g., ILLINOIS DEBATES, supra note 21, at 470 (remarks of Thomas Davis); 2 IOWA DEBATES, supra note 48, at 1656 (remarks of John Niles); 1 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA, ASSEMBLED AT IOWA CITY, MONDAY, JANUARY 19, 1857, at 451 (Davenport 1857) (hereinafter IOWA DEBATES) (remarks of Jonathan Hall); KENTUCKY DEBATES, supra note 12, at 282 (remarks of Larkin Proctor); NEW YORK DEBATES, supra note 14, at 546 (remarks of Robert Nicholas); id. at 588 (remarks of James Tallmadge); 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850-51, at 353 (Columbus 1851) (hereinafter OHIO DEBATES) (remarks of John L. Green); id. at 353 (remarks of Edward Archbold).

50. 1 IOWA DEBATES, supra note 49, at 450.

51. Id. at 455; see also 1 OHIO DEBATES, supra note 49, at 585 (remarks of J. McCormick).

52. See, e.g., ILLINOIS DEBATES, supra note 21, at 471-72 (remarks of David Gregg and of Curtis Harvey).

53. See, e.g., CAL. CONST. of 1849, art. VI, § 3; IOWA CONST. of 1857, art. V, § 3; OHIO CONST. of 1851, art. IV, §§ 2, 11; see also N.Y. CONST. of 1846, art. VI, § 2 (adopting staggered terms, but providing that half of Court of Appeals would be chosen in
The idea that the switch to the elective judiciary was intended to secure a partisan Jacksonian bench ignores practical political realities. If the delegates who voted for the elective system were confident that popular majorities would elect Democratic judges, then they should have been just as confident that majorities would elect Democratic governors and legislators. In that case, Jacksonians—well known for their advocacy of the spoils system in other areas of government—would have seen no need to switch to the elective judiciary in order to install their candidates on the bench. If anything, the appointive system would have seemed more reliable; in a state like Illinois, where Democrats had unchallenged control of the governorship and both houses of the legislature, partisan considerations might have led the Democrats who controlled the 1847 convention to retain the power of appointment.

One might imagine that newly elected Democratic administrations wanted to replace judges appointed by prior administrations with their own partisans. But if that was the reformers’ goal, they could have used much less radical means. Imposing limits on judicial terms, or changing almost any other structural feature of the judicial system, would have given them an excuse to clean house. States that had new Democratic majorities, moreover, switched to an elective judiciary no more often than states that long had been reliably Democratic. Michigan, a state in which Democrats had held the governorship and both legislative houses for years, adopted the elective system in 1850; New Jersey, a state that Democrats won in 1849 after a long period of Whig control, stuck by the appointive system.

Partisan patterns are simply impossible to detect. States where Whigs controlled the state government—though few and far between by 1850—seemed almost as likely as Democratic states to switch to the elective method. Kentucky’s Whigs had held the governorship and both houses of the legislature for years when the state switched to an elective judiciary, and Vermont’s Whigs were no less dominant when the state began to elect inferior-court judges in 1850. In contrast, Maine—controlled by Democrats throughout the period in which the elective judiciary was on the rise—never adopted the reform. Many states in which neither party was dominant enacted the elective system, but other such states retained the appointive method. Even inside the states that switched to the elective system while other half would come from lower courts were elected by districts.

55. PARTISAN DIVISION OF AMERICAN STATE GOVERNMENTS, 1834-1982 (computer data file available at the Yale Computer Center). This file is the source of all my statements about party power in state governments.
56. At least 93 of the convention’s 166 members were Democrats. See ILLINOIS DEBATES, supra note 21, at 949-83 (biographical sketches).
57. New York, Pennsylvania, Maryland, Ohio, Louisiana, and Tennessee.
58. North Carolina and Delaware.
tive system, partisan alignments are sometimes hard to define.\textsuperscript{59}

Results do not always match intentions, but if partisan Democrats expected the elective system to give them control of the judiciary, they must have been disappointed. In Mississippi, two of the three members of the nation’s first elected court of last resort were Whigs, at least one of whom was “strongly opposed to an elective judiciary.”\textsuperscript{60} The third, though a Jacksonian, also opposed the elective system.\textsuperscript{61} William Sharkey, the court’s first Chief Justice, was re-elected three times before his retirement in 1850, even though “during the whole time of his public services he was a staunch Whig, while his constituency was as intensely Democratic”; a Unionist during the Civil War, Sharkey bucked public opinion in the state so successfully that he was appointed provisional governor by President Johnson in 1865.\textsuperscript{62} In Missouri, too, a Whig Chief Justice sat in a Democratic state,\textsuperscript{63} while in New York, “The first election was made irrespective of parties. All the parties came forward and nominated a mixed ticket. Nearly all the old judges were re-elected . . . .”\textsuperscript{64}

A Lawyer’s Reform?

Where some historians suggest that the popular election of judges was designed to curtail judicial power and activity,\textsuperscript{65} Kermit Hall argues that the shift was “a lawyer’s reform,” led by “lawyer-delegates” who sought “to ensure that state judges would command more rather than less power and prestige.”\textsuperscript{66} Upset at judges who invalidated the laws enacted

\textsuperscript{59} See MILES, supra note 1, at 40 (detecting no partisan division in Mississippi convention’s debates on elective system).

\textsuperscript{60} DUNBAR ROWLAND, COURTS, JUDGES, AND LAWYERS OF MISSISSIPPI, 1798-1935, at 89, 92 (1935).

\textsuperscript{61} MILES, supra note 1, at 43.

\textsuperscript{62} JAMES D. LYNCH, THE BENCH AND BAR OF MISSISSIPPI 194 (New York 1881). At least some elections turned on character rather than politics. In 1849 the Democrat Joseph Thacher lost his seat on the Mississippi high court to the Whig Cotesworth P. Smith; though the election took place in an overwhelmingly Democratic district, the public voted for Smith when it learned of Thacher’s secret connivance with a local newspaper editor to impugn Smith’s character. \textit{Id.} at 212.

\textsuperscript{63} 2 MASSACHUSETTS DEBATES, supra note 2, at 819 (remarks of Francis Bird).

\textsuperscript{64} \textit{Id.} at 763 (remarks of Richard Dana, Jr.). Dana went on to charge that New York’s process had soon “fallen into the political cauldron,” but his report suggests that the elective system originated in a spirit of nonpartisanship.

\textsuperscript{65} See Stephen Botein, “What We Shall Meet Afterwards in Heaven”: Judgeship as a Symbol for Modern American Lawyers, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 49, 52 (Gerald L. Gelosn ed., 1983). Botein suggests that the elective system reflected what Tocqueville earlier had called the “secret tendency to diminish the judicial power.”

\textsuperscript{66} Kermit L. Hall, Constitutional Machinery and Judicial Professionalism: The Careers of Midwestern State Appellate Court Judges, 1861-1899, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 29, 29 (Gerald W. Gawalt ed., 1984) [here-
by the popular branches and who controlled juries too strictly, a handful of radicals favored election as a means to "diminish the power of judges to frustrate the will of popularly elected legislators."67 But conservatives and moderates, Hall contends, both wanted to strengthen courts, disagreeing only on how to do so.

Hall observes that the moderates whose votes decided the issue shared conservatives' doubts about the wisdom of popular legislatures. They "denounced the legislature's uncontrolled spending and unwillingness to serve a diverse body of economic interests," and they "criticized the repeated inability of the judiciary to strike down legislative measures."68 But where conservatives feared that an elective judiciary would give free rein to the tyranny of the majority,69 moderates blamed the appointive system for the judiciary's weakness as a check on the legislature. Moderates "agreed with conservatives on the necessity of retaining an independent and powerful judiciary," but they "sensed that business as usual would not bring that end."70 The appointive system, they believed, too often selected party hacks rather than skilled judges,71 and it deprived judges of the strength that would come from "hav[ing] their powers confirmed in the same way as governors and legislators."72 Not only would the elective system "professionalize the bench,"73 but it also would "make judicial review more credible,"74 "stimulate public confidence in the state appellate system,"75 and result in a judiciary "able to restrain legislative power."76

Hall's moderates liked the idea of popular sovereignty, but they wanted to keep it in its place: the legislature should be democratic, but it should be restrained by a strong independent judiciary. Accordingly, Hall suggests, though the moderates sought to give the judiciary "a popular base of power,"77 they did not want the judiciary actually to be under pop-

