

University of Nevada, Reno

**“Electing State Court Judges:
Harmonizing Democracy with Judicial Review in Pursuing
Balanced State Government and Legitimacy”**

A Thesis Submitted in Partial Fulfillment of the Requirements for the
Degree of Master of Judicial Studies

by

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THE GRADUATE SCHOOL

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ABSTRACT

Traditional democratic political theorists promote the idea that Supreme Court exercises of judicial review create a *counter-majoritarian difficulty*, theoretically threatening the foundation of American democracy. Nevertheless, Alexander M. Bickel and other writers, while accepting this premise, seek to reconcile the judicial review power with democratic principles. This thesis rejects the existence of a *difficulty*. It proposes a historically-based approach for studying democratic theory which considers the elective reality among state judiciaries, and then including these judges' decision making in theoretical discussions. The fact that state court judges are subject to popular vote earns them a substantial degree of democratic legitimacy because they are closer to people than appointed federal counterparts. They more frequently adjudicate common issues affecting peoples' everyday lives, and they far outnumber U.S. Supreme Court Justices. These predominantly elected judges also interact with the public when they periodically step into the political arena to engage in campaign activities (i.e., election, re-election, or retention).

The pervasive nature of the state judicial role and judge elections acquaint the populace with who these judges are and what they do in ways that are unimaginable for the few and remote Supreme Court appointees. As a result, the thesis questions theorists' proclivity to analyze the counter-majoritarian issue by considering only the Supreme Court's potential impact on the public sentiment. The Supreme Court lens, it will be argued, is too narrow and unrepresentative of the many and complex state court decisions that result in social control and regularly impact the public mind. This thesis remedies the omission of state court decisions from the analysis.

As a part of this investigation, the thesis reviews the nineteenth century transformation of the state judicial office from a legislatively-appointed position to one that became subject to popular vote. During the post-Jacksonian era of democratization, state constitution makers committed to remake state governments by rescuing their political institutions from the claws of the ill-fated experiment of legislatively dominant state governments. Recurrent economic depression, poverty,

and instances of government corruption early in the century, led voters to demand fundamental reform. Leading into the 1850s, reformers accepted the important truth that the dominant-legislative model lacked needed checks and balances against public abuse. They slowly recognized that a balanced tripartite system was essential for effective governance.

Judiciaries needed to be strengthened if judges were going to assist in securing roughly balanced state government. Abandoning appointments and embracing judicial review and elections led to needed separation and independence of judiciaries from adjoining branches. These reforms also empowered judges to oversee and maintain adjoining branches within newly defined constitutional spending and lawmaking limits. This also bolstered the ability of judges to protect individual rights against government intrusion. Newly empowered judiciaries thus promoted governmental equilibrium against legislatures and executives whose powers were also more clearly defined. Understanding these reforms holds a key to recognizing the taming of formerly dominant legislatures. Considering this combination of changes also reveals how apparently divergent elements (i.e., elections and review power) may be reasonably credited with saving state governments from ruinous corruption and promoting democratic legitimacy.

The proposed state-centric analytic model requires theorists to reconsider prior approaches to democratic political theory, including the federal Supreme Court view. The refocus on state court decision making and elections permits more precise consideration of crucial questions. For example, it is important to see, and document, the extent to which American courts exercise consequential judicial review, and to appreciate whether the public actually sees such exercises as problematic, as the Supreme Court view asserts. This approach also helps to illuminate how judges' participation in campaigns affects public views of legitimacy. The proposed approach offers a richer evidence-base (i.e., state court exercises of the power) on which to base assertions about whether judicial review (and elections)—rather than being a deviant force—actually harmonizes democracy with the American system for the fair administration of justice.

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“The executive power in our government is not the only, perhaps not even the principal, object of my solicitude. The tyranny of the legislature is really the danger most to be feared, and will continue to be so for many years to come. The tyranny of the executive power will come in its turn, but at a more distant period.”

-Letter from Thomas Jefferson to James Madison, March 15, 1789.

I. INTRODUCTION

This thesis examines whether judge elections and “judicial review”¹ among state courts promote healthy governmental balance and democratic legitimacy. Legitimacy lies at the heart of Alexander M. Bickel’s argument in *The Least Dangerous Branch: The Supreme Court at the Bar of American Politics*, where he considers how judicial review may be compatible with democracy. Bickel asserts that when the Supreme Court overturns legislative or executive actions, such exercises of judicial review potentially raise a “counter-majoritarian difficulty” in the public mind that may be inimical to democratic principles.² Despite his theoretical misgivings, Bickel explains how the review power serves an important role under our constitutional democracy. Nevertheless, his explanation of the counter-majoritarian concern leaves an analytic gap in the premise about whether such a difficulty actually exists, which I will explore in this thesis.³

¹ Alexander Bickel defined “judicial review” as “the power to apply and construe the Constitution, in matters of greatest moment, against the wishes of a legislative majority, which is, in turn, powerless to affect the judicial decision.” He also observed: “The power which distinguishes the Supreme Court of the United States is that of constitutional review of the actions of other branches of government, federal and state.” Bickel, Alexander M., *The Least Dangerous Branch: The Supreme Court at the Bar of American Politics* at 1, 16-23 (2d ed. Yale University Press 1986[1962]). Bickel was a chief contributor to the exploration of the “counter-majoritarian difficulty.” Reconciling this difficulty formed Bickel’s life’s work.

² Professor Bickel coined the phrase, “counter-majoritarian difficulty,” in his influential book, Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of American Politics*, *supra*, at 16-23. For additional examples of the theoretical use of the federal approach, see Dworkin, Ronald, *Freedom’s Law: The Moral Reading of the American Constitution* (Harvard Univ. Press 1996) and Waldron, Jeremy, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346 (2006).

³ Ronald Dworkin articulated the majoritarian premise in slightly different words in pursuing his own reconciliation of judicial review’s role in democracy: “political procedures should be designed so that, at

Bickel first falters when he assumes that the U.S. Supreme Court's exercise of judicial review is theoretically representative of the social-legal impact that *all* American courts have on the public's perception of the judicial power. The thesis will refer to this single-actor view as the "Supreme Court" or "federal" analytic model to connote its exclusive focus on the high court's decision making. It is doubtful, however, that the Supreme Court's episodic and rare decisions are responsible for the potential public hostility that judicial review is accused of engendering. This animosity presumably simmers among the populace which stands ready to rebel against the Court or democracy on the next occasion when a judicial decree violates the community's sense of shared values. Both history and common sense contradict this narrow view. Focusing on the final arbiter ignores *how* decisions the Court makes initially entered and evolved in the public arena. This single-actor approach also ignores the innumerable and meaningful decisions that every other state and lower federal court judge makes around the country that influence the public perception of legitimacy. Despite the many lower court decisions, it is indisputable that most of them will never undergo Supreme Court scrutiny, and so we are left with how to account for the likely impact these decisions have on the public consciousness and democratic legitimacy.

The implausibility of the single-court actor model is revealed when one considers the prevalence of more numerous and local state court exercises of judicial review. Focusing

least on important matters, the decision that is reached is the decision that a majority or plurality of citizens favors, or would favor if it had adequate information and enough time for reflection." Dworkin, *supra*, *Freedom's Law* at 15-16. This description includes important qualifications regarding decisions that a "majority or plurality of citizens favor," but a plurality is not a majority. Dworkin's definition includes another provisional class of the people included in the majority: decisions that he presumes this group "would favor if it had adequate information and enough time for reflection." This group adds an additional level of speculation to the extent the analyst must guess about policy directions that a majority or plurality of people *might* favor.

on local examples of judicial action before turning to national Supreme Court instances provides more decisions to study and a richer data-set for evaluating the interplay between local court decision making and expressed public beliefs. The local inquiry allows a more accurate view of the social friction or control potential that comprise Bickel's apparent theoretic calculus of the counter-majoritarian effect. This thesis refers to this more focused study of local decision making involving elected judges (i.e., judicial review) as the "state-centered" or "state-centric" model.⁴

The world, in fact, is not as simple as Bickel's suggests by his traditional single-actor, Supreme Court approach. Most people learn about judicial decisions through local or state adjudicators, either personally or through media accounts. People may know someone who sought justice before a local judge to save a home, defend against an accusation that they committed a crime or a traffic violation, end a marriage, or secure the constitutional right to marry a loved one. Assuming Bickel's premises are correct, and all conditions hold true, such local cases would logically serve as useful examples of the concern that Bickel foresaw in his analysis of judicial review's impact on democracy. The problem is that Bickel's premises are not correct, and the condition of an appointive judiciary does not hold true for the national *elected* judiciary.

⁴ This thesis proposes consideration of the state-centered model for evaluating democratic theory, including these courts' predominant democratic feature. The elective nature of most state court judges who daily impact the public perception requires reconsideration of the premise that the Supreme Court is the best yardstick for measuring the impact of judges' decisions on the public attitude toward judicial review. Unlike their federal counterparts, the majority of state court judges have been subject to popular election since the 1850s, which contradicts Bickel's underlying assumption that judges obtain their position by appointment. Clearly, judges who can claim democratic legitimacy stand in a different theoretic footing than the appointed Supreme Court on whose bench theorists lay the counter-majoritarian fault. Failing to consider the local state court path of decision making ignores this important democratic reality.

Certainly, the proposition that frequent and proximate state court decisions will more significantly impact the public consciousness seems more plausible than Bickel's alternative suggestion of the Supreme Court's primacy in its public influence. These common and frequent social-legal interactions between people and the legal system initially emerge in county courthouses around the country rather than the Supreme Court building in Washington, D.C. The traditional counter-majoritarian analysis ignores the meaningful interactions that a study of state court decision making offers.

In addition to the greater proximity of state court judges to the people in their decision making role, the larger absolute number of these judges, and the geometrically increased number of decisions they make, we may add another crucial fact that bolsters the local judge's connection to the voting public: the manner in which state court judges achieve their positions. History demonstrates that most state court judges have been democratically elected or retained in public office since the mid-nineteenth century. The elective element, being of the essence of democracy, cannot be ignored when considering their theoretic question of compatibility with democracy. These differences between the high court and local judge decision making substantially undercut Bickel's additional assertion that exercises of judicial review are *undemocratic*. The Supreme Court's exercise of judicial power may be undemocratic in the sense that justices are appointed, but the election of most state court judges demonstrates their democratic credential and potentially endows democratic legitimacy to their judicial decisions.

The elective element contradicts Bickel's underlying assumption that the Supreme Court model somehow provides an accurate representation of the impact that the entire

judiciary has on the public conscience. In fact, the Supreme Court is not representative of the entire judiciary. The Court has never been electorally representative in any sense that resembles the history of American state court judges. The more pervasive state court judges, therefore, are in a better position as between the two courts to profoundly demonstrate the social interaction or control dynamic between judges and the people. State courts are, therefore, more likely to inform the public perception about the integrity of judicial decision making than the high court's rarer and episodic decisions.

Pursuing the state-centric approach to study majoritarian questions admittedly contrasts with the prevailing view that *only* Supreme Court exercises of judicial review are important to theoretic understanding. The contrast reveals writers' failure to consider state judge decision making as being relevant to developing their favorite approaches for resolving the "counter-majoritarian" quandary.⁵ In fact, most theorists share the Supreme Court single-actor starting point for their analysis. This focus is not surprising under American federalism where federal supremacy takes the drivers' seat and where states seem to be only along for the ride. Certainly, momentous questions involving governmental balance and adjustment of the country's moral compass have traditionally been heard in the high court. But the stubborn persistence of judicial democracy among

⁵ Bickel, *supra*, at 16-23. See Friedman, Barry, *Dialogue and Judicial Review*, 91 Mich.L.Rev. 577, 578 (1993) ("We have been haunted by the 'countermajoritarian difficulty' far too long.... The endeavor has consumed the academy and... distracted us from recognizing and studying the constitutional system that we do enjoy."); Ackerman, Bruce A., *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013, 1016 (1984) ("Hardly a year goes by without some learned professor announcing that he has discovered the final solution to the countermajoritarian difficulty, or even more darkly, that the countermajoritarian difficulty is insoluble."); Chemerinsky, Erwin, *Foreword: The Vanishing Constitution*, 100 Harv.L.Rev. 43, 46 (1989) (noting that scholarly literature about judicial review has been dominated by the countermajoritarian difficulty for decades).

American courts may benefit from some question asking about the traditional approach toward the alleged counter-majoritarian difficulty under democratic theory.

The elective element, this thesis argues, raises questions as to whether the asserted public regret or theoretic difficulty that judicial review is assumed engender can be ameliorated where it is elected judges rather than the Supreme Court that engages in the conduct. It is asserted that state court judge exercises of judicial review are more palatable to the electorate than those of the high court. It may be that people are more tolerant of elected judges' exercise of the review power because they know they *can* remove these judges if judicial rulings stray too far from community norms. Elected judges, in fact, are not be regularly removed as a result of their decisions, but it has been known to happen in local and state supreme court elections. Including the complexity of the state court judge decision making offers important insight into whether their exercise of judicial review is a positive or negative force under American constitutional democracy. This question at its core devolves into whether people reasonably accept the legitimacy of the judicial function.⁶

Despite the assertion that judicial review lacks democratic legitimacy, questions continue to inspire the search for solutions.⁷ Writers recently have begun to study the historical context in which judicial review and judge elections have evolved in order to

⁶ See Gibson, James L., *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy*, at 22 (Univ. of Chicago Press 2012). Gibson finds, after a carefully conducted study, that, "while some campaign activities do indeed harm judicial legitimacy, the overall effect of judicial elections is beneficial to legitimacy. This is a very important finding, one that should fundamentally reframe how we understand the benefits and costs of electing judges." Social science researchers provide important insight. They confirm that campaign advertising by elected judges has not dissuaded the public from viewing the judiciary as legitimate in the American system of government.

⁷ Friedman, *supra*, at 578; Ackerman, *supra*, at 1016; Chemerinsky, *supra*, at 46.

answer persisting theoretical questions.⁸ But these reviews unsatisfactorily explain judicial democracy's persistence despite efforts to abandon elections.⁹ Other theorists have been overly theoretical in trying to provide answers.¹⁰ Bickel's analysis inspires this question: if *only* Supreme Court decisions are relevant to his analytical approach, why wouldn't state court judges' exercise of judicial review also impact popular views of the judiciary and be relevant to a study of the counter-majoritarian concern?¹¹

A more thorough view of the theoretical question's parameters would help to illuminate how our system for the fair administration of justice contributes to democratic legitimacy. Both the elective nature of the judicial office and its role in checking legislative and executive power provide important clues for understanding the analytic question. Together with judicial review, elections may serve as democracy-enhancing mechanisms "that operate efficaciously and serve to create a valuable nexus between citizens and the bench."¹² Judicial democracy and campaigning may further explain why

⁸ Shugerman, Jed Handelsman, *The People's Courts* (Harvard Univ. Press 2012); see Kramer, Larry D., *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford Univ. Press 2004).

⁹ Popular elections in modern America play some role in the selection or retention of ninety percent of state court judges across thirty-nine states. Streb, Matthew J., *The Study of Judicial Elections in Running for Judge: The Rising Political, Financial and Legal Stakes of Judicial Elections*, 1, 7 (M.J. Streb ed. 2007).

¹⁰ Some writers emphatically oppose any justification for judicial review, and instead maintain that "rights-based judicial review [over legislation] is inappropriate for reasonably democratic societies whose main problem is not that legislative institutions are dysfunctional but that their members disagree about rights." Waldron, *The Core of the Case Against...*, *supra*, at 1406; see also Kramer, *The People Themselves*, *supra*, Tushnet, Mark, *Taking the Constitution Away from the Courts* (1999), Waldron, Jeremy, *The Dignity of Legislation*, 54 *Maryl.L.Rev.* 633 (1995). This thesis does not attempt to step in the middle of Waldron/Dworkin debate, but rather offers a judicial *democracy* lens for viewing the legitimacy of judicial review.

¹¹ The question of reconciling democratic legitimacy and judicial review cannot avoid considering state court judges who regularly face voters in popular elections. The thesis explores these and other questions to bridge the gap between democratic theory, as explained by Bickel, and its real world practice. See Book Review of *The People's Court*, by Sean Beienburg and Paul Frymer, "*The People Against Themselves: Rethinking Popular Constitutionalism*," in 41 *Law & Social Inquiry*, Issue 1, 242–266 (Winter 2016).

¹² Bonneau, Chris W., and Hall, Melinda Gann, *In Defense of Judicial Elections*, at 2 (Routledge 2009) ("In this book we argue that, contrary to the claims of judges, professional legal organizations, interest groups,

people have generally accepted the legitimacy of judicial review in relative stability, with some notable exceptions, without marching on the courts against its practice.¹³ This thesis will examine these questions and the historical record to help illuminate my theoretic path to understanding these issues.

This thesis first reviews the origin of the federal-centric Supreme Court model that Bickel relied upon in considering the assertion that judicial review potentially upsets democracy. It considers the advantages of the Supreme Court model, including the overall strength of relying on a powerful court with nationwide jurisdiction as opposed to the more parochial influence of state court judges whose authority is bound by state borders. Nevertheless, the thesis explains how the federal model is overly narrow and under-inclusive. It fails to include lower federal court decisions, but, more important for this thesis, it fails to include state court exercises of judicial review. The Supreme Court view precludes consideration of the rich historical record that evidences the essential fusion of judicial review with democracy in the state court system.

Next, utilizing the state-based judiciary model, the thesis reviews the historical record in considering the incongruent assumption in counter-majoritarian theory that judges are *appointed elites*. This may be true for the Supreme Court but not for most state court judges. History reveals that during the judicial aristocracy of the early 1800s state court

and legal scholars, judicial elections are democracy-enhancing institutions that operate efficaciously and serve to create a valuable nexus between citizens and the bench.”) (footnotes omitted).