67. Hall, Judiciary on Trial, supra note 10, at 343, 354.
68. Id. at 350.
69. Id. at 341.
70. Id. at 343.
72. Hall, Judiciary on Trial, supra note 10, at 350.
73. Hall, "Route to Hell", supra note 71, at 230.
75. Hall, Constitutional Machinery, supra note 66, at 29.
76. Hall, Judiciary on Trial, supra note 10, at 343.
77. Hall, Progressive Reform, supra note 74, at 348.
ular control. The shift to the elective judiciary, then, was largely tactical. While conservatives at the state conventions were ineffective because they failed to adapt their tactics to “a political culture that increasingly resonated to expanded suffrage and partisanship,”78 the moderates did not make this mistake. They “harness[ed] the ideal of popular election to the goal of enhancing judicial power,”79 and “resorted to popular democracy”80 in order to realize their own agenda: “a more efficient administration of justice, an increase in the status of the bench and bar, an end to the penetration of partisan politics into the selection process, and increased independence and power for . . . judges.”81

In short, Hall argues that the impetus behind the shift to the elective judiciary was not the lawyer-delegates’ desire to give power to the people, but rather their desire to give power to the courts. At first, the reformers who adopted the elective system “believed that the democratic goal of popular accountability and the professional goal of an able, powerful judiciary were reciprocal and reinforcing,”82 and so they were not forced to choose between the two. But Hall reports that the professional goal was always uppermost,83 and toward the end of the nineteenth century, when the two goals “appeared increasingly at odds,”84 leaders of the bar jettisoned the rhetoric of democratic accountability and “insisted that they, and not the public at large, should dominate the judicial selection process.”85 Indeed, even at the start, the moderates had hedged the elective reform with various devices “restricting the impact of party and majority rule” on the judiciary.86

Hall is certainly correct that lawyers were a powerful presence at the antebellum conventions. They accounted for half of the delegates to Mississippi’s trailblazing convention,87 as well as 48 of the 128 delegates to New York’s 1846 convention,88 63 of the 166 delegates to Illinois’s 1847 convention,89 42 of the 100 delegates to Kentucky’s 1849-1850 convention,90 and 97 of the 135 delegates to Virginia’s 1850-1851 conven-

78. Hall, *Judiciary on Trial*, supra note 10, at 349.
79. Id. at 353.
80. Id.
81. Id. at 343.
83. Hall, “*Route to Hell*”, supra note 71, at 230.
85. Id. at 351.
87. MILES, supra note 1, at 37.
88. See NEW YORK DEBATES, supra note 14, at vii-viii (table of delegates). The count includes seven delegates who listed their occupations as “lawyer and farmer.”
89. See ILLINOIS DEBATES, supra note 21, at 949-83 (biographical sketches).
90. See KENTUCKY DEBATES, supra note 12, at 5-7 (table of delegates).
tion. In true lawyerly fashion, moreover, they monopolized discussions. In Kentucky and Illinois, for instance, hardly any laymen spoke on the proposed elective judiciary, and the imbalance was only slightly less extreme in New York. "In every convention," Hall reports, "lawyers and judges of both parties . . . controlled the committees on the judiciary. They also dominated debate over the issue once it reached the full conventions."92

Yet despite the number of attorneys at the conventions, the switch to the election of judges was as much a popular reform as a lawyer's reform. Between 1846 and 1860, only two proposed constitutions—in Massachusetts and New Hampshire—retained the appointive system; in each case, the voters rejected the proposed constitution. Of course, it is impossible to say for certain which provisions of the constitutions aroused the voters' wrath. But in 1873, when the voters of New York were asked whether the state should return to an appointed judiciary, the elective system won in a landslide.93 Hall's lawyer-delegates simply reflected the popularity of the reform. In fact, at least one lawyer at the Kentucky convention personally opposed the elective system but voted for it because his constituents had instructed him to do so.94

As a result, in the Progressive era, lawyers who had turned against the elective system were unable to overcome its popularity. "Undoubtedly," Learned Hand proclaimed in 1913, "the general opinion of the bar is in favor of appointment."95 In the journals of the legal profession at the time, the number of articles opposing election dwarfed the number on the other side, and Hurst agrees that "the overwhelming verdict of scholarly and professional opinion" favored the appointive method.96 William Howard Taft, who thought that appointment produced a more expert bench than election,97 went so far as to veto Arizona's admission to the Union because of its provision for the recall of judges. The American Bar Association urged a return to the appointive system,98

91. FLETCHER M. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860, at 289 (1930).
92. Hall, Judiciary on Trial, supra note 10, at 342.
93. This question was put to them on the instructions of the 1867-1868 convention, whose proposed constitution they rejected for good measure.
94. KENTUCKY DEBATES, supra note 12, at 163 (remarks of Elijah Nuttall).
95. Hand, supra note 5, at 83.
96. HURST, supra note 8, at 139. But see Hall, Progressive Reform, supra note 74, at 349 ("A poll of delegates to the 1910 Ohio State Bar Association Convention revealed an almost even division on the issue of adopting a constitutional amendment to appoint rather than elect that state's high court judges."). Hall points to divisions among the bar, arguing that "leaders of the bar" favored appointing judges while "lawyers close to the political processes of the state constitutional conventions" favored electing them. Hall, Constitutional Machinery, supra note 66, at 30.
97. WILLIAM HOWARD TAFT, POPULAR GOVERNMENT 189-93 (1913).
98. Hall, Constitutional Machinery, supra note 66, at 29.
and a significant number of local bars concurred.99 Similarly, the newly formed American Judicature Society backed Albert Kales's plan of appointing judges who periodically would run unopposed in retention elections.100 Nonetheless, most states that had adopted the elective system tinkered with it instead of scrapping it; the most that the elite bar could achieve was a variety of reforms that decreased the partisanship of judicial elections, and thereby increased the bar's influence over the process.101

Hall's thesis may explain why some antebellum delegates supported the reform. But it does not explain why popular majorities enthusiastically agreed with the delegates, pushing the conventions to adopt the elective system and blocking later efforts to scrap it. Nor does it seem consistent with contemporaneous reforms that reduced judges' powers in a variety of ways.102

To account for these facts, one must go further than Hall. Hall is correct that the reformers who backed the elective judiciary intended to check legislatures, but he is wrong to suggest that they identified legislatures with popular majorities. Indeed, the delegates wanted to check legislatures precisely because the legislatures were not reliably majoritarian. The reformers' watchword was that power corrupts, whether the power is legislative, executive, or judicial. The rise of the elective judiciary marked not a mere transfer of power from one branch of government to another, but an effort to decrease official power as a whole. It arose from the people's profound distrust of their own government, whose officials could not be counted upon to act in the citizenry's best interests.

Elections and Judicial Review

Hall is surely correct that the reformers wanted to curtail the powers of legislatures. State after state restricted legislative powers in the very same conventions that created elective judiciaries. The Maryland convention, for instance, cut the terms of senators, stipulated that no bill could become a law without the recorded approval of an absolute majority of


101. See Hall, Progressive Reform, supra note 74, at 349-51. Hall argues that this effort to increase the "professional accountability" of judges at the expense of their "democratic accountability" was both unnecessary and counterproductive; the old elective system "had been more a potential than a real threat" to judicial independence, but the reforms undermined the judiciary's "popular credibility." Id. at 369.

102. See infra text accompanying notes 124-39.
the members of each house of the legislature (rather than merely a majority of those voting), provided that each year the legislature would disband for good on March 10, sharply restricted the body's ability to appropriate money and to run up debts, and forbade it to pass a variety of statutes. The New York constitution of 1846 also required that all laws receive the recorded, affirmative vote of absolute majorities of the members of both houses. The Virginia constitution of 1851 reorganized the legislature, restricted the sorts of laws that it could pass, and put detailed limits on the debts that it could assume.

It is also clear, as Hall emphasizes, that the rise of the elective judiciary paralleled the rise of judicial review, an institution that did much to elevate judiciaries at the expense of legislatures. Morton Horwitz reports that until 1840 the New York courts had voided only nine statutes; fourteen more fell in the 1840s, followed by twenty-five in the 1850s and many more after the war. Of course, a similar trend can be observed in the postbellum federal system, in which the judges remained appointed. Still, whether the rise of judicial review proceeded from a newfound prestige in the judiciary, from changes in the personnel of the judiciary or the legislatures, or from changing conceptions of the law, it is clear that legislatures did lose some power at the hands of the elective judiciary.

But it does not follow that most supporters of the elective judiciary intended judicial review to temper the tyranny of the majority. In fact, it was primarily the supporters of the appointive system who considered judicial review a check on the "raging storm" of the majority's will. Delegates who took this position thought that minority rights would suffer under an elective judiciary because judges seeking re-election would refuse to overturn the enactments of majoritarian legislatures. In the view of these delegates, the people had erected the judiciary as a "self-restraint," "a defence and a bulwark . . . against our

103. GREEN, supra note 91, at 285-86.
104. N.Y. CONST. of 1846, art. III, § 15.
105. GREEN, supra note 91, at 294-95. According to Green, anti-legislature provisions also were introduced into the constitutions of the South Atlantic states that did not adopt the popular election of judges.
107. KENTUCKY DEBATES, supra note 12, at 251 (remarks of Garrett Davis); see also 2 MASSACHUSETTS DEBATES, supra note 2, at 803 (remarks of Rufus Choate) (stressing that judiciary should guard against "temporary popular majority").
108. See, e.g., KENTUCKY DEBATES, supra note 12, at 277 (remarks of James Irwin); 2 MASSACHUSETTS DEBATES, supra note 2, at 762 (remarks of Richard Dana, Jr.).
109. 2 MASSACHUSETTS DEBATES, supra note 2, at 761 (remarks of Dana); see also id. at 810 (remarks of Rufus Choate) (calling judiciary "institution of security" to protect each man against majority).
power";\textsuperscript{110} the judge "is to defend the weak against the strong . . . and may at times be required to interpose himself between an excited and pervading popular sentiment and an individual who may happen to be its subject."\textsuperscript{111} In the border states, where supporters of slavery feared that their legislatures would emancipate slaves without compensating owners, pro-slavery delegates displayed a special solicitude for the property-holding minority,\textsuperscript{112} but in the free states as well delegates argued that only judges appointed for life could counter the tyranny of the majority.\textsuperscript{113} Indeed, some supporters of the appointive system argued that absolute judicial independence was even more important in a republic than in a monarchy, because in a monarchy aggrieved litigants could always appeal over the sovereign's head to the people.\textsuperscript{114}

Most delegates who favored an elective judiciary, however, spoke of judicial review as a restraint on the power of government, not on the power of the majority. They intended the elective system to insulate the judiciary not from the people, but rather from the branches that it was supposed to restrain. In New York, where judges then were being appointed by the legislature, Charles Ruggles told the convention that the appointed judiciary's "connection with the legislative branch of government" was a great fault, because in "all causes in which the constitutionality of an act of the legislature was drawn in question . . . the point in dispute must necessarily have been prejudged in passing the law."\textsuperscript{115} Until the judiciary was placed "beyond the control of the other branches of the government," Judge Borden told the Indiana convention, constitutional provisions "to protect

\textsuperscript{110} KENTUCKY DEBATES, supra note 12, at 257 (remarks of Garrett Davis). Later writers expressed similar ideas. See, e.g., Hal W. Greer, Elective Judiciary and Democracy, 43 AM. L. REV. 517 (1909).

\textsuperscript{111} NEW YORK DEBATES, supra note 14, at 455 (remarks of Charles Kirkland).

\textsuperscript{112} See, e.g., KENTUCKY DEBATES, supra note 12, at 241 (remarks of Archibald Dixon); \textit{id.} at 251 (remarks of Garrett Davis). In the Kentucky convention, all the leading proponents of appointment supported an amendment that forbade emancipation without compensation. Supporters of election divided over the measure, which passed by a vote of 56 to 37.

\textsuperscript{113} See, e.g., 2 MASSACHUSETTS DEBATES, supra note 2, at 803 (remarks of Rufus Choate). Choate's ringing speech was a guiding text to supporters of the appointive system for decades afterward; the January 1917 issue of \textit{The Massachusetts Law Quarterly}, for instance, reprinted the speech in its entirety. For similar arguments, see the remarks of Onslow Peters to the Committee of the Whole at the Illinois Convention of 1847 (July 19, 1847), reprinted in \textit{The Elective Principle as Applied to the Judiciary}, 5 WESTERN L.J. 127, 128 (1847); see also \textit{An Elective Judiciary}, 8 AM. L. REV. 1, 6 (1873).

\textsuperscript{114} See, e.g., KENTUCKY DEBATES, supra note 12, at 241 (remarks of Archibald Dixon); 2 MASSACHUSETTS DEBATES, supra note 2, at 762 (remarks of Richard Dana, Jr.); 3 \textit{id.} at 212 (remarks of George S. Hillard).

\textsuperscript{115} NEW YORK DEBATES, supra note 14, at 371.
the rights of the people, and to preserve a proper equilibrium between the
different departments of the government,” would be mere “parchment bar-
riers” against legislative or executive encroachments.

As Judge Borden suggested, not minority rights but the rights of the
whole people were at stake. The chief reason that the judiciary should be
independent of the legislature was not that legislatures were tools of the
majority, but that they were not; the people’s elected agents often did not
share the electorate’s interests. “I would far prefer to trust the honesty of
the people,” concluded an 1851 article in The Western Law Journal, “than
hazard the risk of bargain and intrigue with the legislature.” It was to
remind the legislature of the source of its powers, not to equate the legis-
lature with the people, that the New York convention required each law to
begin with the clause, “The people of the State of New-York, represented
in Senate and Assembly, do enact as follows.” Indeed, when one
Kentucky delegate proposed that a bare majority of the legislature should
be able to remove judges so that the people would retain control of the
judiciary, several election supporters explicitly protested that the legisla-
ture was not “the people.”

In the words of Illinois delegate John Dement, the election support-
ers “all during the session preached to us continually—distrust to the
Legislature.” Thus David Davis professed that he would “rather see
judges the weather-cocks of public sentiment” than see them “the instru-
ments of power, . . . registering the mandates of the Legislature, and the
edicts of the Governor.” Another Illinois supporter of the elective sys-
tem argued that an appointed judge would be a mere tool of the masters
who got him his seat, whereas one elected by the whole people would be
more likely to “look[] to them all as men whose interests he had been
selected to watch over, guard and protect.” Yet another explained that
“the elective plan was to make [judges] independent of the Governor and
Legislature, and dependent on the people for support against the other
branches of government. . . . Let the Legislature and the Governor pass
the laws, and before those laws can go into effect, the judiciary must give

116. 2 INDIANA DEBATES, supra note 48, at 1808-09.
117. The Election of Judges, 8 WESTERN L.J. 423, 423 (1851).
119. See, e.g., KENTUCKY DEBATES, supra note 12, at 152-60 (remarks of Beverly
Clarke, William Preston, and John Stevenson). Of course, some supporters of the elective sys-
tem did see the judiciary primarily as a check on the power of the people rather than as a
check on the power of the government. Thus Kentucky’s Squire Turner, who favored elect-
ing judges but giving them life tenure, agreed with appointment supporters that the courts
were the people’s way of guarding against “the unchecked exercise of their own power.” Id.
at 222. But these voices were a distinct minority in the election camp.
120. ILLINOIS DEBATES, supra note 21, at 752.
121. Id. at 462.
122. Id. at 463 (remarks of William Archer).
them an approval." It was this general suspicion of officialdom, rather
than any desire to curtail majority power, that motivated the conventions
to enact their restrictions on legislative authority.

Concurrent Changes in Government

In fact, the rise of the elective system was part of a coherent program
to rein in not just the legislatures but all the people’s agents. As Morton
Keller has concluded, “State constitutional revision in the 1840s and
1850s embodied a growing inclination to hobble the power of the execu-
tive, the legislature, the courts, even the constitutions themselves [through
restrictions on the power of amendment].” Thus Silas Woodson exhorted
the Kentucky convention to diminish the powers of all the branches by
limiting the legislature’s sessions, eliminating the governor’s appointment
powers, and electing judges to fixed terms.

The same conventions that stripped governors and legislatures of
their powers to appoint judges stripped them of their powers to appoint
many other officials as well. New York even provided for the election of
canal commissioners; no officer who could dispense government largesse
should be trusted with irresponsible power. As one disgruntled conserva-
tive at the Kentucky convention put it, “We have provided for the popular
election of every public officer save the dog catcher, and if the dogs
could vote, we should have that as well.” In keeping with the theory that no
set of agents could be trusted to look after the whole people’s interests,
franchise requirements were dropping everywhere; at the same time, elec-
tions were becoming more frequent, and special privileges—including the
education requirements for practice at the bar—were being curtailed or
eliminated.

In a development that Hall’s thesis cannot explain, the same people
who favored an elective judiciary demonstrated in a variety of ways that
they trusted judges no more than they trusted their other public servants.
To be sure, the judiciary’s power to review legislation was growing. But
in the nineteenth century, judicial review was a strikingly negative power.
For the most part, the authority to hold laws unconstitutional enabled
judges only to prevent government activity, not to demand it. Since peo-

123. Id. at 466 (remarks of Archibald Williams).
CONSTITUTIONAL CONVENTION AS AN AMENDING DEVICE 67, 72 (Kermit L.
Hall et al. eds., 1981); see also GREEN, supra note 91, at 296 (saying that state constitutions
“began . . . to assume the nature of a code of laws rather than the statement of the principles
upon which government should be based”).
125. KENTUCKY DEBATES, supra note 12, at 265.
126. Quoted in Hall, Judiciary on Trial, supra note 10, at 340-41.
127. See, e.g., IND. CONST. of 1851, art. VII, § 21; at the same time that it eliminated
all property qualifications for voters, the document provided that “[e]very person of good
moral character, being a voter, shall be entitled to practice law in all Courts of justice.”
ple who feared an unrepresentative government might prefer to err on the side of government inactivity, the establishment of a judiciary that would veto the other branches’ enactments was perfectly consistent with the delegates’ distrust of government officials.