¹³ The aftermath of *Board of Education of Topeka*, 347 U.S. 483 (1954) presents a notable exception to this point, when white segregationists organized to oppose implementation of the integration mandate in public schools. Ogletree, Charles J., Jr., *All Deliberate Speed: Reflections on the First Half Century of Brown v. Board of Education* (W.W. Norton 2004). Also, in 1967 Tierra Amarilla courthouse raid in northern New Mexico presents another exception, but this case involved land grant claims asserted by New Mexican landowners. There may have been other examples as well, but the point is that courts continue to administer justice, and exercise the review power, in *relative stability*.

judges were primarily appointed, but within three decades this began to change.¹⁴ Faced with economic crises and governmental corruption that the people blamed on elite-influenced and dominant legislatures, the thesis will explore how constitution makers determined to change the defective state constitutional design. This governmental approach concentrated excessive power in corrupt legislative hands, which ripened conditions for elites to multiply their economic fortunes during the early nineteenth century's instrumental period.¹⁵

The historical record confirms that in the decades leading up to mid-nineteenth century the power relationship between the branches among state governments was completely out of balance. Limits on legislative power were ill-defined, which resulted in overspent budgets and abuse of power, while judges generally depended on legislatures for their commissions. Repeated instances surfaced in which the prevalent state model showed its inherent vulnerability to abuse by elites, within or outside the community, who influenced or bribed legislators for private gain. The thesis will review the practical questions over how state government was initially structured and then changed to avoid these abuses to save an ailing democracy. It will also explore how elections and judicial review empowered judges with some degree of independence to facilitate their new role in state government as an independent branch which was newly empowered to check against abuses by the other branches.

¹⁴ Dworkin emphasized "...the role of history and language... [as] plainly relevant" for deciding what the Constitution means. Dworkin, *supra*, at 10. This thesis strives to maintain constitutional integrity by appreciating the important role state constitutional development played in preserving and promoting democracy.

¹⁵ Horwitz, Morton J., *The Transformation of American Law, 1780-1860*, at 16-30 (Harvard Univ. Press 1977) (Horwitz maintained that judges pursued an instrumental conception of law in creating doctrines that favored economic development).

Finally, the thesis will explain the importance of examining state court judge decision making (as opposed to the Supreme Court approach) in examining democratic theory and Bickel's persisting question over the claimed "counter-majoritarian difficulty." The transformation of state judiciaries from appointed to elected offices (empowered by judicial review) implicates a solution to the theoretic problem. The thesis provides insight into considering the question of whether a proper understanding and application of the state-centric analytic approach might help to dissipate the counter-majoritarian concern.

II. The Supreme Court (Federal) Model Provides an Incomplete Tool for Measuring Public's Sentiment Toward Judicial Review, and the Review Power's Compatibility with Democracy

The root problem in traditional majoritarian analysis stems from the myopic view that only the decisions of the federal Supreme Court have the potential to create what Bickel described as the "counter-majoritarian difficulty." This difficulty represents the unease or objection that the populace is presumed to have against courts when the Supreme Court overturns the decisions of its elected representatives, i.e., legislative or executive agents. This approach begins with the premise that only this exclusively appointed high court is relevant and representative of the entire judiciary for purposes of evaluating democratic theory. The state-centric approach, on the other hand, provides a more accurate measure of the impact that judicial review may have on the populace than the federal-centric Supreme Court model. It is, after all, popular impact and democratic legitimacy that lie at the heart of Bickel's "counter-majoritarian" concern. As a result, examining the judicial actions of a majority of American courts whose decisions regularly impact the public consciousness would seem to provide a more realistic approach than merely looking at

the decisions of the Supreme Court—a court that only rarely makes impactful decisions that are of great interest to the populace.

A. The Supreme Court Model Is Overly Narrow and Under Inclusive

If we accept the fiction that only the appointed Supreme Court exercises judicial review in analyzing the counter-majoritarian question, then Bickel’s explanation would seem to enjoy theoretic consistency. The Court’s assumed primacy and the undeniable artistry of Bickel’s writing help to explain why his conception of the “counter-majoritarian difficulty” has enjoyed so much discussion in the literature. The Supreme Court view, however, is untenable because it ignores decisions of lower federal and state court judges (including state supreme court justices). These decisions, under federal approach, presumably have no impact on the public discourse or any ability to result in public disapproval when they overturn legislative or executive acts. This conclusion makes no sense. Logic dictates that an objectionable judicial decision would offend the public mind when first made, and at each decisional level that it continues to offend the popular sense of justice, i.e., the trial court, intermediate appellate, and the supreme court levels. The federal view, therefore, is misleading and exceedingly narrow because it presumes that *only* Supreme Court decisions are important for purposes of the theory.¹⁶

¹⁶ This premise, however, has unnecessarily distracted theorists from other worthy endeavors in constitutional analysis—including the present critique of a fundamental assumption underlying the theory—and therefore should be re-assessed. *See, e.g.*, Tushnet, *supra*, at 180 (fearing that “asking the Court to do what you want, under the guise of interpreting the Constitution” is “rather openly anti-democratic”); Amar, Akhil Reed, *The Supreme Court. 1999 Term-Foreword: The Document and the Doctrine*, 114 Harv.L.Rev. 26, 40-41 (2000) (cataloging “major breakdowns of democratic deliberation” in the Supreme Court’s decision making process); Sunstein, Cass R., *The Supreme Court. 1995 Term-Foreword: Leaving Things Undecided*, 110 Harv.L.Rev. 4, 7-8 (1996) (advocating the Court’s “decisional minimalism” in appropriate instances because “it promotes reason-giving and ensures that certain important decisions are made by democratically accountable actors”).

Bickel essentially explained that the exercise of judicial review is undemocratic because the *principle* of democracy fails to line up with its *practice*. Despite his assertion that judicial review is counter-majoritarian, Bickel presented a persuasive explanation as to how the review function nevertheless fits with democracy. This thesis asks whether Bickel's skillful and thorough theoretic discussion was entirely necessary. It asserts, contrary to Bickel's Supreme Court focus, that exercise of judicial review by elected state court judges benefits democracy without needing to engage in all the analytic gymnastics that writers have pursued. The thesis therefore challenges the core assumption that "The root difficulty is that judicial review is a counter-majoritarian force in our system."¹⁷ This thesis argues the contrary proposition, that when elected judges exercise judicial review they harmonize this judicial function with democracy.

Even as early as 1788, Hamilton attempted to explain, perhaps to justify, how judicial review works under democracy when he denied the superiority of the judiciary over the other branches. He explained that judicial review "only supposes that the power of the people is superior to both [the judicial and legislative power], and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter [U.S. Constitution] rather than the former [legislative decision]."¹⁸ For Hamilton, this logical formulation reconciled the apparent question of superiority, i.e., the sovereign people. He placed the will of the people above legislative enactments. The *will* of the people is expressed in the

¹⁷ Bickel, *supra*, at 16.

¹⁸ *The Federalist Papers*. Pp. 468. New York: A Mentor Book (Introduction, table of contents, index of ideas and edited by Clinton Rossiter). *But see* Fritz, Christian G., *The American Sovereigns: The People and American's Constitutional Tradition Before the Civil War* (Cambridge Univ. Press 2008) (Professor Fritz thoroughly considers the historical origins of the idea of the people were sovereigns under early state constitutions).

Constitution, and the Supreme Court ultimately decides disputes over the meaning of that instrument. But this resolution was unsatisfactory to Bickel because the concept of the “people” as sovereign in American democracy was simply too abstract to meet his persistent concern over the counter-majoritarian difficulty. Bickel advised that Hamilton’s use of the term “people” in creating the constitution here was an “abstraction,” and nonrepresentational:

...an abstraction obscuring the reality that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people in the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens. It is an altogether different kettle of fish, and it is the reason the charge can be made that judicial review is undemocratic.¹⁹

Given the role Hamilton hoped his writings would play in convincing delegates and the states to support the U.S. Constitution’s adoption, it is no surprise that he would focus on the Supreme Court when he wrote the *Federalist Papers*. This choice anticipated the federal judiciary’s prominent role in the federal tri-partite balance of power. But Hamilton’s purpose in asserting the Supreme Court’s supremacy does not fairly lend itself to explain the counter-majoritarian difficulty in modern times, or its resolution.²⁰ Hamilton was not presenting a theoretical exposé of the role of *state courts* in American democracy in his quest to justify the federal constitution. Certainly, democratization had not yet shifted state governments away from judicial appointments when Hamilton wrote. That stampede would not materialized until the 1850s when a majority of state

¹⁹ Bickel, *supra*, at 16-17. See Fritz, *supra*, at 5 (presents a thorough explanation of the people as sovereign and state constitutions).

²⁰ Hamilton was not addressing state judges’ role in the national constitutional scheme when he discussed the majoritarian premise. He certainly did not say that state court judges have no role in the counter-majoritarian formula. State court judges also exercise judicial review power.

constitution makers adopted judicial elections for their courts, and this transformation changed assumptions that one could fairly make about the counter-majoritarian concern.

The complication of having elected judiciaries, which is revealed in the historical record, makes the federal model an inappropriate foundation upon which to base the traditional theoretic discussion. To this extent, Bickel unnecessarily narrowed his analytic framework by relying on the Supreme Court concept with its limited decision making potential. The proposed historical review of governmental restructuring in the 1850s suggests the need for a broader framework that relies on the historical record of judicial democracy and the nature of decision making in which these elected state court judges engage. Considering the history of legislative abuse and the move toward democratization reveals that constitution makers were fighting for survival of their states; they were also concerned about dominant legislatures and failing democracies.

The historical view also reveals that democratization and judicial review helped to re-balance state governments and to rescue them from influential elites, but these important points are entirely missed by the federal analytic view. Likewise, the Supreme Court model does not invite a history-based understanding of the development of state judiciaries and their decision making in a way that logically reconciles the counter-majoritarian concern. The federal approach dismisses state judge decision making as a mere curiosity; and certainly not as a potential solution to the perceived problem. Practically speaking, democracy and the courts have co-existed without serious challenge since the country's founding. In light of this persistence, one may ask whether elected judges and judicial review cooperate to maintain democratic legitimacy. This theoretical

match between judicial review and democracy runs deeper than their practical co-existence. This thesis explores their theoretical compatibility in addressing Bickel's persisting question: whether judicial review fits with democracy.

In pursuing the following analysis, and as has already been suggested, the thesis uses two distinct lenses for understanding the theoretic quandary: the federal and the state views.²¹ These views focus on whether Supreme Court or state courts—including a review of their historic roots—better contribute to an understanding of the counter-majoritarian question. The thesis attempts to show that the traditional federal-centric approach, which most theorists have uncritically accepted in their analysis, misdirects the theoretic discussion. It asserts that the historical origin of state judicial democracies more fully explains the contribution of these courts to democratic legitimacy. As a result, the following review will explore whether the twin reforms of judicial elections and judicial review helped to right the ship of democracy at a critical moment in the mid-nineteenth century.

B. The Traditional Approach Injudiciously Presumes That Only the Supreme Court Performs *Difficulty Inspiring Judicial Review*

Adherents of the traditional federal-centric approach presume that only Supreme Court decisions are relevant for purposes of evaluating judicial review's impact on the peoples' consideration of democracy and the courts.²² Bickel and his followers do not describe what they do as the federal-centric approach, but their assumptions and

²¹ The federal and state perspectives represent symbolic understandings of how democratic institutions interact with each other on the national stage. The term, symbolic, is used because both views are not true measures of reality but only rough approximations or guesses.

²² See, e.g., Dworkin, *supra*, at 17; Waldron, *supra*; Ward, Kenneth, *The Counter-Majoritarian Difficulty and Legal Realist Perspectives of Law: The Place of Law in Contemporary Constitutional Theory*, 18 J.Law& Policy 851 (2002).

assertions that only *Supreme Court* decisions are important to the theoretic question leave no doubt that their analysis is premised on such a federal approach. State court decision making simply has no role in their discussion.

Bickel first confirms his reliance on the Supreme Court-centered approach in the title of his book: “The Least Dangerous Branch: *The Supreme Court* at the Bar of Politics.” (Italics added). This reference sets up his argument and allows him to focus on the high court’s important exercise of judicial review. Bickel continues his reliance on the federal approach when he quotes *Federalist No. 78*, in recalling the words of Alexander Hamilton: he “denied, in other words, that judicial review constituted control by an unrepresentative minority of an elected majority.”²³ Bickel complained that Hamilton obscured the reality that when the *Supreme Court* declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the actual people of the here and now.²⁴ This reference to the Supreme Court again confirms Bickel’s difference with Hamilton (who recognizes that *judges* in the general sense exercise of judicial review), and his attempt to narrow the analysis from all judges to the narrower Supreme Court body. Hamilton clearly understood that it was *judges* in the plural sense who interpret the Constitution, not merely the Supreme Court, but Bickel’s analytic mission required a narrower conception than all judges, state and federal.²⁵

Bickel again clarifies his use of the Supreme Court perspective when he observed, in discussing the rare use of the Amending Clause of the Constitution and the Judiciary Act,

²³ Bickel, *supra*, at 16.

²⁴ Bickel, *supra*, at 16-17 (italics added).

²⁵ *Id.* at 17. Hamilton’s quote, above, appropriately refers to “judges” as the constitutional decider, rather than the narrower Supreme Court conceptualization, which is significant for the present thesis.

that all concerned have consented to “the exercise of judicial review by the *Supreme Court*.”²⁶ This reference to the federal high court, too, is not accidental. The U.S. Constitution’s Amending Clause would only need to be resorted to if the ultimate Supreme Court authority was involved, and someone has sought to overturn a Supreme Court precedent by constitutional amendment. There would be no other avenue for appeal to a higher court, Congress, or state legislatures to correct a perhaps popularly objectionable Supreme Court ruling.

Bickel continues his reliance on the Supreme Court model when he describes the *appointed* court overruling the decisions of “representatives of the actual people of the here and now,” further confirming his reliance on the Supreme Court, which together with its subordinate federal courts are some of the country’s few remaining purely appointed courts. Bickel means to rely exclusively on the U.S. Supreme Court’s exercise of judicial review as the entity that implicates the popular response to, or difficulty with, the exercise of judicial review. No serious objection to this assertion is expected.

Bickel’s use of the Supreme Court approach was intuitively a strong choice to represent the judiciary in his theory. This Court is the most powerful court under the federal constitution’s Supremacy Clause, which makes it supreme, and the final arbiter of important social and political questions under the federal constitution. The Supreme Court arguably includes the results of inferior federal court decisions, i.e., district, appellate, specialty courts, etc., at least to the extent that these lower court decisions are appealed and reach Supreme Court review.

²⁶ Bickel, *supra*, at 21 (italics added).

In the Supreme Court, Bickel found a single court system whose decisions set important precedents that might either support contemporary understandings of equality, as occurred in *Plessy v. Ferguson*, or almost a hundred years later signal a fundamental departure from the constitutional “separate but equal” doctrine, as occurred in the *Brown* case. But by focusing on the top, the federal approach misses all the potential difficulty-inducing exercises of judicial review in which lower courts regularly engage—decisions that can but are unlikely to reach the Supreme Court. Local judicial exercises of the review power by state courts may also impact communities throughout the country, and create many and varied opportunities for social discomfort or popular regret of judicial overreach.

The federal-centric approach not only avoids considering these lower state court judicial actions, but it conveniently ignores the fact that most of these judges are democratically elected or retained in office. This elective element is inconsistent with the Supreme Court model’s assumption of an undemocratic judiciary. This failure to consider judicial democracy allows Bickel to state that judicial review by the Supreme Court: “thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.”²⁷ He could not have made this assertion if he had considered the varied state judicial actions that involve judicial review performed by elected judges because these judges share the characteristic of democratic legitimacy with their legislative and executive counterparts.²⁸

²⁷ Bickel, *supra*, at 16-23.

²⁸ Hand, L., “The Contribution of an Independent Judiciary to Civilization,” in Dillard, I., ed., *The Spirit of Liberty* at 155-65 (Knopf 1953). Learned Hand, perhaps more profoundly than others, articulated his concerns about judicial review in writing:

If Bickel had considered exercises of judicial review by state court judges, he could not have standardized his theory and made unqualified claims such as his branding of the Supreme Court as an unelected and appointed body.²⁹ But his reliance on the appointed Supreme Court came at the analytic price of being over-inclusive. The exclusion of state court judge decision making precludes consideration of the difficulty inspiring judicial acts of all other courts in the nation. Certainly, the Supreme Court does not act in a vacuum. It relies on decisions of lower federal and state court judges to provide cases for its review. When controversial issues are presented, local judges must exercise judicial review that might contribute to the theoretic counter-majoritarian difficulty that Bickel foresaw, regardless of whether the case ever reaches the Supreme Court. So the question reasonably may be asked, what happens to all this potential difficulty?

In pursuing the federal approach, Bickel essentially says that the Supreme Court's judicial decisions symbolically represent the behavior of the entire judiciary and that they singularly impact the political community to create the counter-majoritarian difficulty. Accordingly, no reference to the remaining courts of the American judiciary is necessary under this approach. As a result, Supreme Court judicial acts alone, under the federal assumption, create the feared judicial impact on democracy when this undemocratic

I do not think that anyone can say what will be left of those [fundamental principles of equity and fair play which constitutions enshrine]; I do not know whether they will serve only as counsels; but this much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

Id.

²⁹ Despite Waldron's arguably broader conception of the judiciary, he falls into the Bickel trap of assuming an elective judiciary. Waldron, *The Core of the Case Against...*, *supra*, at 1363 ("I assume that, unlike the [representative legislature]..., the courts are mostly not elective or representative... the judiciary is not permeated with an ethos of elections, representation, and electoral accountability in the way that the legislature is.").

Court overturns laws. This would be true in the *Brown*, *Plessy*, or *Marbury* cases, where the Court overturned the will of the peoples' democratically elected representatives; behavior that strikes at the heart of our system of government. This thesis asks, to the contrary, whether the exercise of judicial review by *elected judges* plays a role in dissipating, at least in part, the theoretical cloud over American democracy.

Another underlying premise of Bickel's analysis was the premise that the appointed Supreme Court is sufficiently *representative* of all courts to act as a stand-in for the broader judiciary's impact on the public consciousness. This assumption of its representativeness has gone unquestioned. A more accurate and representative conception of the national judiciary should include lower federal and especially all state court decision making. The time has come to explore the mythical assumption that the high Court alone represents all courts for purposes of examining the counter-majoritarian effect, and to consider the reality that understanding the national judicial role, including state court decision making, is central to analytic understanding.

C. The Supreme Court (Federal View) is Unrepresentative of National Judiciary Which Includes Elected State Court Judges; It Fails to Reflect Instances of Public Legal/Social Interaction—and Control—With the Judiciary Around the Country

In asserting that the Supreme Court is unrepresentative of the national judiciary, this thesis proposes to re-focus on the state-centric approach to avoid the limits of viewing only exceptional and rare cases that may reach the Supreme Court. The traditional federal approach, as will be explained, has its limits. What Morton Horowitz said in his groundbreaking book, *The Transformation of American Law: 1780-1860*, about avoiding

the federal constitutional approach applies with some force to the present discussion.

Horwitz wrote:

Constitutional law, I felt, had been overstudied both in terms of its impact on the development of the American economy and in terms of its representative character. Not only do traditional constitutional histories include a large number of atypical “great cases” but constitutional cases are also unrepresentative either as intellectual history or as examples of social control. Indeed, constitutional law in America represents episodic legal intervention buttressed by a rhetorical tradition that is often an unreliable guide to the slower (and often more unconscious) processes of legal change in America.³⁰

Horwitz opted instead to study “judicial promulgation and enforcement of common law rules,” which “constituted an infinitely more typical pattern of the use of law throughout most of the nineteenth century.”³¹ Although Horwitz embraced the common law case approach, his decision to focus on more prevalent state court decisions supports the present state-centered approach. Horwitz confirms the weakness of the federal constitutional approach as being unrepresentative of the vast diversity of cases that local judges regularly review. This may reflect the difference in the volume of cases considered by elected judges as opposed to rarer Supreme Court instances of judicial review.

Horwitz’s additional point is worth exploring, that studying federal constitutional cases is unrepresentative as “intellectual history or as examples of social control.” But what does this mean? The historical point seems obvious; no one would suggest that Supreme Court opinions may be relied upon as a guide to understanding intellectual, American, or even the judiciary’s history. The point about “examples of social control”

³⁰ Horwitz, *supra*, at xii. Horwitz’s approach provides a helpful framework for analyzing and explaining the forces and popular responses that triggered state-by-state efforts to democratize political and judicial offices in the 1850s constitutional re-writing efforts.

³¹ *Id.*

presents an intriguing suggestion. The implication may be that state court judge decision making better demonstrates the social interaction (or social control) that results when local jurists wrestle with important decisions, including decisions that affect legislative or executive actions. Horwitz strikes an important point here about how court decisions fulfill an important social control function. If so, he may be suggesting that local judicial decision making may more frequently impact the local community—whether involving common law or state constitutional issues—than the rare and episodic federal Supreme Court decisions. But, to what kind of impact does he refer?

Court cases at their core involve various examples of social control, so it is no wonder that Horwitz mentions this social function of law. A criminal case may reflect the trial and conviction of individuals for alleged crimes, meting out of punishment to protect the public, and to punish the wrongdoer and deter other members of the community from repeating the behavior. The same is true for traffic cases, with the modification that the lesson for violating speeding laws may involve stiff fines instead of jail time. Marriage and divorce laws regulate the joining and separation of couples, to respond to the passions of love, promote stable family units, assure social cohesion, or promote social harmony. Workers' compensation laws similarly regulate behavior and limit rights and remedies between employers and employees where accidental injuries intervene. Local judges, in making such varied decisions that touch peoples' everyday lives, reveal the face of local courts in their communities and they, therefore, exemplify the social control function in operation. These decisions control peoples' lives and set standards for other members of the community to follow.

The litigation of these and other kinds of social control first occurs in local courts, where judges incrementally control the behavior of litigants and other members of society who may see the practice or be exposed to the practice through media reports. It would be reasonable to conclude that frequent state judge decisions best exemplify socially impactful instances of judicial actions that people regularly witness and to which they may react in their communities. Clearly, not all of these decisions will involve judicial review, but their promulgation nevertheless impact the public consciousness about the work of courts. Such judicial decision create a public response, whether it be an approval or disapproval. Exercises of judicial review by such local courts simply add to already developing public attitudes about the judiciary.

This kind of reaction may be what Bickel described in theoretical terms related to the Supreme Court only, and that he conceived as the social response that may amount to the counter-majoritarian difficulty when the public objects to popularly unacceptable decisions. Horwitz appears to agree that the Supreme Court issues so few opinions that its social control impact is minimal as compared with the decisions of the present and more prolific state court judges. It may be concluded that Horwitz would agree that, while Supreme Court cases provide poor examples of social control, the elective state judiciaries provide superior examples of such control in the national judiciary. It is asserted that this observation may allow a better understanding of state court judges' impact on popular perceptions about their decisions' compatibility with democracy.

III. The State-Centered Model Allows a More Accurate Assessment of the American Public's View Toward Judicial Review

This thesis proposes a broader conception of the national judiciary that includes the innumerable exercises by state court judges of judicial review that occur daily, and how they might impact our constitutional democracy. This state view provides a more optimistic and historically-based perspective of judicial action. It considers the decisions of state court judges throughout the nation, including invalidation of local zoning codes, criminal cases, tort reform, workers' compensation, or countless other examples that arise among the state courts. As observed in the Introduction of *The Judicial Branch*, in discussing the diversity of issues that state courts regularly decide:

Yet, even those who championed the power of states in the late eighteenth century could not have foreseen the role that state judiciaries could come to play in American life. Modern state courts resolve literally millions of disputes each year. With agendas covering such varied subjects as crime, domestic relations, employment, environmental regulations, housing, personal injury, and product liability, state courts are at the center of resolving almost every conceivable public and private dispute.³²

Certainly, this variety of cases includes instances in which state courts exercise judicial review which reaches the populace either personally or through local media reports that publicize such decisions. Some people may agree while others may disagree about whether a judge complies with or opposes the will of the majority. The net effect of these local decisions is that they create local impacts that affect the lives of individuals and the community sense of justice. Any possible public discomfort with judicial overreach is openly and publically experienced in ways that immediately impact peoples' lives.

³² Hall, Kermit L., & McGuire, Kevin T. (ed.), *Institutions of American Democracy: The Judicial Branch*, at xxi (Oxford Univ. Press 2005).

Because of their rarity and often technical obscurity, however, Supreme Court decisions suffer from the risk of being perceived by the public as distant and unconnected to their lives. Under the federal view these Supreme Court decisions become symbolic judicial acts that apparently stand in for the conduct of judges throughout the nation. As symbolic acts, other than the rare case, the public may not see these decisions as relevant or impactful on the local community as more common and frequent local or state court decisions. It is also certainly true that state court judges are closer to the people than federal judges in so far as state judges hear more and varied cases that regularly touch people's everyday lives.

The electoral process further thrusts elected judges into the public eye with the periodic elections in which they must participate. Elections engage judges in political battle against opponents or interest groups that may seek to unseat them. Most of these judges reside in and administer justice under the democratic umbrella of their states where their decisions regularly affect people in real and present rather than in abstract and distant ways. Certainly, it may be otherwise said that elected judges are representative of their voting constituency. A corollary conclusion is that federal judges are unrepresentative of the complexion of the national judiciary.

To say that state court judges are more representative in the democratic sense than federal judges is in no way meant to belittle the important role that federal courts play under American federalism and the administration of justice. But if the counter-majoritarian difficulty is to be explained in a context of an overwhelmingly elected

judiciary, theorists need to seriously consider the elective element as they consider the role that judicial review plays in America's constitutional democracy.

As a question of theory, the elective element allows one to say that the ability to remove state court judges is “of the essence” of democratic process, just as is true for elected legislators and governors.³³ In fact, the elective element which characterizes most state court judiciaries adds to these judges' importance as more democratically significant decision-makers than their appointed counterparts. The elective feature means these judges regularly face validation in the voting booth; it bolsters state court judges' decision making impact on the local community in considering questions of democratic legitimacy. These judges form the face of how the populace views the judiciary in their social control and justice dispensation roles. As a result of their regular and impactful decision making, these state court judges may be viewed as important subjects of study in evaluating the counter-majoritarian concern and questions of democratic legitimacy.

A. The Potential for the People to Remove Judges is of Democracy's “Essence”

People experience the results of judicial decision making directly or indirectly as litigants, witnesses, jurors, or in some other capacity. They may alternatively hear about judicial decisions through word of mouth from friends, family, or media accounts. Clearly, not all state judge decisions are publicized, and most do not involve exercises of judicial review, but infinitely more state court decisions involve judicial review than those of the high court. The frequency of local judge decisions familiarizes people with who the judges are and what they do.

³³ Bickel, *supra*, at 17.

The voting public also periodically experiences state court judges through the franchise when judges face the electorate as they participate in contested, non-partisan, and retention elections. Whether or not most members of the public are actively involved in the election process, or whether they follow particular judges on the ballot, is not critical to furthering judicial democracy's legitimizing impact. Voter participation in most elections is admittedly low, and most voters lack information or interest in who they will trust to serve as judges. Nevertheless, people who can vote for or against these judges know that they *can* vote to remove these judges when they stray too far from accepted community standards of justice. The fact that people can vote for or against judges, it is asserted, dissipates the concern over whether judges act with public approval. The mere *potential* of their popular democratic participation—the right to exercise a voice—is the democratically significant event.

The “potentiality” point was discussed by Bickel when he addressed elected legislators and executives. He said that these elected representatives cannot continually take “nose counts on the broad range of issues of daily governmental activities.” We elect them to political office for set terms to engage in the work of governance. As Bickel explains, “It is a matter of a laying on of hands, followed in time by a process of holding to account—all through the exercise of the franchise.”³⁴ Although majorities may fluctuate, decisions once made are not continually resubmitted or unmade. Voting majorities hold in reserve the *power to reverse* prior actions. Bickel confirmed that the power of reversal was “of the essence” of the democratic process,³⁵ and he therefore

³⁴ Bickel, *supra*, at 17.

³⁵ *Id.*

recognized its importance regardless of whether reversal is actually exercised. This potential exercise of the reversal power by the electorate applies to both to the decision maker and, indirectly, to the decision made. Voters may utilize their power to hold the offending representative to account by voting him or her out of office. It becomes central to understanding theoretical fit when we apply the concept beyond traditional elected officials (i.e., legislators and executives), and apply it to elected judicial representatives.

As in the case of legislators and governors, voters may also hold elected judges to “account” at the ballot box as majorities vote them (or retain or reject) in or out of office, regardless of whether the removal option is actually or regularly exercised. Maintaining the right to vote for judicial officials, as in the case of legislators/executives, also demonstrates the “essence of” democracy in the judicial context. The potential removal establishes a sort of coercive trust between the sovereign voter and the elected judge. Thus, when judges decide to apply, enforce, or overrule statutes or executive orders, the people are more ready to understand and accept the judicial role in our system of justice, whether the judge invalidates a governor’s decision or overrules a statute that contravenes fundamental constitutional provisions. The potentiality of public removal or approval through the elective mechanism, therefore, may be said to sanctify these judges’ decision making as they interpret constitutional provisions and overturn the actions of adjoining branches. This point may be better understood in the context of the historical record of judicial democratization.

B. Judicial Democracy Has Persisted American Courts Since Mid-1800s

Judicial democracy has persisted in the majority of American state courts since its introduction in the 1840s and 1850s. Contrary to the federal judiciary,³⁶ state laws and constitutions among the 50 states vary widely. Popular elections continue to play some role in the selection or retention of ninety percent (90%) of state court judges across thirty-nine (39) states.³⁷ Nevertheless, the judicial franchise has not been universally embraced among the states, as some states continue to utilize variations of the appointive or other models.³⁸ In the early 1900s, Roscoe Pound and the American Bar Association

³⁶ The federal judiciary has utilized only the appointive model since the U.S. Constitution's ratification (1789) for determining who will serve as federal judges and justices. U.S. Const., Art. 3, §1, provides for what as:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The appointments clause further establishes U.S. President's appointive power. U.S. Const., art. 2, §2, Clause 2 (appointments clause). The framers of the U.S. Constitution attempted to establish a balance among the three branches of government (executive, legislative and judicial) in its 1789 version, which is evidenced in the Federalist Papers, [references], the Chief Justice John Marshall cemented the judiciary's power to check the executive and legislative branches through the landmark decision in *Marbury v. Madison*, 5 U.S. 137 (1803); Kramer, *supra*, at 35-72. When state constitutions were adopted, however, the power of judicial review was not firmly ingrained in our system of justice, and so state constitution writers designed fairly weak judiciaries based on legislative or executive appointment.

³⁷ Schotland, Roy A., "New Challenges to States' Judicial Selection," 95 Geo.L.J. 1077, app. 2 (2007). *See generally* Am.Judicature Soc'y, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* (2009).

³⁸ Dimino, Michael R., *Judicial Elections versus Merit Selection: The Futile Quest for a System of Judicial "Merit" Selection*, 67 Alb. L. Rev. 803 (2004). The Brennan Center documents the states' contemporary adherence to these judge selection procedures:

- **“Most states use elections as some part of their selection process – 39 states use some form of election at some level of court. Of the 38 states where elections are used to select judges to the high court:**
 - In 16 states, judges are appointed by the governor and reselected in unopposed retention elections.
 - In 15 states, judges are selected in contested nonpartisan elections.
 - In 7 states, judges are selected in contested partisan elections, including New Mexico, which uses a hybrid system that includes partisan elections.
- **Appointments are also a common aspect of judicial selection. At the high court level:**
 - In 9 states, judges are appointed by the governor. Judges serve life terms in three of these states. In the other six, judges can be reappointed to additional terms by the governor. In the District of Columbia the president appoints judges to the D.C. Court of Appeals.

argued for a commission-based alternative to judicial elections to better promote the appointment of better qualified and independent judges. This reform was intended to remove politics and partisanship from the judge selection process.³⁹ The commission-based reform effort experienced some, though limited, success in removing voters from the judicial selection process. Other reforms have also been tried, including making judge elections non-partisan,⁴⁰ but these efforts often retain an elective element in some form

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- In another 16 states, judges are initially appointed by the governor and reselected in unopposed retention elections. In addition, in New Mexico, judges are initially appointed by the governor, must then compete in a partisan election during the next general election, and then are reselected in unopposed retention elections.
 - In a total of 26 states and D.C., the governor appoints judges to their first term from a list of candidates provided by a nominating commission.
 - **Although most selection processes center around executive appointment or popular elections, 16 states provide avenues for legislative influence.**
 - In 2 states, judges are appointed by the state legislature and in another 14 states the governor's judicial nominee is subject to confirmation by one or both state legislative bodies. The federal Legislature confirms the president's appointments to the D.C. Court of Appeals."

Judicial Selection: Significant Figures, Brennan Center for Justice (May 8, 2015), <https://www.brennancenter.org/rethinking-judicial-selection/significant-figures>

³⁹ As an example, New Mexico follows a modified Missouri Plan for selecting, electing, and retaining state court judges at all levels. N.M. Const., art. IV, §35 (Appellate Judges Nominating Commission), §36 (District Court Judges Nominating Commission), and §37 (Metropolitan Court Judges Nominating Commission). This plan provides that when a vacancy occurs for a judicial position, the temporary judge must be selected pursuant to the state's constitutional process. The temporary judge is first appointed through a commission-based selection process that develops a short list of candidates. The governor then appoints the temporary stand-in judge to fill the position until the next general election. She or he must run in the next general election and face any challengers. These are partisan elections which usually include a primary process where voters first have an opportunity to consider their party's nominee before proceeding to the general election. Of course, New Mexico primaries are also contested so the temporary judge and challengers, if they are affiliated with a political party, must first succeed in their party's primary, and successful nominees coming out of the primary must then run in the general election contest.

The winner of this first general election earns democratic legitimacy through the successful election outcome. Some temporary appointees do not survive the general election challenge, and their democratically elected challenger then proceeds to serve the term. After winning and serving a first term, the winning judge again faces subsequent periodic retention elections, which are uncontested, every 4 or 6 years. To retain the position the retention candidate must win 57 percent "Yes" votes. The retention process thus provides subsequent opportunities for voters to express their approval or disapproval—a democratic check—on the backend of the judge's service.

⁴⁰ Raferty, William, *Judicial Selection in the States*, Trends in State Courts (website) ("The 1970s and the 1980s marked the rise of the merit selection for judges. However, recent trends have been to eliminate merit selection, alter its components, or return to judicial selection 'to its roots.'"), <http://www.ncsc.org/sitecore/content/microsites/future-trends-2013/home/monthly-trends-articles/judicial-selection-in-the-states.aspx>.

and at some stage of the judge's service. As a result, judicial democracy continues to serve an important role in most judicial selection processes.

Even those states that utilize the commission-based model often leave open the door to have voters participate at some stage of the judges' service, whether it is early in the process, after an initial appointment (i.e., partisan or non-partisan election, contested or not by popular retention vote at the back end of the process),⁴¹ or some other variation on the theme. These state schemes share the elective element that empowers voters, at some point of the judge's term, to potentially remove elected judges from office.

The potential to remove judges may be enough to meet the interest of holding judges to account for behavior that a majority of the populace may find objectionable. The holding to account factor, to the extent it applies to judges is certainly consistent with Bickel's idea of elected representatives generally and compatible with democracy. But the accountability element promoted by electoral reform for judges is not alone in establishing the compatibility of their work with democracy. As will be seen in the next section, the judicial review reform also contradicts the claimed theoretical counter-majoritarian difficulty under democratic theory to the extent the review power helped establish state governmental balance and harmony.

⁴¹ See, e.g., NM Const., art. VI, Sec.32, 33 & 35 (provides for a commission to prepare a list of recommended candidates for the governor to review and appoint the temporary trial and appellate judge; judge serves until the "next general election;" these temporary judges, along with any other interested candidates may run through the partisan state election process for permanent position; the winner of this contested election then periodically run unopposed in "retention" elections, and must win at least 57% affirmative votes to win retention for a succeeding term).

C. Elected State Court Judges Regularly Engage in Judicial Review

The Supreme Court is certainly not alone in utilizing judicial review to settle constitutional skirmishes. The reality is that although the Supreme Court is sometimes the final arbiter of constitutional meaning, it is by no means the only decider of the meaning of American constitutional provisions. U.S. Supreme Court Justice William Brennan long ago wrote about the important role that state courts can play in American federalism as the Supreme Court becomes less adventuresome in its decision making.⁴² Justice Brennan recognized that state courts have a critical role in democracy and constitutional interpretation. Laura Langer has more recently examined the importance of state supreme courts in exercising judicial review as federal courts retreat from their traditional role.⁴³ When combined with the fact that state court judges more regularly and proximally exercise judicial review in local communities, the elected judge perspective becomes all the more important for testing the credibility of traditional counter-majoritarian analysis.