The judiciary was not above this suspicion. Several state conventions, for instance, required supreme-court judges to file written opinions in every case they decided. At the same time, judges’ power to control their own spheres was declining even as their power to block the policies of other branches was expanding. Though juries had lost the power to decide questions of law, they were enjoying ever-greater authority over questions of fact. As Maxwell Bloomfield reports, “Many states witnessed the enactment of procedural rules which made the judge little more than a passive moderator in his own court, forbidden to comment on the evidence or otherwise to assist the jury in reaching a verdict.”

Under Hall’s theory that the convention delegates favored the elective judiciary as a way to professionalize the bench and boost its importance, one would expect the supporters of the elective system to have opposed giving lay juries such power. Yet supporters of the elective system favored an extensive factfinding role for juries. As Michael Hoffman, one of Hall’s moderates, told the New York convention, “The juror [is] to determine a fact and the judge to apply the law.”

Like most of his colleagues, Hoffman believed that the judiciary’s task was objective, not discretionary; the judge’s mission, in his words, was simply “to find out the law which society had before established.” If every honest and competent judge would arrive at the same view of every law, then the facts as found by the jury would determine the outcome of every trial. The move to give juries a monopoly over factfinding, therefore, can be seen as an effort to take the key part of the judicial process out of the hands of government officials. In Tocqueville’s words, “The institution of the jury . . . places the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government.” This was surely the understanding of the supporters of an elective judiciary. As one put it: “A jury decides the facts of the

128. See, e.g., IND. CONST. of 1851, art. VII, § 5; MD. CONST. of 1851, art. IV, § 2. Many states had had such requirements for years, though generally in statutory rather than constitutional form. But cf. KY. CONST. of 1792, art. V, § 3.

129. Maxwell Bloomfield, Law vs. Politics: The Self-Image of the American Bar (1830-1860), 12 AM. J. LEGAL HIST. 306 (1968); see also 2 BRYCE, supra note 4, at 89 (“Distrust of authority and ‘faith in the people’ have led nearly all States to limit strictly the functions of the judge. He may declare the law and sum up the evidence, but is not permitted to advise the jury as to the conclusions they ought to draw from the evidence . . . . “).

130. NEW YORK DEBATES, supra note 14, at 548.

131. See infra text accompanying notes 161-81.

132. NEW YORK DEBATES, supra note 14, at 543.

133. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282 (Henry Reeve trans., Knopf 1985) (1840).
case, and your judges the law of the case. Questions of fact are much more difficult to be decided than questions of law."

Later supporters of an appointive judiciary opposed the jury’s hegemony over questions of fact, precisely because it restricted the bench’s power and prestige. Indeed, Charles Eliot, the former president of Harvard, blamed the elective system for keeping the judge from being “the principal person in the court room.” As New York lawyer Henry M. Earle explained, judges should “direct the proper result, instead of umpiring,” but they held back for fear of making errors that would haunt them in elections. By contrast, Earle praised Connecticut (a state with the appointive system) for reposing “such . . . confidence in the Judges that gradually it has developed that four-fifths of the cases are submitted to the Courts, instead of Juries.”

Just as the jury is a check on judges, so the power to issue advisory opinions lets judges have a greater role in crafting policy. On the eve of the Civil War, six of the eight states that continued to appoint their judges permitted the legislative or the executive branch to seek legal advice from the judiciary. But no state with an elective judiciary had ever had any formal provisions for this practice, and Professor Albert Ellingwood’s study of advisory opinions lists only two such states that had used the practice even informally.

134. KENTUCKY DEBATES, supra note 12, at 175 (remarks of George Kavanagh).


136. HENRY M. EARLE, THE PUBLIC AND THE COURTS 6-8 (n.d.). For similar explanations of the rise of jury power, see Frederick Bausman, Election of Federal Judges, 37 AM. L. REV. 887 (1903) (asserting that elected judges depend for re-election on lawyers, so refuse to control them in court); Herbert Harley, Taking Judges out of Politics, 64 ANNALS AM. ACAD. POL. & SOC. SCI. 187 (1916) (saying that popular election led legislatures to regulate procedures minutely, "making the trial judge little more than a passive moderator"). Reflecting on the rise of the jury, one writer condemned as "an inexusable shifting of responsibility" the refusal of appellate judges "to exercise their well trained intelligence in setting aside jury verdicts where they would have found differently on the facts." Greer, supra note 110, at 520-21.

137. Massachusetts, New Hampshire, Maine, and Rhode Island authorized the practice in their constitutions; the practice was permitted by statute in Delaware and adopted without explicit legal authorization in North Carolina. ALBERT ELLINGWOOD, DEPARTMENTAL COöPERATION IN STATE GOVERNMENT 30-78 (1918); see also Hugo A. Dubuque, The Duty of Judges as Constitutional Advisors, 24 AM. L. REV. 369 (1889) (sketching history of advisory opinions in America).

138. See ELLINGWOOD, supra note 137, at 30-78. Pennsylvania seems to have had an early custom of advisory opinions, but Ellingwood’s study lists no examples after 1807; similarly, the study reports a lone example from New York in 1845.

At the Massachusetts convention of 1853, Foster Hooper defended both the elective judiciary and advisory opinions, while the constitution proposed by the convention would have rejected both. Nonetheless, the antebellum correlation between advisory opinions and the appointive judiciary is striking. After the Civil War, a few states with elective judiciaries dabbled with advisory opinions, but the practice still seems to have been concentrated in the
The apparent rejection of advisory opinions by states with elective judiciaries fits the anti-government theory more naturally than it fits Hall’s pro-court theory. Advisory opinions arose in America as a means of “securing coordination between the departments of government,” and people who were skeptical of government’s motives might have feared this kind of cooperation. In addition, people who distrusted all government officials, including judges, might well have hesitated to imply that judges were privileged readers of the law; if judges were privileged over legislators and governors, then they might be privileged over the rest of the citizenry too. Finally, people who wanted to check government power must have recoiled at the possibility that judges would draw legal conclusions without hearing the arguments of ordinary litigants.

**The Genesis of the Debates over the Elective Judiciary**

In an article that concentrates on the postbellum years, Hall has suggested that disagreements about the elective judiciary generally result from divergent assumptions about the nature of law:

> If the function of appellate judging is considered essentially technical, then popular election and limited tenure in office thrust unwanted and undesirable political considerations into the selection process and, ultimately, into the performance of the judicial role. . . . On the other hand, if the judicial role is more art than science, and an art that ought to be sensitive to political necessity as well as formal legal rules, then popular election offers a legitimate means of ensuring judicial accountability through the political process.

Apparently applying this framework to the antebellum dispute, Hall reports that the notion of lawyers and judges as “the apolitical servants of a scientific law” prevailed only in Massachusetts (where the appointive system won out), and he suggests that the conservatives who favored appointment had a much more formalistic view of law than the moderates who favored election. But the antebellum debate over the election of judges is more naturally understood as a debate over official power than as a debate over the nature of law.

To be sure, as Hall suggests, most supporters of appointment would have agreed with their Massachusetts ally Richard Dana when he said: “The law is a science. The judges are professors of a science.” In the various conventions, supporters of appointment compared judges to archi-

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139. *Id.* at 33. The roots of advisory opinions—which date to twelfth-century England, where “separation of powers was practically unknown,” *id.* at 1—would not have reassured suspicious delegates.

140. Hall, *Constitutional Machinery*, supra note 66, at 34.


142. 2 MASSACHUSETTS DEBATES, supra note 2, at 768.
tects143 and to professors of chemistry;144 later writers added surveyors,145 doctors,146 and engineers147 to the list. The answers to legal questions should depend on "great and fundamental principles" rather than "the caprice or fluctuation of either public or private opinion."148 When presented with a dispute, courts should "calmly, impartially and correctly declare what rule of action for the citizen has been fixed as the public will, in prior enactments, in already existing laws."149 A judge's political ideas were, or should be, irrelevant, because judges did not make policy; the judiciary "has no will."150 As Philadelphia minister Henry Boardman argued in 1862, "The whole power of the State is vested in the Legislative and Executive branches of the government. . . . [Judges] are simply the oracle of the law. . . . They are without discretion."151 To supporters of the appointive judiciary, the judicial function was to "uphold"152 and to "administer"153 the law; the mushier "interpret" was used sparingly, and then by people who made clear that they did not mean it to be mushy.154

143. See, e.g., id. at 822 (remarks of Judge Morton) ("If an individual wants to build an edifice, it is a good deal better that he should go to an architect, than to draw the plan himself.").