The U.S. Constitution is but one of over 50 functioning constitutions in America's constitutional democracy that judges may examine in assessing the validity of legislative or executive actions. Each state has its own distinct state constitution under which litigants may claim greater or distinct constitutional protections from those available

⁴² Justice William Brennan wrote about the importance of pursuing constitutional remedies in state courts as early as 1977. Brennan, William J., Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977) (Abstract: "During the 1960s, as the Supreme Court expanded the measure of federal protection for individual rights, there was little need for litigants to rest their claims, or judges their decisions, on state constitutional grounds. In this Article, Mr. Justice Brennan argues that the trend of recent Supreme Court civil liberties decisions should prompt a reappraisal of that strategy. He particularly notes the numerous state courts which have already extended to their citizens, via state constitutions, greater protections than the Supreme Court has held are applicable under the federal Bill of Rights. Finally, he discusses, and applauds, the implications of this new state court activism for the structure of American federalism.").

⁴³ See Langer, Laura, *Judicial Review in State Supreme Courts: A Comparative Study* (SUNY Press 2002).

under the federal document.⁴⁴ For example, these state constitutions contain provisions that protect individual rights that resemble those of the U.S. Constitution, but they are not necessarily identical provisions;⁴⁵ state court judges may exceed the floor of protection required under the federal equal protection or due process clauses.⁴⁶ State courts may in some circumstances diverge from federal constitutional interpretations. It is also clear that most state constitutions have distinct clauses with no federal counterpart, such as the educational guarantee clauses in many state constitutions.⁴⁷ Where state constitutions contain unique constitutional protections, no federal review is appropriate or likely to occur.

The distinct protective potential of state constitutional schemes, therefore, provide further evidence of the importance of evaluating local and state jurisprudence in analyzing majoritarian theory. Certainly, other than limited concerns over supremacy where in some cases federal interpretations takes precedence, there is no reason why the concerns and decisions of state constitutional founders and reformers involving the

⁴⁴ See Langor, *supra* (on the importance of judicial review in state supreme courts).

⁴⁵ Peck, Robert S., *For Trailblazers, When the U.S. Constitution is Not Enough*, 45 New England L.Rev. 855 (2011) (considers Robert F. Williams's *The Law of American State Constitutions* and seeks to provide rich information about the debates, interpretation and application of state constitutions, and it advocates for the advancement of independent state constitutional jurisprudence); Williams, Robert F., *The Law of American State Constitutions* (Oxford Univ. Press 2009). Professor Williams provides legal analysis of the nature and function of state constitutions by contrast to the federal Constitution, including rights, separation of powers, policy-based provisions, the judicial interpretation issues that arise under state constitutions and the processes for their amendment and revision. He references history and political theory, but primarily focuses on legal analysis.

⁴⁶ In the case of similar state constitutional clauses, state court judges have an opportunity to break new ground and provide greater constitutional protection than is available under comparable federal clauses. See Brennan, *State Constitutions and the Protection of Individual Rights*, *supra*, at 491 ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law--for without it, the full realization of our liberties cannot be guaranteed.").

⁴⁷ Bauries, Scott R., *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 Geo. Mason L. Rev. 301 (2011) (citations omitted); Cruz, Lynn C., *No Cake for Zuni: The Constitutionality of New Mexico's Public School Capital Finance System*, 37 N.M. L. Rev. 307 (2007).

courts, democracy, and institutional balance should take a back seat to that of federal constitution writers. In fact, the interpretation of state constitutional reformers take a primary role under the state-centric view of democratic theory. Further bolstering the need to consider local decision making is the close contact that state court judges have with the people both in terms of their common and frequent decisions and their campaign activities.

People regularly witness state judicial decision making in state trial and appellate courts.⁴⁸ In contemporary society, information about these decisions is readily available to the populace. Computerized dockets are available not only to litigants and attorneys, but to media sources and for public review. Freedom of information and public records laws make court records readily available to investigating reporters whose purpose it is to publicize newsworthy decisions in pursuing their First Amendment constitutional role. Modern mass communication channels, therefore, allow reporters to regularly follow and publicize state court decisions to an educated and politically aware electorate. The reality is that most cases in which constitutional meaning is addressed will never reach the Supreme Court. It is inevitably true that elected supreme court justices will have the final word in deciding constitutional meaning under their constitutions.

Elected judges must necessarily participate in the elective process, and they interact with voters as a result of this effort. Judges may not say much during the election process, especially as judicial canons traditionally limit the statements or promises they make in

⁴⁸ The fact that most of these judges have or will periodically face popular election clothes their judicial acts with the public trust that democracy demands. These regular exercises of judicial review acclimate the people to the necessity and propriety of judicial role in checking and tempering the conduct of adjoining branches, thus removing the stain of counter-majoritarian concern. This democratic credential, it is suggested, benefits of the appointed state and federal courts, even as they exercise judicial review.

campaign speeches. Nevertheless, one may assume that, in campaigning, judges listen to what people tell them. Judges give speeches about ideal judicial conduct. They also internalize messages about behaving honorably and consistently with the public moral sense on a myriad of issues. Judges who too frequently neglect to do the right thing (at least according to the prevailing democratic mood), or who behave poorly on or off the bench, risk losing their position when the majority disapproves their re-election or retention. In this way, focusing on state court judges may reveal a side of humanity—perhaps their sense of accountability to those who hold the power to maintain them in office—that is shared with other elected officials.

Elections necessarily place judges in a position to interact with the electorate in a focused manner. This process exposes them to, and they are presumably influenced by, what they learn on the campaign trail. Beyond the moral influence, self-preservation incentives may temper judgments as elections near. As a result, the elective element, and all its conflicting pressures, may motivate judges to better contemplate, discern, and respond to the prevailing moral sense of the times. Whether or not these speculations hit the mark perhaps misses the point. The clearer point is that studying the behavior of *appointed* judges simply fails to provide the potential for such insight into the rich public interaction that their elected counter-parts experience. This potential insight includes better understanding, and the legitimizing potential of, how judges draw the lines in balancing power in government and morality lines between citizens or between government and individuals.

The legitimizing effect of judicial elections makes the exercise of judicial review more palatable or acceptable to the people. The power of judicial review is exercised, and publicly felt, from the lowest to the highest state tribunal. While true that state court decisions are more local in impact, and that federal court decisions may immediately affect the community on a national scale, this difference is one of degree rather than of principle and practical effect. At every stage, the community may witness state court judges deciding cases that may disturb legislative enactments or executive decisions. These judges thereby invoke the theoretical difficulty that Bickel so carefully considered.

As a result, including state courts at each decisional level—where the public may feel the counter-majoritarian effect—justifies their inclusion in the state-centric conception. The proposed model’s focus on historical reality requires re-consideration of basic assumptions underlying the counter-majoritarian problem, and the question of democratic legitimacy that lies at its core. The state focus may, therefore, contribute to an understanding of how elected judiciaries and judicial review may be democracy-enhancing mechanisms that help to legitimize the judicial role, and thereby soften the edge of the counter-majoritarian concern.

IV. Examining the Historical Perspective With the State-Centric Lens Provides a More Accurate Framework than the “Supreme Court” Model for Understanding Judicial Review’s Impact on American Democracy

If we accept that the broader conception of the national state-centric model better reflects the theory and practice of American democracy and the courts, one may ask how this undemocratic mode for appointing judges was introduced as a common judicial selection process. This section explains how early states came to utilize the legislative

appointment model for selecting judges and other officials. The discussion starts with the appointive model and proceeds to review the subsequent judge election model of the mid-1800s. This includes an explanation of state court elective history, which vacillated between the goals of achieving general and relative independence as influenced by legislative, executive, elite, and democratic forces.⁴⁹ The following brief review relies upon the work of Jed Handelsman Shugerman⁵⁰ to elucidate the historical origins of judicial elections and judicial independence in American courts.⁵¹

The appointive model was introduced early in American history during what Shugerman referred to as the pre-modern unseparated judiciary period, before the American Revolution, when legislators might perform judicial duties as a part of their primary legislative or executive roles.⁵² This was followed by the interim era of the judicial aristocracy as the judicial office became more specialized as a profession, but less independent as judges relied on the grace of legislatively dominant state governments to secure and maintain their appointments. Finally, during the mid-nineteenth century, state constitution makers abandoned appointments and embraced judge elections and judicial review. They used these structural mechanisms to re-balance state government and address the corrupting influence of elites and overly powerful legislatures. These

⁴⁹ Shugerman, *supra*, at 9.

⁵⁰ Shugerman, Jed Handelsman, *The People's Courts* (Harvard Univ. Press 2012).

⁵¹ See Kramer, Larry D., *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford Univ. Press 2004).

⁵² Shugerman described judicial independence occurring in general and relative terms over time: "The concepts of general and relative independence can be traced over five stages in American history: the premodern unseparated judiciary, judicial aristocracy, judicial democracy, judicial meritocracy, and judicial plutocracy." Shugerman, *supra*, 9. This thesis focuses primarily on the initial period and through judicial democracy.

reforms of the state governmental structure were intended to remedy the lack of an adequate system of checks and balances and avoid unhealthy concentrations of power.

A. Premodern Unseparated Judiciary

The premodern, unseparated judiciary refers to America's early settlement when colonial judicial functions were mixed with legislative, administrative and executive roles. These courts begin to take shape as the colonies struggled to develop their own courts utilizing magistrates to perform a wide array of duties. We may look to the Massachusetts Bay Colony of the mid-1600s as exemplifying the approach: "judicial powers of the governor and the assistants were in many ways more extensive than the legislative and other functions which they exercised."⁵³ Judging was a function rather than an office. This function was often performed as an element of other duties that governors and legislators might perform. One person might wear multiple hats in service of the colony or the Crown. There was no attempt to separate the branches of government. "Because the premodern judiciary lacked separation of powers and judicial independence, elected officials played multiple roles, including judging."⁵⁴ Both Connecticut and Massachusetts exemplify the model. This was a time when the right to vote was exclusive to "freemen" and members of the prevailing religious order (i.e., white men of English ancestry who were Puritan or Calvinist). Voters elected councilmen to administer the colony, who were essentially legislative officers performing a myriad of mixed governmental functions.

⁵³ Haskins, George Lee, *Law and Authority in Early Massachusetts: a Study in Tradition and Design* at 32, (The MacMillan Co. 1960).

⁵⁴ Shugerman, *supra*, at 9.

These were not reliably judicial positions which judges could exclusively hold that had any semblance of independence or separation from the other branches of government. In fact, there were no branches to separate. The same man could in one moment vote to pass a law and in another pass judgment on an accused thief's guilt or innocence. In Connecticut, the multifaceted office was primarily a legislative office, but the governmental body on which they served was called the general court. "Under Connecticut's first charter of 1636, the governor and magistrates were elected popularly to the general court, and sometimes acted like judges."⁵⁵

The same kind of multi-function office existed in the Massachusetts Bay Colony in the 1630s when elected legislators (members of the General Court) similarly served in mixed roles. They performed the judicial function as well as the legislative and administrative roles with which they were charged under the Royal Charter. George Lee Haskins presents a quote about colonial voting that illustrates the mixed role in the Massachusetts Bay Colony in 1634: "At the fourth, or election, session every freeman was expected to be present and to 'gyve his owne voice.'" Following such election, "the General Court resumed the powers granted it under the charter. . . . Its activities were not limited to legislation, but included judicial and administrative functions as well."⁵⁶

Despite reference to elections, voting was exclusive to a limited group of Freemen, and did not include women, slaves, men of color, or those who did not belong to the dominant religious group. These elected bodies were essentially variegated executive and

⁵⁵ *Id.*, at 16. In the mid-1600s Connecticut's colonial legislative bodies performed some judicial duties. "Under Connecticut's first charter of 1636, the governor and magistrates were elected popularly to the general court, and sometimes acted like judges." *Id.*

⁵⁶ Haskins, George Lee, *Law and Authority in Early Massachusetts: a Study in Tradition and Design* at 30-31, (The MacMillan Co. 1960)

legislative bodies that performed judicial and administrative functions. Magistrates might perform a broad array of duties. “One could say that colonial America was full of elected judges, but it is more accurate to say that colonial America was full of elected officials who had some judicial responsibilities.”⁵⁷ These magistrates comprised a central part of the ruling governmental structure⁵⁸ in these small, uncomplicated communities that operated under royal charter.⁵⁹

B. Judicial Aristocracy Promoted Legislative Control of Appointed Judges

The judicial aristocracy is often associated with the post-revolutionary era when state constitution makers embraced a governmental design that had abandoned the royal executive, and instead opted to concentrate power in locally elected legislative representatives. Judges under this emerging regime also lacked independence due in part to the constitutional design that made legislatures responsible for their appointment.

One aspect of judicial independence involved separating courts from other powerful governmental institutions. Shugerman observed a change in understanding of judicial independence in Hamilton’s *Federalist No. 78*: “independence from illegitimate *executive* power [shifted] to independence from illegitimate *legislative* power.” Hamilton spoke of a judicial aristocracy,

⁵⁷ Shugerman, *supra*, at 28. Democracy was not the rule, and much less universal democracy, during this period. In fact, only select Freemen held the exclusive right to vote, and these were definitely a small minority of the populace during the early colonial period.

⁵⁸ Haskins, *supra*, at 27 (“...the effect of the October [1630] meeting of the General Court was to concentrate in the hands of the ‘magistrates’ (as all members of the Court of Assistance were referred to) all legislative, judicial, and executive powers of the government. It seems not to have concerned these few men that the assumption of the powers of the General Court was a clear violation of the charter [of March 1629].”). See also Shugerman, *supra*, at 27-28. Likewise, in 1711, Connecticut’s judges of the superior court were partly elected and partly appointed. It is unclear why judges begin to be elected during this early period, but it may be due to the undeveloped judicial role at the time. The concern for clear separation of powers did not initially surface. There was little differentiation in roles, and legislators often performed both judicial, executive, and lawmaking functions.

⁵⁹ Haskins, *supra*, at 30.

...not in the pejorative sense of a privileged class of nobility, but in the sense of a separate and independent estate, enjoying the privileges of life tenure so that it can check the excesses of both the monarchy and democracy. This usage was consistent with the Framers' "machine" metaphor as the mechanics of separation of powers to balance interests.⁶⁰

Hamilton's conception of judicial aristocracy was intended to justify the need to separate the three distinct branches under the proposed U.S. Constitution, including promoting judicial independence.⁶¹ This federal appointive model included a mechanism for achieving independence, i.e., life tenure—a feature that the states chose to avoid.

Hamilton's concern for an independent judiciary may have been born from the predicament that state judges faced in the post-revolutionary era; they were left as a weak office in the face of dominant legislatures.⁶² Although state constitutions achieved independence from the executive in this period, judicial dependence persisted as most legislatures held the appointment power over judges through the nineteenth century's first half. Constitution makers' adoption of popular sovereignty carried its own ailment. It diffused public trust and power among locally elected representatives from the peoples' ranks. But these legislatively-dominant state governments tolerated minimal, if any, judicial tinkering. This meant that judicial review was not a significant tool in the judicial arsenal.

⁶⁰ Shugerman, *supra*, at 23, citing Witt, John Fabian, *Patriots and Cosmopolitans: Hidden Histories of American Law*, 63-69 (2007).

⁶¹ As Shugerman observes, "Thomas Jefferson had called for judicial independence from England, but he intended that kind of independence to translate into judicial accountability to the public. Jefferson and his followers focused more on judicial accountability as they rose to power over the Federalists after the 'Revolution of 1800.'" Shugerman, *supra*, at 30.

⁶² Gordon S. Wood in *Revolutionary Characters: What Made the Founders Different*, at 199 (Penguin Press 2006) suggests, to the contrary, that state constitution makers after the revolution sought to create balanced government, but the evidence presented by Shugerman, and a review of these constitutions, confirms a less balanced state constitutional effort (i.e., legislatively dominant model) that persisted at least until what he calls the American Revolution of 1848. Shugerman, *supra*, at 103-115.

Given colonists' recent experience with and rejection of the English monarch, it should be no surprise that the states rejected a mode of governance that tolerated an executive (governor) with superiority over other governmental units. Instead, state constitution makers that, if anyone was going to be superior, it would be someone they could trust: they selected locally elected legislators to hold the reins of governmental power rather than distant and untrustworthy governors. This less centralized approach to governance was in some ways more democratic, but also more easily influenced by powerful economic interests. It concentrated most of the government's lawmaking, spending and appointment powers (including judges) into the hands of elected legislatures. The system, however, lacked an essential mechanism to achieve the kind of governmental balance that Montesquieu long before considered so essential to good government.⁶³ Although these legislators were elected, there were few other state offices that were subject to popular vote, and judicial offices did not have the kind of protections to assure judicial independence that contemporary jurists consider so essential.

Legislatures had few limits on their law-making, spending, and appointive powers. Constitutional designers conferred almost exclusive governmental authority on elected legislatures. In fact, these state constitutions were vaguely drafted and failed to clearly define the scope of legislative power. Imprecision in defining legislative power permitted legislators to expansively read and interpret their legislative authority under these early constitutions, including the appointment power over many offices, including judges. This

⁶³ In 1748 Montesquieu had written about including judges as a distinct branch of government; they would provide a needed check against executive and legislative powers and defend liberty: "Nor is there liberty if the power of judging is not separate from legislative power and from executive power.... If it were joined to executive power, the judge could have the force of an oppressor." Montesquieu, *Of the Laws Which Establish Political Liberty, with Regard to the Constitution*, chap. 6, in bk. 11 of *The Spirit of the Law* 157 (Anne M. Cohler trans. and ed., 1989).

approach limited the powers of the executive and essentially excluded judges from the state power balance.⁶⁴

⁶⁴ For instances of early constitutions that generally provided for legislative dominance of state government, including appointment of judges, *see* the following examples:

1. Delaware Const., art. 3, 4, 7 & 12 (this constitution was not submitted to the people but was proclaimed on Sept. 21, 1776) (established legislature as General Assembly of Delaware, consisting of two branches: House of Assembly and the Council; a President or Chief Magistrate appointed by joint Assembly; judges and justices to be appointed by legislative branch; this constitution did not clearly limit the power of the various legislative elements). The Avalon Project, Yale University, Documents in Law, History and Diplomacy, http://avalon.law.yale.edu/18th_century/de02.asp#b1
2. Connecticut: Generally referred by the nickname of the “Constitution State,” Connecticut did not immediately adopt a constitution after issuance of the Declaration of Independence in 1776. Rather, it continued to operate under the English Royal Charter, with necessary amendments. Its nickname refers to Connecticut's Fundamental Orders, which was arguably the first written constitution in the world. *See* http://avalon.law.yale.edu/17th_century/order.asp. The Fundamental Orders, adopted in 1639, set forth the framework for Connecticut's government under the Royal Charter, who was eligible to vote, appointment of magistrates to administer justice, and how laws were to be made. *See* Connecticut State Library, <http://libguides.ctstatelibrary.org/law/connecticut-constitutional-history> and http://avalon.law.yale.edu/17th_century/order.asp
3. New Hampshire Const. (Jan. 5, 1776), this was the first constitution to be framed by an American Commonwealth); this constitution expresses regret for English departure: “The sudden and abrupt departure of his Excellency John Wentworth, Esq., our late Governor, and several of the Council, leaving us destitute of legislation, and no executive courts being open to punish criminal offenders;” but provides that the Council and Assembly shall appoint the respective justices of courts. *See* The Avalon Project, Yale University, Documents in Law, History and Diplomacy, http://avalon.law.yale.edu/18th_century/nh09.asp
4. Georgia Const., (Feb. 5, 1777), this first constitution provided for separation of powers of the three branches of government, but the legislative house of assembly was primary. The constitution provided that all civil officers shall be subject to election, “except justices of the peace and registers of probates, who shall be appointed by the house of assembly.” http://avalon.law.yale.edu/18th_century/ga02.asp
5. Maryland Const., art. XXV, XLVIII. (Nov. 11, 1776), revealed its legislative dominance in that the governor was selected by joint action of both Houses and the governor gives commissions (appointment) for judges, who serve during good behavior. The Avalon Project, Yale University, Documents in Law, History and Diplomacy, http://avalon.law.yale.edu/17th_century/ma02.asp.
6. N.J. Const., art. I & XII (1776) (“government of this Province shall be vested in a Governor, Legislative Council, and General Assembly;” judges were to be “appointed by the Council and Assembly” for specified terms), The Avalon Project, Yale University, Documents in Law, History and Diplomacy, http://avalon.law.yale.edu/18th_century/nj15.asp
7. N.Y. Const., art. XXIV, XXVIII (April 20, 1777) (judges appointed during good behavior), The Avalon Project, Yale University, Documents in Law, History and Diplomacy, http://avalon.law.yale.edu/18th_century/ny01.asp
8. North Carolina Const., Art. XXXIII (Dec. 18, 1776) (provides for House of Commons and Senate to elect governor annually, and provides that the legislature shall recommend justices of the peace to governor for appointment to serve during good behavior), The Avalon Project, Yale University, Documents in Law, History and Diplomacy, http://avalon.law.yale.edu/18th_century/nc07.asp
9. Penn. Const., Sec. 20 (the president of legislative body, with quorum of council (5), shall have the power to “appoint and commissionate judges, naval officers, judge of the admiralty, attorney

Although policy makers in the early period gave voice to the importance of judicial independence and of separating judges, their conception of the need for independence did not encompass the need for practical institutional mechanisms to assure their separateness and balanced state government. Independence from the political branches of government (i.e., executive and legislative) and from influential mercantile and elite classes in some states was addressed by providing for long terms. The principle of judicial independence was not always followed in the practice, especially when respect for elite interest overshadowed concern for following the ideal of justice founded in common law principles.⁶⁵

Legislatures were the primary elective office for which people might vote while most other offices were subject to appointment, and usually by the legislative body.⁶⁶ The

general and all other officers, civil and military....”), The Avalon Project, Yale University, Documents in Law, History and Diplomacy, http://avalon.law.yale.edu/18th_century/pa08.asp

10. South Carolina Const., art. XIX (This constitution was framed by the "Provincial Congress", of South Carolina and adopted March 26, 1776. It was not submitted to the people for ratification.) (art. XIX provides: “That justices of the peace shall be nominated by the general assembly and commissioned by the president and commander-in-chief, during pleasure.”), The Avalon Project, Yale University, Documents in Law, History and Diplomacy, http://avalon.law.yale.edu/18th_century/sc01.asp
11. Vermont Const., § XXVII (July 8, 1777) (Section XXVII appears to provide an exception to the general trend of legislative dominance, but Vermont’s example will be more carefully considered in this thesis: “That the General Assembly, when legally formed, shall appoint times and places for county elections, and at such times and places, the freemen in each county respectively, shall have the liberty of choosing the judges of inferior court of common pleas, sheriff, justices of the peace, and judges of probates, commissioned by the Governor and Council, during good behavior, removable by the General Assembly upon proof of mal-administration.”), The Avalon Project, Yale University, Documents in Law, History and Diplomacy, http://avalon.law.yale.edu/18th_century/vt01.asp
12. Virginia Const. (June 12, 1776) (“The two Houses of Assembly shall, by joint ballot, appoint Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, Judges of Admiralty, Secretary, and the Attorney-General, to be commissioned by the Governor, and continue in office during good behaviour.”), *Who We Are: The Story of America’s Constitution*, <http://www.nhinet.org/ccs/docs/va-1776.htm>

⁶⁵ Horwitz, *supra*, at 16-30.

⁶⁶ See Note 64, *supra*, and accompanying text (for examples of early constitutions that generally provided for legislative dominance of state government, including appointment of judges and other offices).

judicial office, too, was often appointed by legislatures.⁶⁷ If we accept Horwitz's assertion that judges pursued an instrumental role of creating doctrines that favored economic development, we are left with the puzzle as to why these judges would engage in this perhaps unjust and non-traditional approach to the administration of justice. As a refinement of Horwitz's analysis, this thesis proposes that strong legislatures, holding the power of the purse and of appointment, promoted and implemented the economic-development focus of the instrumental approach that judges were prone to follow. The lopsided structure of early governments, with their dominant legislatures, explains the institutional bias toward economic development. This also explains why judges, for a time, lost their way in dispensing justice through the instrumental period, and why at least some of these judges might have abandoned the formal charge of fairly administering justice instead of favoring economic promotion in deciding cases.⁶⁸

In the post-revolutionary period colonial officials attempted to separate the branches of state government despite the existence of judicial appointments.⁶⁹ But "separate" did not necessarily equate to the modern conception of judicial independence:

For example, most of the early state constitutions gave the legislature, not the voters, the power to choose the governor, and others used popular election

⁶⁷ The Founders saw this legislative concentration of power among the states in the early republic, and presumably learned from it and sought to avoid the mistakes of this model in drafting the federal constitution, which ultimately settled on a more balanced model of co-equal branches of government.

⁶⁸ Horwitz, *supra*, at 16-30. The strong legislative influence—with its origins in legislative appointive power—makes sense of the question of why judges would engage in such unexpected, biased conduct that favored elite business interests. It also explains why subsequent efforts by voters and constitution makers coalesced in the 1840s and 1850s to eliminate this legislative appointive prerogative. Horwitz explains his reasoning with a series of examples in what was considered ground-breaking analysis when he wrote the book in 1977.

⁶⁹ Appointments in the post-revolutionary period, however, avoided giving judges too much independence. Instead, the appointment model followed the Publius and Federalist models of controlling judges over the more independently minded inclinations of "Brutus and the Anti-Federalist in the 1790s." Shugerman, *supra*, at 27.

only to create slates of candidates from which the legislature could choose. Not every legislature identified the judiciary as a separate branch, nor did every state give its judges life tenure or even long tenure. Eight states adopted constitutions that guaranteed judicial commissions during good behavior, and only three of those limited removal of judges to a supermajority impeachment process. The other five exposed judges to the insecurity of a “removal by address” process by a bare legislative majority. The remaining five states did not give judges life terms during good behavior.⁷⁰

In this uncertain setting, judges found their appointments regularly directed by the legislative will as states continued to follow the aristocratic appointive approach for judge selection.⁷¹ The structure of state government lent itself to abuse of the purse and of appointive powers. A fundamental imbalance existed in the state governmental structure that needed to be addressed.

More than being merely a different way of looking at the law, the instrumental conception of law worked with judicial appointments to corrupt common law principles in the nineteenth century in a way that favored the interests of the emerging American elite class.⁷² The interests of these appointed judges favored a new conception of American law that supported emerging economic interests of legislators and elite patrons. As Horwitz explained in *The Transformation of American Law: 1780-1860*:⁷³

The emphasis on law as an instrument of policy encouraged innovation and allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change. And from this changed perspective, American law stood on the verge

⁷⁰ Shugerman, *supra*, at 20.

⁷¹ *Id.* at 15-20.

⁷² Horwitz called this approach the instrumental conception of law because decision making became a tool or instrument for promoting economic interests. Horwitz, *supra*, at 2 (“Indeed, judges gradually began to shape common law doctrine with an increasing awareness that the impact of a decision extended beyond the necessity merely of doing justice in the individual case.... In short, by 1820 the process of common law decision making had taken on many of the qualities of legislation. As judges began to conceive of common law adjudication as a process of making and merely discovering legal rules, they were led to frame general doctrines based on a self-conscious consideration of social and economic policies.”).

⁷³ Horwitz, *supra*, at 16-30 (section titled, “The Emergence of An Instrumental Conception of Law”).

of what Daniel Boorstin has correctly called one of the great “creative outbursts of modern legal history.”⁷⁴

Horwitz presents many examples in which judges were undertaking to promote the instrumental approach to decision making,⁷⁵ but the overriding goal of instrumentalism favored a growing elite class of industrialists who sought to promote economic development. Horwitz’s historical review of cases of the early 1800s postulates that these judges promoted economic development as their guiding motivation in making important judicial decisions.⁷⁶ He asserted that American judges engaged in an “instrumental conception of law” through which they sought to promote “economic development.” These appointed judges followed the instrumental approach rather respecting precepts of justice or traditional common law principles that most states had recently adopted. Although the legislative appointment process and the instrumental approach empowered dominant legislatures to control judges, they were inconsistent with principles of democratic rule by the majority.

As Gordon Wood observed, the federal constitution cemented the aristocratic model in the federal judiciary to check democratic impulses of the majority, it was “in some

⁷⁴ Horwitz, *supra*, at 30 (“By 1820 the legal landscape in America bore only the faintest resemblance to what existed forty years earlier.... Law was no longer conceived of as an eternal set of principles expressed in custom and derived from natural law. Instead, judges came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct.”).

⁷⁵ For examples of the instrumental approach, Horwitz explains “jurists began to frame legal arguments in terms of ‘the importance of the present decision to the commercial character of our country,’ or of the necessity of deciding whether adherence to a particular common law rule will result in ‘improvement in our commercial code.’ By the first decade of the nineteenth century, it was common for judges to argue that ‘to admit a party to a negotiable note to come forward as a witness to impeach that note would greatly embarrass trade and commerce, and almost entirely prevent the circulation of this species of paper.” Horwitz, *supra*, at 2, quoting and citing *Liebert v. The Emporor*, Bee’s Admir. Rep. 339, 343 (Pa. 1785), *Silva v. Low*, 1 Johns. Cas., 184, 191 (N.Y. 1799) and *Winston v. Saidler*, 3 Johns. Cas. 185, 196 (N.Y. 1802). See also other examples of instrumental approach, Horwitz, *supra*, at 2-4, 9-16 and 17-30.

⁷⁶ Horwitz, *supra*, at 1-4. Horwitz’s approach provides a helpful framework for analyzing and explaining the forces and popular responses that triggered state-by-state efforts to democratize political and judicial offices in the 1850s constitutional re-writing efforts.

sense an aristocratic document designed to curb the democratic excesses of the Revolution.”⁷⁷ The appointment process under Article 3 accomplished this end. After passage of the Judiciary Act of 1789, most state constitutions continued for several decades to provide strong state legislatures with the power to appoint judges. This meant that early state governments had weakened executives, powerless judges, and empowered legislatures. The states therefore lacked the traditional tri-partite system of checks and balances that we take for granted today, and that became central to the federal system after the U.S. Constitution’s ratification.

Appointed judges belonged to the exclusive club of chosen and well-read men of position who perhaps considered themselves aristocrats of law. Their lots were inextricably linked, not to the vulgar masses, but to the exclusive ruling class, and their legislative patrons.⁷⁸ They knew from whence they came. But the changing perspective that Horwitz observed during this period was not due to an unchanging aristocracy of judges, but to judges who conformed to the private interests of an emerging elite class and dominant legislatures’ intent to promote economic self-aggrandizement. If judges’ aristocratic background and social standing created a unity of interest that encouraged their appointment and retention, it was this same hierarchy of influence that prevented their judicial independence from the dominant appointing authority.⁷⁹

⁷⁷ Wood, Gordon, *The Creation of the American Republic: 1776-1787*, at 626 (1998 ed.).

⁷⁸ Wood, *Revolutionary Characters*, *supra*, at 250 (Penguin Press 2006) (in characterizing aristocrats in these terms, “...crucial is the revolutionary leaders’ belief that the public for which they wrote was cosmopolitan and cultivated. We know they conceived of their audiences or readership as restricted and aristocratic, as being made up of men essentially like themselves, simply by the style and content of what they wrote...an intellectual fraternity, the ‘republic of letters,’ a view that gave them a confidence in the homogeneity and the intelligence of their audience....”).

⁷⁹ From another perspective, Gordon Wood has observed that even though the historical interpretation of the Constitution’s origin in the Framers’ economic self-interest “in a narrow sense is undeniably dead, the

By virtue of favoring ruling elite interests, the instrumental approach pursued by these early judges conversely opposed the interests of the emerging majority—i.e., agrarian workers, laborers, artisans, and other working folk—upon whose backs the country’s economic prosperity and elite interests were being furthered. This was the same group in the early 1800s that was beginning to appreciate the benefit of a shifting political paradigm. The voting populace was intent on reversing past “forms and institutions of legal subordination.”⁸⁰ Through increasing democratization, including the franchise, people were beginning to realize their common interests and the importance of diffusing political power to avoid excessive concentration of authority in legislative institutions. With the proliferation of the franchise voters developed a stronger voice in the electoral process in this Jacksonian era.⁸¹ More men were obtaining and exercising the right to vote.⁸² They were realizing their ability to effect political outcomes through the ballot box not only in legislative offices but also other political offices, including judges, which stood in stark contrast to the prior political model of legislative dominance and bias favoring elite interests and economic development.

Adoption of elections was part of a broader trend reaching beyond the courts. The move toward elections was an evolutionary process that expressed itself across the

general interpretation of the Progressive generation of historians—that the Constitution was in some sense an aristocratic document designed to curb the democratic excesses of the Revolution—still seems to be the most helpful framework for understanding the politics and ideology surrounding the Constitution.” Shuggerman, *supra*, at 23, quoting Wood, *The Creation of the American Republic*, *supra*, at 626.

⁸⁰ See Tomlins, Christopher, *Freedom Bound: Law, Labor and Civic Identity in Colonizing English America, 1580-1865* at 336 (Cambridge Univ. Press, 2010).

⁸¹ See Wilentz, Sean, *The Rise of American Democracy: Jefferson to Lincoln* at 13-39 (W.W. Norton & Co. 2005).

⁸² Ratcliffe, Donald, *The Right to Vote and the Rise of Democracy, 1787–1828*, 33 *Journal of the Early Republic* (2013) (discusses differing views on early, changing patterns of the emerging white male right to vote among American states).

political spectrum in the early to mid-1800s. Reformers removed legislative appointments over a variety of political offices, and adopted elections for prosecutors, attorney generals, sheriffs, constables, and clerks to avoid unhealthy concentration of power and the deleterious consequence of legislative or executive patronage.⁸³ Judicial elections were an important part of the democratization move, but were only one aspect of the overall trend. These complimentary efforts to democratize government institutions (political and judicial) transferred power from an elite-controlled legislative appointment process—a holdover from the monarchic conquest and colonization—to one based on popular election.

This thesis now turns to examine the emergence of judicial democracy among the states in the national judiciary—rather than the Supreme Court conception—a system in which the majority of judges would eventually obtain or retain their positions by virtue of popular consent. Judicial democracy allows the flexibility to avoid the Supreme Court model and to reject the misleading premise that the judiciary is exclusively appointed. This focus involves considering the history of judicial democracy’s adoption, and understanding how state constitutional reformers pursued elections and judicial review to avert a constitutional crisis. This crisis resulted from the legislative supremacy approach toward state governance—a nascent but pernicious form of majoritarian rule that facilitated and tolerated governmental corruption and abuse.

⁸³ From the 1790s to the 1830s, “eight states switched to electing justices of the peace, along with other executive officials, such as attorneys general, sheriffs, constables, and clerks. But most states still appointed justices of the peace until the wave of judicial elections in the 1840s-1850s.” Shugerman, *supra*, at 78, note 112. *See also* Ellis, Michael, “The Origins of the Elected Prosecutor,” 121 *Yale L.J.* 1528 (2012) (starting with Mississippi in 1832, states adopted new constitutions, statutes, or amendments that made prosecutors elected officials. By 1861, nearly three-quarters of the states in the Union elected their prosecutors).

C. State Constitution Makers Embraced Democracy and Judicial Review to Re-Balance Legislatively-Dominant and Corrupt State Governments

After the revolution, state constitution makers had drafted constitutions that regularly granted legislatures unrestrained lawmaking, spending, and appointive powers. They exercised patronage appointments over a full array of governmental officials, including judges and sometimes executive officials.⁸⁴ As a result, in early America the patronage appointment, with all its inherent problems, remained in legislative hands until constitution makers combined to remake state governments.⁸⁵ State legislators expected judges to serve the elite interests of their privileged origins that they had learned to honor. Judges owed their position to the favor of appointing legislatures and elite patrons.⁸⁶

This constitutional response to institutional disequilibrium re-defined the executive branch, limited legislative power, and empowered the judicial office. Constitution makers may have believed that judges held the key to this series of reforms. They fitted important pieces of the democratic puzzle into place by adopting two major proposals for the judicial branch. First, they replaced legislative appointments with judicial elections, which helped to separate judges and to make them independent of adjoining branches, as

⁸⁴ See Note 64, *supra*, for a listing of early state constitutions providing for legislative appointment of judges.