144. ILLINOIS DEBATES, supra note 21, at 460 (remarks of Onslow Peters).

145. EATON, supra note 9, at 41. Eaton also mentioned engineers, architects, admirals, and geologists.

146. Hall, supra note 3, at 177.

147. Address by Albert M. Kales to the State Bar Association of Wisconsin (June 27, 1918), reprinted in ELECTION VERSUS APPOINTMENT OF JUDGES 74 (Lamar T. Berman ed., 1926).

148. NEW YORK DEBATES, supra note 14, at 412 (remarks of Alvah Worden); see also 2 OHIO DEBATES, supra note 49, at 356 (remarks of Benjamin Stanton) (saying that judges are bound to follow written laws, but the rules by which judges decide what a given law means are based on "immutable laws of right, above human constitutions and human laws"); EATON, supra note 9, at 14 (saying that judges should represent the "pure, passionless, universal and unchanging spirit of justice").

149. Peters, supra note 113, at 128.

150. 2 MASSACHUSETTS DEBATES, supra note 2, at 764 (remarks of Richard Dana, Jr.); see also 3 NEW YORK 1867 DEBATES, supra note 11, at 2188 (remarks of Joshua Van Cott) (saying that judges are "beyond the region of will").

151. HENRY A. BOARDMAN, THE FEDERAL JUDICIARY 15 (Philadelphia 1862). Boardman cited with approval John Sergeant's "very able" speech in the Pennsylvania convention of 1837, id. at 16, which described the judge as someone "who has almost passed away from this life, into a sphere where he can look upon others with an impartial eye, and can decide between them uninfluenced and unawed," using the principles that constitute the "science" of law. JOHN SERGEANT, SPEECH ON THE JUDICIAL TENURE 10, 48 (Philadelphia 1838).

152. See, e.g., NEW YORK DEBATES, supra note 14, at 590 (remarks of Henry Murphy).


154. See, e.g., 2 MASSACHUSETTS DEBATES, supra note 2, at 766 (remarks of
One could describe the perfect judge in wholly apolitical terms, as someone who was “able,” 155 “learned,” 156 “impartial,” 157 “honest,” 158 and “competent.” 159 Later writers stated the ideal even more strongly: “If the laws express accurately the will of the people, and the judges interpret them honestly and in the spirit in which they are written, there can be no honest objection to judicial decisions.” 160

This rhetoric, however, did nothing to distinguish supporters of the appointive judiciary from supporters of the elective judiciary. Both camps disavowed what subsequent scholars have termed an “instrumental” approach to law, whereby antebellum judges consciously or unconsciously molded their decisions to reflect their economic and political views. 161 While admitting that extralegal considerations often influenced judges in practice, pro-election delegates argued that the judiciary “should speak the same language in all times and countries,” and base its decisions “on principles the same in all ages.” 162 An 1851 Western Law Journal article supporting the elective system spoke of “the laws of science and the principles of jurisprudence”; 163 convention delegates who supported the elective system stressed that judicial opinions should reflect neither “ingenuity” 164 nor “political sentiments,” 165 but “the settled general judgment as expressed in the law, and nothing else.” 166 Judges were to “administer” 167

Richard Dana, Jr. (“It interprets the laws. The powerful department of the government is that which makes the laws.”).

155. See, e.g., id. at 797 (remarks of Joel Parker). In the same speech Parker used “learned,” “competent,” and “impartial.”

156. See, e.g., KENTUCKY DEBATES, supra note 12, at 220 (remarks of Garrett Davis). In the same speech Davis used “able” and “impartial.”

157. See, e.g., 2 MASSACHUSETTS DEBATES, supra note 2, at 706 (remarks of Henry Wilson). In the same speech Wilson used “able,” “learned,” and “pure.”

158. See, e.g., id. at 800 (remarks of Rufus Choate). In the same speech Choate used “upright,” “learned,” and “impartial.”

159. See, e.g., NEW YORK DEBATES, supra note 14, at 378 (remarks of George Simmons).

160. Samuel Rosenbaum, Election of Judges, or Selection?, 9 ILL. L. REV. 489, 495 (1915); see also EATON, supra note 9, at 39, 54 (saying that political principles “have no reference to the capacity of any man to fill a judicial station,” because “the moment a lawyer becomes a judge, he must as such know no policy, no political platform”).

161. See generally HORWITZ, supra note 106.

162. KENTUCKY DEBATES, supra note 12, at 223 (remarks of Squire Turner, who advocated election but believed that judges—once elected—should hold office during good behavior).

163. The Election of Judges, supra note 117, at 425.

164. KENTUCKY DEBATES, supra note 12, at 300 (remarks of John Taylor).


166. NEW YORK DEBATES, supra note 14, at 588 (remarks of Michael Hoffman); see also ILLINOIS DEBATES, supra note 21, at 472 (remarks of Curtis Harvey).

and to “expound” the law; again, the ideal judge was “able,” “learned,” “impartial,” and “honest.” Most of the delegates opposed lay judges, and one reasoned that laymen would fail to give “universal satisfaction”; they therefore would not achieve “the object of jurisprudence,” which The Western Law Journal defined as being “to hold all the rights and relations of man in exact and harmonious relation and order.”

Only a rare voice suggested that two competent and intelligent judges, free of outside influences, could use honest and rigorous reasoning but still arrive at opposite conclusions. John Stevenson may have been the only such voice in the Kentucky convention; though himself a supporter of slavery, he illustrated the need to insulate judges from the legislature by hypothesizing a confrontation between a pro-slavery legislature and an abolitionist judge who, “in the exercise of his reason and under the sanction of his oath, chooses to give an honest expression of his opinion.” Stevenson’s counterpart in the Indiana convention, John Pettit, asserted that “the administration of the law is subject to modification and change”; he also envisioned judicial candidates competing against each other with stump speeches that discussed “the general principles of jurisprudence,” an idea that may presuppose that different candidates could legitimately take different views of those principles.

Other delegates displayed no hint of relativism. While many supporters of the elective system did speak of judicial discretion, most of them seem to have been referring only to the practical power to give a judgment to the wrong side. Kentucky’s George Kavanaugh, for instance, favored election as a way to keep judges from abusing their “discretionary power,” but he also opposed the proposal for an itinerant supreme court

168. See, e.g., ILLINOIS DEBATES, supra note 21, at 472 (remarks of Curtis Harvey).

169. See, e.g., NEW YORK DEBATES, supra note 14, at 483 (remarks of William B. Wright); KENTUCKY DEBATES, supra note 12, at 273 (remarks of Francis Bristow).

170. See, e.g., KENTUCKY DEBATES, supra note 12, at 270 (remarks of James Guthrie); see also id. at 277 (remarks of Francis Bristow) (“There is no such thing as getting to the end of this information—it is progressive.”).

171. See, e.g., 3 MASSACHUSETTS DEBATES, supra note 2, at 197 (remarks of Foster Hooper).

172. See, e.g., 2 id. at 700 (remarks of Foster Hooper).

173. KENTUCKY DEBATES, supra note 12, at 298 (remarks of William Preston). Only four states required judicial candidates to have legal training, but the other conventions rarely discussed the issue, leading Hall to suspect that most delegates simply assumed that judges would be lawyers. Hall, JUDICIARY ON TRIAL, supra note 10, at 353.


175. KENTUCKY DEBATES, supra note 12, at 161.

176. 2 INDIANA DEBATES, supra note 48, at 1652.

177. Id. at 1680.

178. KENTUCKY DEBATES, supra note 12, at 176.
on the grounds that, without an expensive library at each courthouse, the judges would not reach "correct decisions."\textsuperscript{179}

Even some of the delegates who defended lay judges seemed to agree that every legal question had a single legal answer; they simply thought that lawyers tended to become mired in "inapplicable" technicalities.\textsuperscript{180} Unencumbered with the lawyerly habits of thought bred by absurd procedural complexities, laymen who sat on \textit{en banc} courts might be able to point their law-trained colleagues to the plain meaning of the written laws and to the current principles of justice. But the fact that the science of law was accessible did not make it any less scientific.

Supporters of the elective judiciary were not forgetting their suspicions of legislatures when they insisted that judges mechanically apply the written law. Unless a law conflicted with the people's charters—the constitutions that the people-at-large had ratified—the delegates were not eager to compound their problems with officialdom by encouraging judges to override legislation. Speakers at the conventions often reminded their colleagues that judges were but men,\textsuperscript{181} no more inherently trustworthy than legislators. Even a judge who honestly strove to protect the people's interests, moreover, might not be able to discern those interests; such issues fell into the realm of politics, not science. Apparently for that reason, even Ohio's Peter Hitchcock—who asserted that a judge should be "as much a representative of the people, as a member of the Legislature"—agreed that in practice the ideal judge could do no more than "to administer justice to all . . . in accordance with the principles of law." Judges were bound to follow the people's instructions, Hitchcock explained, but to be authoritative the instructions had to reflect the will of "the whole body of the people authentically expressed"; such instructions had never been seen in Ohio's history "and probably never would be."\textsuperscript{182}

\textsuperscript{179} \textit{Id.} at 283.

\textsuperscript{180} NEW YORK DEBATES, \textit{supra} note 14, at 371-72 (remarks of Charles Ruggles); \textit{see also id.} at 542 (remarks of Ansel Bascom).

\textsuperscript{181} \textit{See, e.g., id.} at 562 (remarks of Levi Chatfield); 2 MASSACHUSETTS DEBATES, \textit{supra} note 2, at 792 (remarks of Benjamin Butler); \textit{id.} at 773 (remarks of Edward Keyes).

\textsuperscript{182} 2 OHIO DEBATES, \textit{supra} note 49, at 354-56. Hitchcock's colleague R.P. Ranney also voiced the representative ideal; in his view "the very fact that the judiciary subsists by virtue of power delegated by the people, renders the judges, the representatives of the sentiments and will of the people." \textit{Id.} at 356. But the meaning of such statements depends on what the will of the people is taken to be, and pro-election delegates generally believed that the will of the people was to see justice administered independently and impartially, according to the scientific principles of law.

Whether judges are the people's representatives recently became a crucial legal issue. As amended in 1982, section 2 of the Voting Rights Act of 1965 forbids giving members of one race "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." In 1990 the Fifth Circuit, in a sharply divided \textit{en banc} decision, held that the Voting Rights Act does not apply to judicial elections because judges are not "representatives." League of United Latin American Citizens
The judge’s responsibility was therefore simply to apply the written law—which, whatever its flaws, was the clearest available indication of what the people wanted.

In sum, views about the ideal judge did not distinguish supporters of the elective judiciary from their opponents. Instead, the two camps diverged over how to ensure that flesh-and-blood judges approached this ideal. Predictably, that difference in turn sprang from their profound division over whether the electorate’s representatives could be trusted to act in the people’s interests. Where the supporters of an elective judiciary believed that the people would secure better judges than their elected representatives, the supporters of an appointive judiciary believed that the people’s elected representatives could promote the people’s long-run interests more effectively than the people themselves. In each state convention, the debates boiled down to two camps, one that opposed official power and one that favored it.

Because the science of law was technical, the appointment camp argued, the masses were incapable of choosing intelligently among judicial candidates. Some delegates said simply that the people would never be able to acquire the relevant information about candidates; others asserted that the people would be unable to assess whatever information they gained. In any event, the skills of the politician were not the skills of the judge, and poor scientists would dupe the public and ascend to the bench.

An elected judiciary, these delegates argued, would be biased as well as incompetent. Successful candidates would have obligations to their supporters and grudges against their opponents. They also would want to be re-elected; their tenure on the bench would cost them not just their former clients, but also the mental habits necessary for success as an advocate, and hence they would become dependent on their judicial

Council No. 4434 v. Clements, 914 F.2d 620 (5th Cir. 1990). Shortly thereafter, a panel in the same circuit took the same position in a related case. Chisom v. Roemer, 917 F.2d 87 (5th Cir. 1990). At oral argument before the Supreme Court, in response to the contention that a judge’s only constituency is “the blindfolded lady with the sword and the scales,” Solicitor General Starr countered that judges “are elected by the people and are accountable to the people.” N.Y. TIMES, Apr. 23, 1991, at A17. Dividing 6-3, the Court agreed with Mr. Starr and reversed both of the Fifth Circuit’s decisions. Chisom v. Roemer, 111 S. Ct. 2354 (1991); Houston Lawyers’ Ass’n v. Attorney General of Texas, 111 S. Ct. 2376 (1991).

183. See, e.g., 3 MASSACHUSETTS DEBATES, supra note 2, at 200 (remarks of Joel Giles).

184. See, e.g., ILLINOIS DEBATES, supra note 21, at 460 (remarks of Onslow Peters). Peters drew special attention to Illinois’s foreign immigrants, who could vote after six months of residence: “They were good men, but not competent to judge of a man’s knowledge of abstruse science.”

185. See, e.g., KENTUCKY DEBATES, supra note 12, at 277 (remarks of James Irwin); 2 MASSACHUSETTS DEBATES, supra note 2, at 806 (remarks of Rufus Choate); NEW YORK DEBATES, supra note 14, at 587 (remarks of Charles Kirkland).
salaries.\textsuperscript{186} Under the resulting pressure, they would neglect the legitimate rights of the politically weak in order to curry the favor of the rich and powerful,\textsuperscript{187} or of the general public.\textsuperscript{188}

A further line of argument, most powerfully expressed in the later literature but present in some antebellum material as well, focused on public confidence in the judiciary. Precisely because the public was incapable of assessing the technical merits of judicial opinions, it would not know when decisions were correct.\textsuperscript{189} As a result, even able and unbiased judges would be damaged by the hurly-burly of political campaigns.\textsuperscript{190} What is more, regardless of the quality of judicial decisions, people would always suspect them and wonder whether the elected judges had bowed to the pressure of re-election.\textsuperscript{191} Public confidence in the judiciary, and therefore judges' powers themselves, would diminish.\textsuperscript{192}

It was far better, the supporters of appointment argued, to give the power of selecting judges to one conspicuous public servant who had sufficient resources to gather the necessary expert opinion, and who would feel responsible—and could be held accountable—for poor choices.\textsuperscript{193} In addition to putting the choice in the most suitable hands, appointment for life would insulate judges from political pressures and make the courts "as independent as the lot of humanity would admit."\textsuperscript{194}

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\textsuperscript{186} See, e.g., Peters, supra note 113, at 132; 2 MASSACHUSETTS DEBATES, supra note 2, at 807 (remarks of Rufus Choate).
\textsuperscript{187} See, e.g., KENTUCKY DEBATES, supra note 12, at 163 (remarks of Elijah Nuttall).
\textsuperscript{188} See, e.g., id. at 227 (remarks of William Johnson).
\textsuperscript{189} See, e.g., BOARDMAN, supra note 151, at 17 ("It is no disparagement to them to say, that they are not competent to review the proceedings of the courts; if they are, why not abolish the courts altogether?").
\textsuperscript{190} See, e.g., 2 MASSACHUSETTS DEBATES, supra note 2, at 767 (remarks of Richard Dana, Jr.); id. at 806 (remarks of Rufus Choate).
\textsuperscript{191} See, e.g., id. at 808-09 (remarks of Rufus Choate); see also id. at 708 (remarks of William Schouler). This theme became much stronger in the later literature. See, e.g., EARLE, supra note 136, at 10 ("[T]he public cannot determine Judicial qualifications, but they will draw their own conclusions when they know, or believe, that the Judges receive their positions as political rewards rather than as marks of distinction after successful professional careers."); An Elective Judiciary, supra note 113, at 9.
\textsuperscript{192} See, e.g., 2 MASSACHUSETTS DEBATES, supra note 2, at 766 (remarks of Richard Dana, Jr.).
\textsuperscript{193} See, e.g., Mode of Appointing Judges, 1 AM. JURIST & L. MAG. 313, 314 (1829) (favoring gubernatorial over legislative appointment because in legislative system "the responsibility of the choice does not rest on any individual. The governor of a state who appoints a notoriously incompetent person to a judicial office, disgraces himself. His own personal character suffers."). The same argument surfaced more strongly later. See, e.g., 3 NEW YORK 1867 DEBATES, supra note 11, at 2183 (remarks of Matthew Hale); William Baxter, The Selection of Judges, 3 CENTRAL L.J. 70, 72 (1876); Is There Danger in an Elective Judiciary?, 8 WESTERN JURIST 520, 521 (1874).
\textsuperscript{194} 2 MASSACHUSETTS DEBATES, supra note 2, at 803 (remarks of Rufus Choate, quoting the Massachusetts constitution of 1780).
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The election camp took exactly the opposite line. Since it distrusted the sectional and partisan motives of the government officials who controlled judicial appointments, it argued that only the people themselves could be counted on to look out for their best interests. As The Western Law Journal put it, "[T]he whole people can have but one motive; and if they fail in the selection of good men, it will be by mistake, and not design. Intrigue, combination, and faction, which oftentimes prove so potent with small bodies of men, are powerless with the whole mass of voters."195

Even if the people's agents did try to promote the public good, the whole people acting together would still make better choices. "[Y]ou can more safely trust the whole people than any portion of them," Francis Bird told the Massachusetts convention, "because the whole . . . includes that portion, and you not only have the benefit of their wisdom, but the wisdom of all the rest."196 The mere fact that law was a science did not disqualify the voters from selecting its practitioners, since voters who did not understand the science could simply base their decisions on the candidates' reputations.197 In fact, the very responsibility of voting would elevate and educate the voters, making them equal to the task.198