⁸⁵ Early state constitution makers favored empowering legislatures over executives with the appointive power given their recent experience with the English tyrant. Although legislatures held judges accountable through the power of appointment, they also used the threat of “impeachment, repealing judicial offices, shortening terms, and creating new courts. When judicial accountability was the goal, judicial elections were not necessary.” Shugerman, *supra*, at 57.

⁸⁶ The term “elites,” as used in this thesis, includes a generalized conglomeration of post-revolutionary statesmen and masters of commerce who found common interest in a system of government and industry that favored economic growth in a newly created country. The term “elite” is not necessarily a value-laden term that denotes exclusively the aristocracy, born into wealth, but it certainly includes some of these person. Rather, the term is meant to denote a broader grouping of powerful people, i.e., merchants, owners of business, larger farmers, slave holders, political leaders, and others, who shared a common interest in promoting their mutual material aggrandizement. Cite?

will be explained in the following historical review. Second, they promoted judges' use of judicial review to hold the power of adjoining branches within defined constitutional limits. Constitutional designers thus relied on elections to empower judges through independence and used the check of judicial review as essential democratic tools for achieving governmental balance. Reformers embraced the idea that these twin reforms contained the seeds for democracy's salvation, by strengthening and establishing the state judiciary as a more effective counter-balance against executive and legislative power. These constitutional elements effectively re-balanced state governments at a critical historical moment to effect a needed course correction in the ship of democracy.⁸⁷ By fitting these pieces into the constitutional dilemma, reformers addressed a recurrent concern over dominant legislatures that had grown accustomed to exploiting power to serve private elites instead of the public interest. Within this context, the following discussion reviews the courts' transformation from an appointed judiciary to an elective system.

After adopting elections for a greater array of public offices as the nineteenth century progressed, part of the intention of constitutional reformers was to replace the legislative appointment process over these political offices. They embraced elections for a wide array of public offices, including the judicial office, to avoid the evils of a patronage system of appointments that was rife with legislative overreach and corruption.⁸⁸ The

⁸⁷ Of course, characterizing elections, or more specifically the review power, as part of an essential constitutional response, contradicts the accepted academic premise that judicial review is incompatible, on its face or intrinsically, with democracy, but the record conflicts with this central assertion of traditional democratic thinking. *See Bickel; Waldron; Dworkin.*

⁸⁸ From the 1790s to the 1830s, "eight states switched to electing justices of the peace, along with other executive officials, such as attorneys general, sheriffs, constables, and clerks. But most states still appointed justices of the peace until the wave of judicial elections in the 1840s-1850s." Shugerman, *supra*, at 78, note

stars were aligning as mid-century approached to promote a more robust vision for democracy among the states. State judiciaries were a central part of this alignment, as reformers saw that judicial power could act as an additional democratic counter-balance against dominant legislatures. In the democratizing milieu of this post-Jacksonian period,⁸⁹ it simply made sense to add judges to the mix of public offices over which the people might assume an elective voice. Leaders in a majority of states organized and acted in domino-like succession to call for constitutional conventions and ultimately adopt these reforms for the ailing state governmental body.

1. The Early Period of Judicial Election Experiment

Even before it became a state, the Republic of Vermont in 1777 revised its charter to adopt elections for lower court judges, but Vermont's democratization effort was an exception to the trend of appointed judiciaries.⁹⁰ Vermont's example characterizes the power struggle between local and rural communities, and elite interests in remote capitals or other states. Elite attempts to secure resources and public lands led to popular reaction and discontent. These efforts motivated the call for constitutional conventions, and highlighted the need for structural changes in the state governmental structure. Struggle over judicial elections highlights some of these struggles:

112. See also Ellis, Michael, "The Origins of the Elected Prosecutor," 121 Yale L.J. 1528 (2012) (starting with Mississippi in 1832, states adopted new constitutions, statutes, or amendments that made prosecutors elected officials. By 1861, nearly three-quarters of the states in the Union elected their prosecutors).

⁸⁹ See Wilentz, *supra*, at 13-39.

⁹⁰ Vermont Const., Ch. II, § XXVII (July 8, 1777) ("...the General Assembly, when legally formed, shall appoint times and places for *county elections*, and at such times and places, the freemen in each county respectively, shall have the liberty of choosing the judges of inferior court of common pleas, sheriff, justices of the peace, and judges of probates, commissioned by the Governor and Council, during good behavior, removable by the General Assembly upon proof of mal-administration.") (italics added). Of course, election of judicial officers pre-dated the revolution by many years, but early judicial functionaries served mixed roles, including fulfillment of the legislative role. See Notes 53-59 and accompanying text, *supra*.

These lost stories of judicial elections reveal that opposition to judicial power was not the main impulse for judicial elections in the early republic. Instead they were a shield to defend localities against the elite outsiders in more remote capitals, and they were a means of separating powers to increase the courts as a check against legislative power.⁹¹

In a particularly contentious example, Vermonters tried to protect their land claims from attempted usurpation by New York elites. Elites held sway over appointed judges, who came from the more populated urban areas. Vermonters responded by promoting the local election of judges. Local judges, it was hoped, would check legislative power by separating judges from the influence of legislators and elites. Elected judges would be more sensitive to local claimants, and would be fairer than appointed judges from far-off cities, and would help resolve land claims more favorably to local claimants.⁹²

The themes of separating powers and checking the legislative branch would continue to guide reform debates in other states. Under the proposed Vermont constitution, separation of the judiciary would be accomplished by making at least local judges more accountable to the voters who put them into office. “The appellate judges were to be appointed by the governor with consent of the council, but it gave the voters the power to

⁹¹ Shugerman, *supra*, at 58 (“After Connecticut retained judicial elections from its colonial constitution, the next “state” to turn to judicial election elections was the Republic of Vermont, which was not even a state yet.”).

⁹² Although Vermont’s proposed constitutional convention was promoted, in part, by the hope that Congress would establish it as a free state, Vermonters also aimed to secure independence from covetous New York and elite land claims, which were allegedly obtained *ex parte* and by false representation. The preamble to Vermont’s 1786 constitution explicitly refers to New Yorker land claims to portions of the Vermont territory that were maintained under false representation. Vt. Const., Preamble (July 4, 1786) (“And whereas the late Lieutenant-Governor Colden, of New York, with others, did, in violation, of the tenth command, covet those very [Vermont] lands: and by a false representation, made to the Court of Great-Britain (in the year 1764, that for the convenience of trade and administration of justice, the inhabitants were desirous of being annexed to that government) obtained jurisdiction of those very identical lands, *ex-parte* which ever was and is disagreeable to the inhabitants [of Vermont.]”), http://avalon.law.yale.edu/18th_century/vt02.asp; see also Shugerman, *supra*, at 58 (“Vermont’s constitution began with a long preamble of almost 1,200 words listing grievances against New York, deliberately echoing the Declaration of Independence’s grievance against England. It abolished slavery and gave all men the right to vote, regardless of property ownership or wealth.”).

elect some of their judges: ‘the judges of inferior court of common pleas, sheriff, justices of the peace, and judges of probates.’”⁹³ At least at the state level, the idea of having separate branches, or recognizing that the judiciary should comprise its own branch in government, was not yet fully accepted in the political discourse among state constitution makers.

As was this discussed earlier, this early experiment with elected judges preceded even the revolution, as occurred in Connecticut, but these were invariably not fully independent and exclusively judicial offices: “Under Connecticut’s first charter of 1636, the governor and magistrates were elected popularly to the general court, and sometimes acted like judges.”⁹⁴ Vermont and Connecticut may be counted as early efforts in the context of mixed offices, but both states later “abandoned judicial elections in favor of appointments for short terms,” changes that might promote accountability to the appointing authority but certainly reduced judicial independence.

Vermont’s example demonstrates how discrete issues, such as land claim adjudication, drove popular concern over who should have the power to select judicial officers. Concern for making judges independent of elite interests may have motivated the decision to establish life-tenure appointments for some local judges, but this protection was soon abandoned. “Once they had solidly established their independence from New York by 1786, the impulses of localism, separation, and insulation were less significant, and they [Vermont constitution-makers] replaced life-tenure elections with

⁹³ Shugerman, *supra*, at 58-59.

⁹⁴ Shugerman, *supra*, at 16. But this was the period of mixed legislative and judicial offices; the same man could in one moment vote to pass a law and in another pass judgment on an accused thief’s guilt or innocence. In the mid-1600s Connecticut’s colonial legislative bodies performed some judicial duties.

short-term appointments.”⁹⁵ These impulses for localism and separation also appeared among Massachusetts voters as they struggled through the post-revolutionary attempt to re-pay the war debt.

As the populace had only recently rebelled against England in 1786, the memory of tyranny was still fresh on the Massachusetts mind upon the occurrence of Shays Rebellion. The populace showed signs of revolt under the leadership of General Shays as they faced unreasonable tariffs and over-taxation. A faction of people, under the general’s leadership, organized a group of 5,000 bankrupt farmers and working class merchants in 1786 to fight against tariffs on interstate trade under the legislature’s New England Regulation. This organized effort against state government leaders, it was feared, might exemplify an ever present evil of popular democracy. Governor Morris, in adjoining New York, repeated the elite gentry’s complaint, that the people were beginning “to think and reason” as a group, and this was not good. General Shays and his supporters eventually used the force of muskets to prove the seriousness of their concerns.⁹⁶

Emerging voters were beginning to see a connection between their growing poverty and legislatures’ excesses and corruption. They were also beginning to understand that the franchise provided them with an opportunity to collectively decide who would represent them. Bolstered by such popular uprisings as Shays Rebellion (1786-1787)

⁹⁵ Shugerman, *supra*, at 60.

⁹⁶ Wilentz, *supra*, at 30-31 (“Ordinary people not only were present; they had begun, as conservative Gouverneur Morris said about the New York mob, ‘to think and reason’—and to help run political affairs. What painters expressed on canvas, gentry political leaders understood as a public sensibility that could not be ignored.”... The sharpest conflicts surrounded the so-called New England Regulation, a string of rural uprisings best known for the Massachusetts rebellion led by an ex-army captain from Berkshire County, Daniel Shays, in 1786.” In response to demanding economic regulations instituted to pay off the war debt, Shays and his band of supporters “took up arms and disrupted local courts, only to be crushed by a privately founded militia organized by Governor James Bowdoin.”) (citations omitted).

(over taxation to pay off war debt) and later the Yazoo Land Fraud (1789-1810) (bribed legislators sold off millions of acres of Indian lands), organized factions among the populace were realizing that the unchecked power of legislatures was contributing to emerging political and economic woes. Voters could now use their vote to punish corrupt legislators, and to decide who they might trust to exercise that power. But voting out corrupt legislators was not enough as the force of greed merely replaced one crooked legislator with his successor. The state governmental system was not working, and the electorate and its leaders eventually saw the need for fundamental reform.

In response to Shays uprising, voters recognized the validity of the rebels' concerns in the voting booth. Although Governor Bowdoin succeeded in putting down the uprising with a privately funded army, the critical majority of Massachusetts voters responded to the governors' harsh tactics. Voters collectively rebelled against the governor and his supporters in proper democratic fashion by turning out to vote in record numbers. The governor and his supporters were voted out of office, and the Regulation was tempered.⁹⁷

In early 1816, Thomas Jefferson hailed Connecticut's long history of holding elections but at the same time he "endorsed weakening the courts by making it easier to

⁹⁷ Shays Rebellion revealed a fundamental weakness with the Articles of Confederation, i.e., the need to strengthen the centralized government to avoid tariff wars among the states. It also exemplified that the emerging majority was beginning to collectively wield power in the voting booth against elected legislators and governors who displeased them. Wilentz, *supra*, at 31 ("The Shays affair dramatized not only the rawness and limitations of American democracy in the aftermath of independence, but also its possibilities.... Sympathetic with the rebels' plight (if not their tactics), and horrified by the ham-handed repression, Massachusetts voters turned out in extraordinary numbers in the statewide elections the following spring, removed Bowdoin and his most adamant allies from office, and elected a government that reached an accommodation with the rebels (including a pardon of Captain Shays). In all, one democratic Massachusetts farmer recalled years later, 'everything appeared like the clear and pleasant sunshine after a most tremendous storm... a striking demonstration of the advantages of a free elective government.'") (citations omitted).

impeach judges and remove judges from the bench.”⁹⁸ Ironically, he recognized the importance of separation of powers, at least in theory, when he criticized legislative appointments: “to give it [the appointment power] to the legislature, as we do, is a violation of the principle of separation of powers.”⁹⁹ The practical approach in the early nineteenth century, however, was to empower the Jeffersonian controlled legislatures to better limit the power of executives and decisions of lingering Federalist judges. The legislative structure was therefore aimed at strengthening legislatures while weakening the judicial office, and this motive continued even after Jefferson’s served out his term.

Early state governments had exceedingly robust legislatures which held the lion’s share of political power. This circumstance left executive and judicial offices as mere shadows of their potential roles. As explained, the fact that legislative powers were not well-defined allowed these powers to be expansively read; they had not yet developed a tradition of limits on revenue, expenditure, or maintaining annual budget balancing.¹⁰⁰ Dominant legislatures enacted laws that they intended should raise revenues for a variety of purposes, including payment of the war debt, imposing burdensome tariffs, and others. Between the 1820s and 1830s, as state leaders faced the challenge of economic collapse, they decided to also pursue expensive public works projects in an effort to spend themselves out of economic crisis. New York had successfully built the Erie Canal early in the century, but other states after the Erie Canal venture were financially ill-equipped

⁹⁸ *Id.*

⁹⁹ Thomas Jefferson to Samuel Kercheval, July 12, 1816, in *The Writings of Thomas Jefferson*, 15:34 (Andrew A. Libscomb, *et al.* eds. 1903).

¹⁰⁰ National Conference of State Legislatures, *State Tax and Expenditure Limits-2010*, <http://www.ncsl.org/research/fiscal-policy/state-tax-and-expenditure-limits-2010.aspx#typesoflimts>.

to pursue such projects given their limited tax bases.¹⁰¹ Rather than solving recurring economic depressions, these construction efforts aggravated budgets and merely contributed to the economic downturn.

2. Georgia and Indiana Adopt Half-Measures ,While Mississippi Is First to Adopt Judicial Elections for *All State Court Judges*

Following these early democratization efforts, several other states begin to consider, and actually succeeded in adopting, elections for some or all of their judicial posts. At the turn of the 1800s, Georgia and Indiana initially only adopted elections for lower court judges, but Mississippi was the first state to embrace elections for all its courts. These efforts, as in prior reforms, were motivated by recurrent concerns over undemocratic, elite influence of the legislative process and the appointment of judges.¹⁰² The path toward judicial democracy corresponds with the constitutional effort to re-balance state governments in an effort to address perceived legislative and judicial corruption. The constitutional aim was to empower judges and to separate them from legislative influence. This effort to make judges independent, it was hoped, would cast a veil of popular legitimacy over the courts. Reformers came to understand from unfortunate experience that legislators could not be trusted with the important appointive power. Although the appointive power had rested in legislative hands since shortly after the revolution, policy makers were beginning to understand the wisdom of re-allocating this power to the electorate. A careful balance with co-equal branches, which characterized

¹⁰¹ See, e.g., Scheiber, Harry N., *The Ohio Canal Era: A Case Study of Government and Economy, 1820-1861*, at 8 (Ohio Univ. Press 1987) (“The key problem [among state government] was lack of capital. The total tax revenues of the state government itself amount to \$200,000 annually during the decade before 1820; and since most of this was required to support general-purpose government, little was left to finance roads and other transportation improvements.”).

¹⁰² Horwitz, *supra*, at 1-30.

the federal model, was showing its advantage over the dominant legislative system that was showing its incompatibility with democracy. The following sections explain how one state after another came to realize that these undemocratic influences pervaded dominant legislatures and deprived government of essential checks and balances.

a. Georgia Was an Early Convert to Judicial Democracy

In 1798, Georgia held its constitutional convention where it adopted judicial elections for “inferior” courts (called Superior Court judges), but not for appellate judges.¹⁰³ This democratization move succeeding Vermont’s attempt, but Georgia followed different logic in focusing on inferior courts:

Appellate courts engage in a combined role of adjudication, lawmaking, and general interpretation, so it makes more sense under democratic theory for these judges to be more accountable to the public. By contrast, trial court judges engage more in case-by-case adjudication, where individualized fairness should trump public opinion.¹⁰⁴

Georgia’s move to establish elections for inferior court judges, according to Shugerman, responded to two distinct concerns: how the U.S. Supreme Court had ruled (i.e., where

¹⁰³ Georgia Const., Art. III, Sec. 1 (1798) (“The judicial power of this State shall be vested in a superior court, and in such inferior jurisdictions as the legislature shall, from time to time, ordain and establish. The judges of the superior court shall be elected for the term of three years, removable by the governor, on the address of two-thirds of both houses for that purpose, or by impeachment and conviction thereon. The superior court shall have exclusive and final jurisdiction in all criminal cases which shall be tried in the county wherein the crime was committed and in all cases respecting titles to land, which shall be tried in the county where the land lies; and shall have power to correct errors in inferior judicatories by writs of certiorari, as well as errors in the superior courts, and to order new trials on proper and legal grounds....”). See also Shugerman, *supra*, at 60-62.

¹⁰⁴ Shugerman, *supra*, at 60.