Where the supporters of an appointive judiciary called for judges independent of all influences, the supporters of the elective system tended to believe that influences of some sort were inevitable, and that the influence of the whole people was preferable to the influence of smaller groups. As Francis Bristow explained to the Kentucky convention, the judge "is to look somewhere for his bread, and that is to come from the people. He is to look somewhere for approbation, and that is to come from the people."199 In the Massachusetts convention, Edward Keyes emphasized that appointment for life did not make angels out of judges: "They are men, and they are influenced by the communities, the societies and the classes in which they live, and the question now is, not whether they shall be influenced at all, . . . but from what quarter that influence shall come."200

195. The Election of Judges, supra note 117, at 423.
196. 2 MASSACHUSETTS DEBATES, supra note 2, at 819.
197. See, e.g., 2 INDIANA DEBATES, supra note 48, at 1681 (remarks of Daniel Kelso); KENTUCKY DEBATES, supra note 12, at 264 (remarks of Silas Woodson) (saying that nine times out of ten, farmers can name their county's best lawyer); 2 MASSACHUSETTS DEBATES, supra note 2, at 700 (remarks of Foster Hooper).
198. See, e.g., KENTUCKY DEBATES, supra note 12, at 282 (remarks of Larkin Proctor); 2 MASSACHUSETTS DEBATES, supra note 2, at 699 (remarks of William Wood). As a result, Wood asserted, we would want to hold elections even if we could get by without doing so.
199. KENTUCKY DEBATES, supra note 12, at 273.
200. 2 MASSACHUSETTS DEBATES, supra note 2, at 773; see also id. at 774 (remarks of Samuel French).
As a result, the notion of independence could not be taken as far as the appointment camp was suggesting. To be sure, since "one object of the judiciary was to protect the people from the other branches of the government," 201 it was essential that the judiciary be "above the control of the legislative or executive departments." 202 But judicial independence should go no further than the separation of powers. 203 As Kentucky's James Guthrie proclaimed, "We want no judiciary independent of the people." 204

Some delegates did not seem bothered at all by such statements. To Guthrie, the people's interests would always square with justice: "We want the constitution upheld, and the liberty and rights of the people secured, and what is the interest of one is the interest of all." 205 Likewise, Larkin Proctor asserted that the people acting as a whole could never abuse their powers, 206 while Ben Hardin said that an erring majority would quickly correct itself. 207 Other supporters of the elective judiciary, however, did fear popular excitements. Still, they thought that unchecked temporary majorities posed a smaller threat than unchecked government officials. Unlike official abuses, the people's errors tended to be short-lived; given time, public opinion would support judges who properly followed the law over those who heeded the temporary clamor. 208 In addition, district elections and staggered terms could reduce the impact of popular excitements on the elected judiciary.

The reformers resolved the tension between the need to minimize outside influences on judges and the need to control government officials by seeking a judiciary that was independent but not irresponsible. As Rodney French told his Massachusetts colleagues, "I like to have independent and upright men in all public stations, but I do not like the idea of having any public officers entirely independent of the people. I think they should be so dependent at least, as to have an eye to the power they serve." 209 Indiana's Henry Thornton expressed a similar idea of the proper relationship between a judge and the people: "I do not say that he should be so much under their influence as to be awed into decisions, but

201. ILLINOIS DEBATES, supra note 21, at 466 (remarks of Archibald Williams).
202. Id. at 462 (remarks of William Archer).
203. See, e.g., KENTUCKY DEBATES, supra note 12, at 266 (remarks of Silas Woodson).
204. Id. at 268. For similar views expressed by a delegate who voted for the appointive system, see 2 MASSACHUSETTS DEBATES, supra note 2, at 811 (remarks of Amasa Walker).
205. KENTUCKY DEBATES, supra note 12, at 268.
206. Id. at 281-82.
207. Id. at 151.
208. See, e.g., id. at 270 (remarks of James Guthrie); id. at 225 (remarks of Squire Turner).
209. 2 MASSACHUSETTS DEBATES, supra note 2, at 785.
merely that he should understand their will."\textsuperscript{210}

As for the matter of public perceptions, it seemed clear to supporters of the elective system that a judiciary appointed by the other branches would have "none of the confidence of the people." Only an elected bench "would be entirely independent of the other branches of government," and so it alone "would always receive the support and protection of the people."\textsuperscript{211} These beliefs followed inevitably from the delegates' distrust of the other branches.

### The Heritage of Revolution and Jacksonianism

The historical context in which the elective judiciary arose supports the idea that the reform was motivated by a general suspicion of official power. Well before the Age of Jackson, England's radical Whigs were warning of government's potential for evil. *Cato's Letters*, the English radicals' most enduring document, argued that nations have "but two Sorts of Usurpation to fear; one from their Neighbours, and another from their own Magistrates: Nor is a foreign Usurpation more formidable than a domestick, which is the most dangerous of the Two . . . ."\textsuperscript{212} The radicals took a dim view of governmental power:

> Men change with their Stations, and Power of any sort rarely alters them for the better; but, on the contrary, has often turned a very good Man into a very bad. This shows that Men forbear Evil, chiefly to avoid the ill Consequence of it to themselves, and for want of Opportunity and Protection; and finding both in Power, they prove, by making use of them, that their Virtue was only Self-love, and Fear of Punishment.\textsuperscript{213}

*Cato's Letters* suggested that society might find some protection in frequent rotation in office, because "Men, when they first enter into Magistracy, have often their former Condition before their Eyes." But "the Possession of Power soon alters and viciates their Hearts," and eventually they become "insolent, rapacious, and tyrannical, ready to catch at all Means, often the vilest and most oppressive, to raise their Fortunes as high as their imaginary Greatness."\textsuperscript{214} In the long run, *Cato's Letters* concluded, liberty can be preserved only when government is constructed so as "to make the Interests of the Governors and of the Governed the same," because people in power look out for themselves.\textsuperscript{215} In short, "It is the Nature of Power to be ever encroaching."\textsuperscript{216}

Despite such documents, Gordon Wood's definitive study of the

\textsuperscript{210} 2 INDIANA DEBATES, *supra* note 48, at 1662.

\textsuperscript{211} 3 ILLINOIS DEBATES, *supra* note 21, at 46-46 (remarks of David Davis).

\textsuperscript{212} 3 JOHN TRENCHARD & THOMAS GORDON, *CATO'S LETTERS* 76 (London, 6th ed. 1755).

\textsuperscript{213} Id. at 81.

\textsuperscript{214} 2 Id. at 239.

\textsuperscript{215} Id. at 232.

\textsuperscript{216} 4 Id. at 82.
Republic's creation shows that suspicion of officialdom took firmer root in America than in England. American revolutionaries saw in the English government the capture of official power by small groups, which secured special privileges at the expense of the common good. "[W]hat the many through successive ages have desired and sought," Josiah Quincy, Jr., wrote in 1774, "the few have found means to baffle and defeat." At least at first, the revolutionaries firmly believed in the existence of a common good; as one local convention proclaimed when called upon to help form a new government for Massachusetts, "Our interests when candidly considered are one." Yet as Quincy argued, in the past mankind "hath abandoned the most important concerns of civil society to the caprice and control of those, whose elevation caused them to forget their pristine equality..." The proper course was instead to entrust law-making power to legislatures that would "think, feel, and act like [the people at large], and... be an exact miniature of their constituents."

Initially, it was suspicion of the executive that led the American revolutionaries to favor the separation of powers: "The executive power is ever restless, ambitious, and ever grasping at encrease of power," and so legislatures should be able to enact laws without fear of executive displeasure. But soon the legislatures too attracted suspicion. "No country can be called free which is governed by an absolute power," wrote the Pennsylvania radicals, "and it matters not whether it be an absolute royal power or an absolute legislative power, as the consequences will be the same to the people." As Wood makes clear, it was the widespread and


218. JOSIAH QUINCY, JR., OBSERVATIONS ON THE ACT OF PARLIAMENT COMMONLY CALLED THE BOSTON PORT-BILL; WITH THOUGHTS ON CIVIL SOCIETY AND STANDING ARMIES, in JOSIAH QUINCY, MEMOIR OF THE LIFE OF JOSIAH QUINCY, JUNIOR, OF MASSACHUSETTS 394 (Boston 1825).


220. QUINCY, supra note 218, at 394-95.

221. RESULT OF THE CONVENTION OF DELEGATES HOLDEN AT IPSWICH IN THE COUNTY OF ESSEX, in PARSONS, supra note 219, at 376. Similarly, Josiah Quincy urged his comrades to put national defense in the hands of community militias rather than standing armies that government officials could use against the people: "The sword should never be in the hands of any but those who have an interest in the safety of the community, who fight for their religion and their offspring,—and repel invaders that they may return to their private affairs and the enjoyment of freedom and good order." QUINCY, supra note 218, at 413.

222. PHILADELPHIA JOURNAL, Nov. 13, 1776, quoted in WOOD, supra note 217, at 135.

223. FOUR LETTERS ON INTERESTING SUBJECTS 19 (Philadelphia 1776).
increasing sense that even elected legislatures could fall prey to special interests or the corrupting influences of power that led to the uniquely American idea of calling "conventions of the people" to write constitutions that would bind government officials. Since representative bodies "might become ten thousand times more dangerous to the elective rights of the People than the Crown could ever possibly be," the radicals stressed popular sovereignty. Thus the inhabitants of Orange County, North Carolina, listed seven principles for their delegates to follow at the convention that established North Carolina's government:

1. Political power is of two kinds, one principal and supreme[, ] the other derived and inferior.
2. The principal and supreme power is possessed only by the people at large, the derived and inferior power by the servants they employ.
3. Whatever persons are delegated [or] chosen or employed or intrusted by the people are their servants and can possess only derived inferior power.
4. Whatsoever is constituted and ordained by the principal supreme power cannot be altered, superseded or abrogated by any other, but the same power that ordained may alter[,] suspend or abrogate its own ordinances.
5. The rules whereby the derived inferior power is to be exercised are to be constituted by the principal supreme power and can be altered, suspended [or] abrogated by the same and no other.
6. No authority can exist or be exercised but what shall appear to be ordained and created by the principal supreme power or by some derived inferior power which the principal supreme power has authorized to create such authority.
7. The derived inferior power can by no construction assume authority injurious to or subsersive to the principal supreme power.

Some Americans, however, did not share this vision of republicanism. Wood reports that many observers in the 1780s, many observers came to believe that the new nation's problems stemmed from legislatures that responded too much rather than too little to the popular will. As one Boston newspaper declared, the people's "transient and indigested sentiments have been too implicitly adopted." State constitutions reflected the new wariness, which became central to the debate over the federal Constitution. Warning of the threat that factions could pose to minority rights, James Madison spoke of the need for enlightened representatives to guard against "an interested and overbearing majority." Likewise Edmund Pendleton, another Federalist, asserted that "[t]here is no quarrel between government and liberty; the former is the shield and protector of

224. WOOD, supra note 217, at 306-25, 336-38. Some radicals, Wood recounts, favored an even broader role for the people acting "out-of-doors."
225. PHILADELPHIA PACKET, Apr. 29, 1776, quoted in WOOD, supra note 217, at 336.
226. 10 COLONIAL RECORDS OF NORTH CAROLINA 870f-870g (William L. Saunders ed., 1890). The inhabitants of Mecklenburg laid out virtually identical principles for their delegates to attempt to insert into the state's Bill of Rights. Id. at 870a-870b.
227. BOSTON INDEPENDENT CHRON., May 10, 1787, quoted in WOOD, supra note 217, at 410.
228. THE FEDERALIST No. 10.
the latter. The war is between government and licentiousness, faction, turbulence, and other violations of the rules of society, to preserve liberty.” 229 To these thinkers, official power could be a positive force to protect the rights of the few against the incursions of the many. Rejecting his opponents’ extreme fear of officialdom, Madison argued that government must be based on the assumption that “the people will have virtue and intelligence to select men of virtue and wisdom”; unless this assumption were true, “no form of government[] can render us secure.” 230 Pendleton, for his part, argued that if the people’s servants abused their power, the problem would be corrected easily: “[W]e will assemble in Convention; wholly recall our delegated powers, or reform them so as to prevent such abuse; and punish those servants who have perverted powers, designed for our happiness, to their own emolument.” 231

Antifederalists condemned such theories, warning that “[t]he tyranny of Philadelphia may be like the tyranny of George III.” 232 In the view of these delegates, popular rights could best be protected by keeping most government power at the local level, where officials were closer to the people and where the citizenry’s interests were the most homogeneous. 233 The Antifederalists lost the battle over the Constitution, but they did provide the impetus for the Bill of Rights. And despite our modern views of the Bill of Rights, Akhil Amar recently has argued that it was written as a majoritarian document; it was “centrally concerned with controlling the ‘agency costs’ created by the specialization of labor inherent in a republican government,” and it aimed to minimize the ability of government officials “to rule in their own self-interest, contrary to the interests and expressed wishes of the people.” 234 In sum, as Bernard Bailyn has concluded, “profound distrust of power lies at the ideological heart of the American Revolution.” 235

It is natural to understand the rise of the elective judiciary in light of this distrust of power, for the same distrust was central throughout the Jacksonian period. While some historians have seen Jacksonian democracy as the reflection of a new commitment to laissez-faire libertarianism, others have argued more persuasively that it built on the old fear of unrepresentative officers. Andrew Jackson saw himself as an heir of “good old

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230. Id. at 536.
231. Id. at 37.
232. Id. at 314 (remarks of Patrick Henry).
233. BERNARD BAILYN, FACES OF REVOLUTION 243-45 (1990); WOOD, supra note 217, at 520-29.
235. BAILYN, supra note 233, at 220.
Jeffersonian Democratic Republican principles,"236 and his presidential campaigns "appealed to republican nostalgia."237 Echoes from the past are unmistakable in the Jacksonians' recurrent condemnations of the use of government to promote narrow interests and to confer special privileges. According to Robert Remini, Jackson's leading biographer, Old Hickory was "in the true Jeffersonian tradition, only more emotional in his commitment to and affection for the great masses of people."238

Jackson had first-hand reason to doubt the motives of the people's agents. As the leading vote-getter in the 1824 presidential election, he was convinced that he had been kept out of the White House by a "corrupt bargain" between Henry Clay and John Quincy Adams, in which Clay threw his electoral votes to Adams in exchange for a cabinet position. After he did become President, Jackson's messages repeatedly stressed his abiding faith in "the first principle of our system—that the majority is to govern."239 His proposals that the Electoral College be abolished, that senators and federal judges be elected directly by the people, and that civil servants regularly be rotated out of office smacked of his distrust of irresponsible power. Indeed, his distrust of the people's agents was matched only by his trust in the people themselves. "Perhaps more than anything else," Remini concludes, "he believed in a virtuous people and was supremely optimistic about the capacity for self-government."240 Like Jefferson, Jackson believed that federalism and civic virtue would combine to keep national majorities from mistreating local interests, and to that extent he favored minority rights. But in the nullification controversy with South Carolina, Jackson firmly disavowed Vice President John Calhoun's proclamation that "constitutional government and the government of a majority are utterly incompatible."241

Today we tend to see both liberty and society in individualistic terms, and accordingly call on our government officials to rise above popular prejudices in order to protect the just claims of minorities. But the dominant theory of republicanism was different in the period during which the elective judiciary arose. In striving to protect liberty, Jacksonian America put its faith in the honest many rather than the enlightened few. The debates over the elective judiciary can be understood only in the context of these competing visions of republicanism.

238. REMINI, supra note 236, at xvii.
239. WATSON, supra note 237, at 97 (quoting Jackson).
240. REMINI, supra note 236, at xvii.
241. See WATSON, supra note 237, at 117-27.
Conclusion

The early commentators who disparaged the elective judiciary as the outgrowth of unthinking Jacksonianism were obviously correct to see reform of the judiciary as part and parcel of the larger democratic movement. But the reformers were hardly simple-minded democrats. Indeed, the reform was more sophisticated than even Hall suggests. As Hall argues, those who supported the elective system in the state conventions aimed to strengthen the judiciary at the expense of the legislatures. But their goals were much broader. With its intellectual roots in the proud philosophical traditions of the Founding, the elective judiciary was intended to enlist some officials—judges—in the process of weakening officialdom as a whole. At the same time, other reforms were curtailing the independent powers of judges themselves, in a concerted effort to rein in the power of all officials to act independently of the people.

In all their reforms, the convention delegates sought to adjust the position of government officials to give them strong incentives to heed the public good. When Nathaniel Holder told the Massachusetts convention that he supported the elective system “for the purpose of placing [judges] in the right position,”242 he articulated the delegates’ attitude toward government officials as a whole. Since all officials tended to act out of self-interest, the trick was to align their interests with those of the people. In this sense, the judiciary became elective not so much to permit the people to choose honest judges as to keep judges honest once they reached the bench. Elections mattered most not because of whom the voters chose—any learned and impartial lawyer, the delegates thought, could become a competent judge—but because of the influences that the elections themselves created.

It seems obvious to say that the elective judiciary arose from a fear that irresponsible power threatened the people’s liberty. Here common sense triumphs over scholarship; anyone hearing about the elective judiciary for the first time would simply assume that the debates boiled down to the clash between populism and paternalism. But the richness of the underlying theory is apparent in the paradox that it raises: In a debate that reflected a profound dispute over how far the people could trust their elected agents, the supporters of the appointive system ended up professing more faith than their opponents in the capacity of elections to secure benevolent guardians of the public interest.

242. MASSACHUSETTS DEBATES, supra note 2, at 711.