Fletcher Yazoo Land Fraud case overturned considered legislative action to correct a recognized wrong, *see below*) in the past and how local judges might rule in the future.¹⁰⁵

During the early 1800s the states witnessed the Jacksonian Era which saw a steady increase in the number and classes of white men who could vote. It became widely known after the 1795 Yazoo Land Fraud that legislators had accepted bribes for the legislative favor of approving the sale of vast areas covering several states to land speculators. The initial land speculators had bribed 28 of 29 legislators to approve the sale. By voting for the legislative sale (which Georgia's governor signed into law),¹⁰⁶ lawmakers essentially entered into a *bona fide* sale of various tracts of land to Fletcher. A succeeding legislative session (most of the legislators who voted for the fraudulent land transfer had been thrown out of office) voted to overturn the sale. After winding through legislative halls and courtrooms of Georgia over a 15 year period, the Supreme Court heard the dispute and ruled that the U.S. Constitution's Contract Clause bound the subsequently elected legislature to respect the former legislature's agreement to sell the lands.¹⁰⁷ The Court reasoned that the attempt by the second legislative session to undo the fraud impaired Fletcher's *bona fide* purchase of the land parcels despite the admittedly

¹⁰⁵ Another early concern involved the popular objection to the U.S. Supreme Court's decision in *Chishom v. Georgia*, 2 U.S. 419 (1793), where the Court denied Georgia's claim of sovereign immunity against suit by private citizens.

¹⁰⁶ The Georgia legislature in 1795 sold the state's western lands (current day Alabama and Mississippi) to private land companies for less than a penny per acre (25.4 million acres). The initial purchasers had bribed 28 of 29 legislators who for voted for sale. Parcels of these lands were later sold to *bona fide* purchasers. The following year, a newly elected legislature determined that the transaction was stained by fraud. The new legislature voted to set aside the fraudulent transaction, but Fletcher, an innocent purchaser, challenged the second legislative action. Appealed ultimately to the U.S. Supreme Court, Chief Justice Marshall invalidated for the first time a state legislative decision (the attempted invalidation of the sale) as being contrary to the U.S. Constitution's Contract Clause. *See generally* Hobson, Charles F., *The Great Yazoo Land Sales: The Case of Fletcher v. Peck* (Univ. Press of Kansas 2016); U.S. Const., Art.1, §10.

¹⁰⁷ U.S. Const., Art.1, §10.

deplorable circumstances under which Georgia first sold those tracts.¹⁰⁸ The 1810 *Fletcher* decision resulted in more than a little difficulty among the American populace. People blamed legislators, threatened them violence, and burned effigies in their names.¹⁰⁹ Popular discontent with legislatures, judges, and elites was for several decades, especially as people linked the irresponsible corruption with increasingly pervasive economic troubles that people faced in the years leading up to the Panic of 1819 (the first Great Depression),¹¹⁰ and the later Panics of 1837 and 1839.¹¹¹ The Yazoo Land Fraud case and the subsequent public discontent that followed demonstrate a waning public trust in legislatures and appointed judges (and particularly the Supreme Court).

Georgia's first constitution, adopted after the revolution on February 5, 1777, provided that the house of assembly would *appoint* justices of the peace and registers of probate, but this changed in succeeding decades. In 1789, Georgian constitution makers

¹⁰⁸ *Fletcher v. Peck*, 10 U.S. 87 (1810).

¹⁰⁹ Sakolski, A.M., *The Great American Land Bubble: The Amazing Story of Land-Grabbing, Speculations, and Booms from Colonial Days to the Present Time* (Harper & Brothers 1932). Sakolski explains the public uproar after the legislative give away was reported:

Vengeance was sought on the speculators, and Georgia became a perilous residence for all concerned in the deal. James Gunn, the United States Senator from the state, and leader of the "Georgia Company," was repeatedly burned in effigy. Other legislators, who were accused of bribery in connection with the deal, were threatened with violence, and subjected to the most scurrilous newspaper attacks.

Id. at 136. See also Notes 95-97, *supra*, and accompanying text (Shays Rebellion) and Notes 103-108 (The Yazoo Land Fraud). See also *Fletcher v. Peck*, 10 U.S. 87 (1810).

¹¹⁰ Clyde Haulman, "The Panic of 1819: America's First Great Depression," in *Financial History* (Winter 2010), made the following observation:

Virginia was not alone in its misery as contemporary observers across the country indicated that the Panic of 1819 was a traumatic experience for the new republic. For example, John C. Calhoun, discussing the situation with John Quincy Adams in 1820, said, "There has been within these two years an immense revolution of fortunes in every part of the Union: enormous numbers of persons utterly ruined; multitudes in deep distress; and a general mass disaffection to the government..."

In Boston, the newspapers reported that "complaints of hard times appear universal" and that what was once a thriving town "presents a dull and uncheery spectacle—silence reigns in the streets..."

https://www.moaf.org/exhibits/checks_balances/andrew-jackson/materials/Panic_of_1819.pdf

¹¹¹ Reznick, Samuel, "The Social History of an American Depression, 1837-1843," in *The American Historical Review*, Vol. 40, No. 4. (Jul., 1935), pp. 662-687 ("Between 1837 and 1843 American society was passing through the deep hollow of a great economic cycle, and the air became heavy with doubt and distress.").

ultimately re-wrote the document to conform to provisions in the U.S. Constitution; this new constitution slightly weakened the power of the legislature by establishing a bicameral legislature, which assumed the power to select the governor. It also established executive and judicial branches, mirroring the federal tripartite structure.

By 1798 Georgians again revised their constitution, partly in reaction to the 1795 Yazoo land fraud. This reform included putting limits on the previously unbridled legislature by more carefully defining legislative power. “Although the legislature continued to be the dominant branch of government, the language used clearly struck a more realistic balance of power among the branches of state government,” which included making the office of governor subject to popular election.¹¹² The constitution also extended democratization to lower court judges so that voters could decide who would represent them in the halls of justice. This approach made more sense to Georgians than continuing appointments with an untrustworthy legislature.¹¹³ Georgia constitutional reformers, therefore, recognized the importance of judicial elections as a means of remedying the inherent imbalance in the state governmental structure. Elections and judicial review improved “relative judicial independence, and ... increase[d] judicial power.”¹¹⁴ Adopting judicial elections, therefore, tempered the inherent problems of legislative supremacy.

¹¹² Hill, LaVerne W. and Hill, Melvin B., *New Georgia Encyclopedia: Georgia Constitution*, (ed. July 26, 2017), <https://www.georgiaencyclopedia.org/articles/government-politics/georgia-constitution>.

¹¹³ Compare GEORGIA CONST., Art. LIII (Feb. 6, 1777) with GEORGIA CONST., Art. III, Sec. 1 (May 13, 1798) (“The judicial power of this State shall be vested in a superior court, and in such inferior jurisdictions as the legislature shall, from time to time, ordain and establish. The judges of the superior court shall be elected for the term of three years, removable by the governor, on the address of two-thirds of both houses for that purpose, or by impeachment and conviction thereon.”).

¹¹⁴ Shugerman, *supra*, at 62.

When combined with the expanding use of judicial review, these changes addressed the counter-majoritarian problem explained by Bickel by democratizing local judges, at least at the state level.¹¹⁵ In Georgia, the high court's decisions to strike down a subsequent *state law* was no esoteric, theoretical, or distant dispute. Contrary to *Marbury v. Madison*, a dispute between the executive and judicial branches over the delivery of judicial commissions between presidential administrations, the Georgia case had entered the consciousness of the electorate.¹¹⁶ The *Fletcher* land fraud case was well-known to the American people, and festered in the country for over 15 years. The case witnessed the failure of popularly elected legislatures to act responsibly and reliably in the public interest. Such irresponsibility eventually led to legislative and judicial decisions that people saw as having caused depleted state budgets, economic crisis, and depression. Georgians were not alone in experiencing the harsh consequence of depression, or in blaming government representatives for governmental failure to address the causes and solutions for a festering economy.

¹¹⁵ If ever there was an occasion for a Supreme Court decision to cause public regret or discomfort, the *Fletcher* case would certainly qualify. Clearly, however, legislatures were the origin of popular dissatisfaction. At its core, voter concern was founded upon well-known legislative corruption and abuse. The electorate could not remove the Supreme Court, but they could and did remove offending legislators at the ballot box, but this was not enough for voters. They also took measures at the 1798 constitutional convention to strip the legislature of the power to appoint judges. Voters were able to promote state court judge accountability through the election process even if they could not remove members of the U.S. Supreme Court. By gaining in voice in electing judges, voters addressed, at least within their own state judiciary, the concern for majoritarian input against unwarranted judicial power.

¹¹⁶ Compare *Fletcher (1810)* with *Marbury v. Madison*, 5 U.S. 137 (1803) (recognized use by the Supreme Court of judicial review over a *federal* executive action). The *Fletcher* case goes a long way toward making Bickel's point about how judicial review creates a counter-majoritarian difficulty. Certainly, the powerful legislatures during this early period showed their susceptibility to abuse. This was more than a theoretical difficulty, the states and the people were up in arms.

b. Indiana Joins Effort to Promote Local Control through Judge Elections

Indiana was the next state to adopt judicial elections for its lower courts when it adopted its constitution in 1816. Since the earlier adoption of the Northwest Ordinance of 1787,¹¹⁷ Indiana settlers in the territory had suffered under federally appointed, out-of-touch aristocrats. The emerging electorate was growing skeptical of an appointed governor and three appointed judges who did little to earn their trust. These officials were not frontiersmen. They were unpopular, unfamiliar, and unsympathetic to local concerns. Although Indianans were expected to adopt the common law of surrounding states, the appointed judges failed to follow the charge and drew primarily from English precedents.¹¹⁸ Appointees identified with New England elites rather than the West in adopting a harsh penal code and other unpopular laws. Settlers despised such foreign influence.

As the Indiana population increased to the point where the terms of the Northwest Ordinance permitted the election of officials, political forces lined up in favor of democratization at many levels. Indianans called for a constitutional convention in 1816. The “poor frontiersmen” constituted a majority of the newly enfranchised populace and prevailed against pro-slavery aristocratic elites in the voting booth. The emerging voting block also succeeded in democratizing the judiciary, among other reforms. “The antislavery settlers had experienced the system of appointments as a tool for promoting

¹¹⁷ For the Transcript of Northwest Ordinance of 1787 (Dec. 12, 2007) (“An Ordinance for the government of the Territory of the United States northwest of the River Ohio”), *see* <https://www.law.gmu.edu/assets/files/academics/founders/NW-Ordinance.pdf>

¹¹⁸ Shugerman, *supra*, at 63.

slavery and thwarting the will of the majority. They also understood that antislavery had become a voting majority....”¹¹⁹

Delegates to Indiana’s constitutional convention engineered a reform to allow elections at various levels, including local judges,¹²⁰ who, it was hoped, would be more sensitive to local needs than the appointed judges had been. According to Shugerman, “This experiment was the result of a mix of frontier culture; a reaction to an overbearing federal administration over the territory; the fight over slavery in the Northwest Territory; and the political strategies of ambitious local leaders.”¹²¹ Settlers were able to use the ballot box to express their rejection of the governor’s arbitrary rule, including his appointment of unsympathetic judges. As a result of the convergence of these various forces, settlers were able to succeed in obtaining democratic changes at their constitutional convention to secure duly elected representatives at many levels of state government. Shugerman observes that:

the turn to electing lower court judges in Vermont, Georgia, and Indiana foreshadowed how the wave of judicial elections would play out several decades later. Local elections were a reaction to abuses of appointments by external powers. Slavery and antislavery influenced the Indiana Convention, and they would play a role in the 1830s through the 1850s. The backlash against the Marshall Court would also rise again.¹²²

This trend of strong local reaction to outside elite influence, legislative abuse of the appointment power, support for antislavery objectives, and the Supreme Court’s meddling would continue to play out in other state conventions. In each of these

¹¹⁹ *Id.* at 64.

¹²⁰ Indiana Const., art. V, §§ 8 & 12 (lower court judges shall be elected by qualified electors).

¹²¹ Shugerman, *supra*, at 62-65.

¹²² *Id.* at 65.

reforming states, “the separation of powers and judicial independence” helped to build the pro-judicial election coalition.

c. Mississippi Ventures Further in Adopting Elections for *All Judges*

The Mississippi experiment presents another state variation in adopting judicial elections. The constitutional convention in Mississippi was dominated by the Whole Hog Revolution of 1832, which saw unique political conflicts that highlighted the unfairness and unrepresentative nature of judicial appointments. In this pre-Jacksonian era development,¹²³ reformers promoted democracy ruled by the common man; their policies extended to suffrage and anti-banking matters. Jacksonians encouraged national expansion and hands-off economic policies. Despite the uniqueness of Mississippi’s conflicts, they similarly objected to outside influence in their move toward democratization.¹²⁴ The conflict involved the Natchez “Aristocrats” from larger cities, who controlled the legislature and utilized patronage appointments to monopolize their advantage among courts.

The “Whole Hogs,” fought for judge elections to promote greater local control, among other objectives. The “Half Hogs” were moderates who supported the half-way

¹²³ Andrew Jackson himself endorsed democracy, and judicial elections in particular, but during his lifetime (died in 1845) only Mississippi adopted judicial elections for all its courts. Interestingly, democratization was not limited to the judicial arena; it extended to a wide array of appointive state offices that had been previously controlled by legislatures. “In the 1810s and 1820s, states were switching from appointing to electing many state officers, but not judges and justices of the peace. Justices of the peace were local officials who had a mix of minor judicial, prosecutorial, policing, and general administrative duties.” Shugerman, *supra*, at 78, note 112.

¹²⁴ Horwitz, *supra*, at 23 (“As judges begin to conceive of themselves as legislators, the criteria by which they shaped legal doctrine begin the change as well. The principle upon which judges ought to decide whether to adhere to a series of decisions, one jurist noted, ‘resolves *itself* into a question of expediency.... As a result, during the first two decades of the nineteenth century judges begin to conceive of themselves as the leading agents of legal change.”).

measure that previous states had followed of electing lower court judges but appointing supreme court judges. This dynamic between the “Whole Hog” majority and the “Natchez” aristocrats fits Horwitz’s narrative of elite-controlled legislatures. These legislators appointed judges who favored their benefactors’ economic interests, i.e., judges who pursued the “instrumental conception of law” favoring economic development; judges thus often acted like legislatures in furthering economically favorable doctrines.

The voting majority in Mississippi fought against the influential aristocrats from the larger cities. Abuses by the Natchez elites triggered a backlash by the rural “Whole Hog” majority.¹²⁵ The Whole Hogs opposed slavery,¹²⁶ they supported pro-debtor judges,¹²⁷ and Indian removal,¹²⁸ while Natchez aristocrats opposed the Whole Hog position on these issues. As a result, the Whole Hogs during the constitutional convention pursued direct democracy, separation of powers, and judicial independence to fight against aristocratic control of the legislature and courts. “Because of some lucky breaks, the

¹²⁵ “Whole Hogs” “fought for local direct democracy, the separation of powers, and judicial independence from Natchez” commercial interests, while the Natchez area aristocrats were “predominantly from the powerful commercial center around Natchez, who favored judicial appointments.” Shugerman, *supra*, at 66.

¹²⁶ *Harry v. Deck and Hopkins*, *Walker’s Mississippi Reports* at 36 (June Term, 1818) (one Natchez judge in 1818 said that “Slaves within the Northwest Territory became free men by virtue of the ordinance of 1787 [and the constitution of Indiana in 1816], and can assert their legal freedom in the courts of this state”); *Mississippi v. Jones*, *Walker’s Mississippi Reports* at 83 (June Term, 1820).

¹²⁷ Shugerman, *supra*, at 70 (“In 1824, the Mississippi Supreme Court struck down a state statute protecting debtors from creditors in *Cochran v. Kitchens*.”); *see also* “The Legislature,” *Natchez Gazette*, Jan. 22, 2825 (*citing* U.S. Constitution, art. I, §10; Mississippi Constitution [1817]).

¹²⁸ Shugerman, *supra*, at 71-74; *see also Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); Wilentz, *supra*, at 314, 427; Drake, W. Magruder, “Mississippi’s Constitutional Convention of 1832,” 23 *Journal of Southern History* 357 (1957).

Whole Hogs won by a very narrow margin [at the 1832 Mississippi convention], and they turned to judicial elections as one way to limit the Natchez Aristocrats.”¹²⁹

The Mississippi reform mirrors Horwitz’s explanation of elite-based exploitation. As state legislatures showed their vulnerability to elite control and abuse, the concerned majority fought for constitutional reform to re-balance the governmental power structure. State governments did not have a balanced tripartite system, as the judiciary lacked independence and empowerment. As a result, a majority of constitution makers voted to adopt judge elections. These judges were expected to oppose elite-biased legislatures. Unlike prior democratization efforts, the Whole Hogs adopted judicial elections for *all judges*.¹³⁰ This change, it was expected, would make courts more accountable to the local community while also promoting egalitarian democratic principles and institutions across the state.¹³¹ Judicial elections also responded to the broader democratic trend of embracing making an increased offices subject to popular vote, which fundamentally worked to bring governmental practice closer into line with democratic theory.

¹²⁹ Shugerman, *supra*, at 66-77.

¹³⁰ From the 1790s to the 1830s, “eight states switched to electing justices of the peace, along with other executive officials, such as attorneys general, sheriffs, constables, and clerks. But most states still appointed justices of the peace until the wave of judicial elections in the 1840s-1850s.” Shugerman, *supra*, at 78, note 112, citing applicable constitutional provisions: Vermont Const. of 1793, ch. II, §9; Ohio Const. of 1803; Georgia Const., Amendment of 1812; Indiana Const. of 1816, art. V, §12; New York Const., Amendment of 1826; Tennessee Const. of 1834, art. VI, §15; Arkansas Const., of 1836, art. VI §15-17; Pennsylvania Const. of 1838, art. VI, §7.

In Rhode Island turned to elections for its justices of the peace in 1842, and in New Jersey in 1844. Ellis, Michael, “The Origins of the Elected Prosecutor” 121 Yale L.J. 1528 (2012) (after the Revolutionary War, most states gave their governors, judges, or legislators the power to appoint prosecutors. Starting with Mississippi in 1832, however, states adopted new constitutions, statutes, or amendments that made prosecutors elected officials. By 1861, nearly three-quarters of the states in the Union elected their prosecutors).

¹³¹ “Mississippi went further, because more was at stake than general accountability. The backwoods delegates also focused on judicial independence, seeking to insulate the courts from Natchez’s manipulation of the appointment process.” Shugerman, *supra*, at 77-78, *citing* Surrency, Edwin, “*The Courts in the American Colonies*,” 11 Am.J. Legal History 347 (1967), among other sources.

Although the *Fletcher* ruling caused public discomfort, the central cause for public outrage was a corrupt legislature. The fact that all but one legislators had abused their oath by accepting bribes to approve the Yazoo land fraud demonstrates that the Supreme Court was not the only object of the public's ire.¹³² Outside interests and elites were using greed to control disposition of vast lands. Georgia legislators had shown themselves to be vulnerable to these influences, and thus were unworthy of the trust that voters had placed upon them.¹³³ This sentiment, of course, was not limited to Georgia, but extended to other states as well, including Mississippi and other states that were lining up constitutional conventions to consider constitutional reforms. Shugerman recognizes that the public "reaction was against the state legislature's corruption. In the face of intractable legislative corruption, [constitutional] reformers produced a number of constitutional changes to check the legislature and to separate powers."¹³⁴ These strong and unchecked legislatures proved they could not be trusted to respect the public interest when the temptation of greed came knocking at the door.

Voters in Georgia and Indiana in the mid-nineteenth century had options to address concerns over the economic crises they were experiencing. They employed ballot, legislative, constitutional, and judicial remedies to address those problems by means of proliferating democracy and thus making the populace more directly responsible for who might service as the peoples' trusted representatives. The Georgia and Indiana constitutional reforms were ultimately half-measures because they adopted judicial

¹³² See Note 103-111 and accompanying text, *supra* (Yazoo Land Fraud); see generally Hobson, Charles F., *The Great Yazoo Land Sales: The Case of Fletcher v. Peck* (Univ. Press of Kansas 2016); U.S. Const., art.1, §10.

¹³³ *Id.* at 60-62.

¹³⁴ *Id.* at 62.

elections for lower court judges only. Nevertheless, for the time, these reforms were robust uses of the constitutional amendment and voting mechanisms. They addressed the majoritarian difficulty that legislative abuse created while riding the wave of the expanding franchise. They also attempted to address recurring practical economic problems by readjusting incentives among stake-holders. This involved a re-balancing of the state governmental power structure, including a strengthening of the judiciary through elections and judicial review.

In addition to this political response, other legislatures pursued an economic response by following the lead of larger states. They tried to spend themselves out of the economic downturn by pursuing expensive public works projects. They figured that spending would spur economic recovery as it had in New York. Such overspending tactics, however, worsened the economy. Although the Erie Canal was eventually completed in 1825, and became a resounding success, the project did not ultimately shield New York from the depths of depression. New York and other states attempted to replicate the Erie Canal's early success, but these efforts exacerbated rather than solved the basic economic crisis.¹³⁵

Regardless of whether extravagant and self-dealing legislatures actually caused the economic downturn is perhaps beside the point. The increasingly enfranchised populace found a ready scape goat in legislatures as the cycles of boom and depression continued to worsen. They saw the infamous practice of having corrupt legislatures appoint judges

¹³⁵ Scheiber, *supra*, at 30 (“Although reckless expansion of the state’s public works a decade later would deprive it in part from the boom psychology that became prevalent in the mid-thirties, it would also reflect a revival of public attitudes fostered by the canal commission itself during the initial period of canal promotion in Ohio.”).

to do their bidding in the early 1800s as easy targets, which certainly inspired subsequent constitutional drives to deprive legislatures of the appointive power, among others. Judicial elections comprised one element of the mechanisms that reformers utilized to accomplish constitutional revision. This element placed the people in the drivers' seat of deciding who voters might trust to perform the work of the courts in administering justice.

3. "Panic and Trigger" in N.Y. Inspire A Wave of Judicial Democracy

The final blow to the regime of judicial appointments came by mid-century when, as Shugerman explains it, a combination of panic and a trigger led to an avalanche of states to replicate prior efforts of reforming state constitutions. By the end of the 1840s and 1850s, most states constitutions have been re-written to adopt judicial elections. The "panic" refers to the transformative economic crisis of in the Panics of 1837 and 1839, and the ensuing depression that plagued the states. These economic conditions eventually motivated disappointed policy makers and voters to send a message to governmental leaders.¹³⁶ As Shugerman writes:

After New York moved heaven and earth to build the Erie Canal, state governments around the country overspent on new canals, roads and railroads in the 1830s. They expected economic good times to pay off their massive debts, but the depression threatened many states with bankruptcy. State legislatures shouldered the blame for folly, fiscal irresponsibility, and corruption.¹³⁷

The "trigger" refers to the New York Constitutional Convention of 1846 that led reformers and emerging voters to embrace judicial elections as a necessary element in helping to address the economic crisis that the people blamed on legislative abuse. The

¹³⁶ Shugerman, *supra*, at 84-86.

¹³⁷ Shugerman, *supra*, at 84.

political seeds that were sown decades earlier through the democratization wave now germinated, grew strong, and proliferated with the New York Convention.

Further bolstering democracy's growth were the increased number of offices subject to the franchise and the increasing number of voters who could exercise their displeasure at the voting booth. New York followed the trend away from appointments—pruning back legislative powers—and democratization of a variety of state offices.¹³⁸ Connected to this expansion of elective offices was an increase in number people who qualified to vote. Suffrage was on the rise, “so that by 1821, all but three of the twenty-four states had decoupled voting from property holding. After the expansion of suffrage, it took a few years for popular participation to increase, but when it did, the increase was dramatic.”¹³⁹ By the 1840s, New York's reform effort with judicial elections rode the democratization wave started by earlier states that sought to reduce legislative dominance through constitutional restructuring. Judge elections, therefore, helped to par back legislative influence over judicial appointments. This reform also contributed to making judges more independent from the other branches, especially as reformers also promoted judicial review, and thus achieving better power balance in state government.

A combination of events led to the decision by constitution makers to reform their state power structure. States were recovering from recurrent economic chaos that people often blamed on legislative irresponsibility and overspending on public works projects.

¹³⁸ For example, from the 1790s to the 1830s, “eight states switched to electing justices of the peace, along with other executive officials, such as attorneys general, sheriffs, constables, and clerks. But most states still appointed justices of the peace until the wave of judicial elections in the 1840s-1850s.” Shugerman, *supra*, at 78. *See also* Ellis, Michael, *The Origins of the Elected Prosecutor*, *supra*, at 1530-31) (starting with Mississippi in 1832, states adopted new constitutions, statutes, or amendments that made prosecutors elected officials. By 1861, nearly three-quarters of the states in the Union elected their prosecutors).

¹³⁹ Shugerman, *supra*, at 78.

The states had only experimented with judicial elections in the post-revolutionary era and through the 1830s, but a fundamental defect emerged in the state governmental structure that showed its destructive consequence. Greed had bred legislatures with extreme spending habits, a propensity to over tax, and limited respect for the public trust. The infamous Shays Rebellion and the Yazoo Land Fraud uprisings were only better known early examples of the trend, but they were certainly not isolated events.

The public was questioning and blaming powerful legislatures who they had entrusted through their vote to address economic problems. Banks were failing and the transportation system was ineffective at getting crops to market. In addition, public works projects had consumed huge capital investment, which was beyond the reach of struggling states, and specie currency was suspended in some states. People were hungry, out of work, and looking for a change. State legislatures were ready targets of the resulting panic.

Legislatures were strong in the early 1800s, but their strength was also their weakness as it contributed to the public perception of a self-dealing institution that lacked effective checks on their power. Constitution makers recognized the deeply flawed dominant legislative formula and were ready to re-think this lop-sided governmental model. Clearly, removing the offending office holders was not addressing the ubiquitous and corrupting influence of elite power and money. The Yazoo Land Fraud debacle had proven this conclusion. Although voters removed verifiably corrupt legislators from one election cycle to the next, an incoming crop of persuadable elected officials stood ready to continue the pattern of corruption, contrary to the public trust. What emerged from the

recurring abuse despite house-clearing was a structural and theoretical flaw at the very heart of state government. State constitution makers understood that the governmental structure lacked basic checks and balances among distinct branches of government as had been carved into the federal constitution. This was a practical problem with theoretical implications. The idea of majoritarian rule had been corrupted by a fundamental imbalance in the basic power structure of state government. Such concerns figured prominently in reformers' minds both in New York and other states leading into the state constitutional conventions of the 1840s and 1850s. These conventions and the readiness for change served as the trigger for state-by-state reform.

a. New York Leads the Way to Reform

New York constitution makers decided to strengthen the judiciary and make it a distinct branch of government, as Georgia, Indiana, and Mississippi had done in the first wave of reform several decades earlier. Although New York adopted judge elections, reformers' concerns in this second wave of reform were broader:

In the state constitutional conventions occurring between 1800 and 1830, the expansion of suffrage and legislative reapportionment were among the most important issues. In the wave of the conventions in the 1840s, however, the bipartisan focus was on limiting legislatures and restraining government. In the wave of the economic crisis, "businessmen were heroes and politicians were villains, a balanced budget was a mark of state morality...."¹⁴⁰

Although not at the center of their reforms, and considered more of a consensus position among competing factions, judicial elections was a means to limit legislative influence over judges by removing their power of selecting and retaining judges. Reformers also logically formulated spending constraints on law makers and promoted use of judicial

¹⁴⁰ Shugerman, *supra*, at 104.

review over legislative actions to further empower judges over the legislative and executive branches. These reforms counter-weighted against demonstrably out-of-control legislatures, which had turned into a majoritarian problem of the highest order.

New York's early economic success with construction of the Erie Canal set a poor example for succeeding decades. Encouraged by the successful completion of the Erie Canal in 1815, New York and surrounding states a decade later were keen on replicating this success in trying to literally to dig themselves out of the depressions that plagued the economy. Shugerman explains the plight in which states found themselves after their legislatures had for decades engaged in overspending and abuse of power:

Drunk with the success of the Erie Canal, New Yorkers went on a binge of internal improvements. In 1825, the New York legislature authorized seventeen new canals, and many were completed at great expense. Other states around the country followed, all promising that the projects would bring great riches and that tolls would pay off the massive debts. State legislatures dramatically increased the number of special incorporations to accelerate economic growth and build infrastructure.

In many states, the choice of where to build new canals and roads sparked bitter fights between regions and between towns within regions. Designs failed and costs skyrocketed. The Panics of 1837 and 1839 further dashed those hopes. A severe depression stretched into the 1840s, with record lows in 1842. As other states defaulted or teetered on the edge of bankruptcy, New York literally tried to dig itself out of debt by building even more canals. Instead, its debts grew to more than fifty times the size of the annual state budget. Many states raised taxes sharply to pay down their debts.¹⁴¹

The Panics of 1837 and 1839 were primarily banking crises, but they affected the American and European economies; even in these early days the transatlantic economy was showing its vulnerability to reciprocal sharing of benefits and burdens.¹⁴² The down

¹⁴¹ Shugerman, *supra*, at 85-86.

¹⁴² Although Professor Hummel disagrees with the traditional explanation, he explains it in these terms: "The traditional interpretation asserts that Jackson's veto of the Bank re-charter and withdrawal of

turn on one side of the ocean was felt at the other end. The people felt the sting of the depression in their daily lives; they could not buy food or other basic goods to meet daily sustenance needs. The populace was looking for a scapegoat, and the popularly recognized corruption of legislators gave voters a ready and visible target to blame, which fed into abandonment of appointments and embrace of democratization.

Shugerman explains that: “Two turning points led to the wave of judicial elections in the 1840s-1850s: the economic crisis of the early 1840s and the New York Constitutional Convention of 1846.”¹⁴³ It was apparent during the 1830s that widespread economic anguish among the populace was resulting from the economic disparities visited on people by dire economic conditions. People responded in the voting booth to the perceived threat of greed and exploitation that seemed to be recurring around them. It mattered little whether the blame for voter misery was best directed at the poor banking policy, President Jackson’s interventionist banking approach, greedy elite outsiders, or spendthrift legislators. Constitution makers and voters ready to consider restructuring state government with an alternative institutional design to help preserve the infant democracy.

The states ultimately abandoned the legislative supremacy approach and appointments for the path of democratizing governmental institutions. They followed the federal tripartite approach of rebalancing branches of state government. Of course,

government deposits caused inflation; Jackson's Specie Circular and the distribution of the surplus caused a panic and depression.” Hummel, Jeffrey Rogers, *The Jacksonians, Banking, and the Economic Theory: A Reinterpretation*, 2 J.of Libertarian Studies 155 (1978) (Hummel argues that this view is in need of revision of economic theory surrounding the Jacksonian era. He claims the present approach suffers from a faulty economic theory, and he therefore proposes a revised evaluation that this is both theoretically sound and historically consistent).

¹⁴³ Shugerman, *supra*, at 84-102.

legislative power would need to be trimmed back. This involved placing specific limits on legislatures and mechanisms for assuring that someone could oversee and enforce those limits. This included bicameralism as a legislative check, spending limits, and eliminating the legislative power over appointments. Instead, constitutional reformers delegated to the people the power to elect prosecutors, attorney generals, sheriffs, constables, clerks, and judicial representatives (judges).¹⁴⁴ Reformers also embraced judicial review to strengthen the judges' ability to check other officials and branches of government. Shugerman offers an extensive account of the competing factions, ideas, and compromises at the conventions leading to the adoption of the judicial franchise.¹⁴⁵ He explains, "New York's watershed adoption of judicial elections—triggering a wave over the next few years—was a combination of the economic crisis, ideological convergence on democracy, good factional management, bad political predictions, and luck."¹⁴⁶ For present purposes it suffices to say that New York delegates eventually amended their constitution to adopt judicial elections and promote judicial review, which became important elements for resolving the practical and theoretical imbalance in the state governmental structure.

¹⁴⁴ See Shugerman, *supra*, at 78 and Ellis, Michael, "The Origins of the Elected Prosecutor," *supra*, at 1530-31 ("Between 1832 and 1860, . . . nearly three-quarters of the states in the Union decided to give voters the right to elect public prosecutors. . . . Supporters of elected prosecutors argued that popular election would give citizens greater control over government, eliminate patronage appointments, and increase the responsiveness of prosecutors to the communities they served. . . . One disgruntled delegate at the 1850 Kentucky constitutional convention mused, '[W]e 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.'" (citations omitted)).

¹⁴⁵ Shugerman, *supra*, at 86-122.

¹⁴⁶ *Id.* at 87.

- b. The Majority of States Embrace Democratization to Cure Dominant Legislature Problem: “*The cure for ills of democracy is more democracy.*”- John Dewey

After the 1846 New York Constitutional Convention succeeded in its reforms, other states organized their own conventions to carry the banner of legislative and judicial reform. They seemed to understand John Dewey’s prescription that the cure for the ills of democracy is more democracy. After New York’s reforms, the majority of remaining states adopted judicial elections and other key changes designed to expand judicial power and to define and limit legislative power. Professor G. Alan Tarr summarized the movement following New York’s plunge into judicial elections in these words:

The adoption of popular election of judges in New York in 1846 transformed the experiments of Mississippi, Georgia, and Indiana into a nationwide movement. With “the leading State in the Union in advance,” in less than a decade eighteen states—Alabama, Arkansas, California, Connecticut, Florida, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Missouri, Ohio, Tennessee, Texas, Vermont, Virginia, and Wisconsin—had adopted popular election for some or all of their judges. In addition, Iowa, which had instituted popular election of trial judges in 1845, extended popular election to its supreme court in 1857.¹⁴⁷

It was clear that the move to democratize was spreading like wild fire in the states. Judicial democratization continued to ebb and flow among the states with regional differences emerging. Massachusetts and New Hampshire rejected popular elections, and some southern states like South Carolina continued for a time to adhere to judicial appointments. Other southern states only gradually adopted judicial elections. The overwhelming trend, however, was in the direction of popular democracy to respond to structural imbalance of the legislatively dominant governments.

¹⁴⁷ Tarr, G. Alan, *Without Fear or Favor: Judicial Independence and Judicial Accountability in the States*, at 45 (Stanford Univ. Press 2012), citing Ellis, Richard E., *The Jeffersonian Crisis: Courts and Politics in the Young Republic*, at 11-12, 69-75, 164-65, Ch. 7 (Oxford Univ. 1971); Rowe, G. S., *Embattled Bench: The Pennsylvania Supreme Court and the Forging of a Democratic Society, 1684-1809*, Ch. 14 (Univ. of Delaware Press 1994).

By the end of the 1850s it could be fairly said that the American judiciary had reached a watershed moment as a majority of the states adopted elections for most judicial positions. This appears to have been a practical response to the majoritarian problem resulting from the abuses of dominant legislatures. State constitution makers succeeded in reducing the power of formerly strong legislatures. First, they increased the number of offices subject to popular election, which included clerks, prosecutors, attorney generals, sheriffs, constables, and judges. These officials would thereafter owe their positions and allegiance to voters. This changed the inherent incentives in an appropriately democratic direction. Second, reformers increased the number of people who could vote by, among other changes, removing property ownership requirements and other impediments to the franchise.

Constitutional reforms by the mid-nineteenth century had resulted in re-balancing state governments by means of relying on the federal tripartite model of governance. The judiciary formed a central part of this reform as the states sought to curb legislative power, but the states did not adopt every feature of the federal system. Most states rejected the federal model's appointment feature. This feature provided for a presidential (executive) appointment, and service during "good behavior." Appointments had been part of the corrupting problem among the states that led to the need for reforms and reformers were not about to continue this part of the system. Instead, they opted for judge elections to go along with the overall democratization trend. Elections re-invigorated a more democratized judicial office, but they did more than merely provide an alternative to the regime of appointments. Elections also helped to achieve separation of judges from legislative influence; but the constitutional redesign did not stop with elections.

In 1803, *Marbury v. Madison* established judicial review as an important judicial power at the federal level for checking both legislative and executive abuses of power horizontally within the federal level, but the review power was also used vertically to review state actions, such as occurred in the *Fletcher* case.¹⁴⁸ Nothing in the nature of judicial review limited its availability only to federal courts or to the U.S. Supreme Court, however. While the Supremacy Clause of the U.S. Constitution would logically limit state judges from vertically overruling U.S. Supreme Court decisions, the power was fully available to state court judges in horizontal exercises within branches and under the constitutions of state government. State constitution makers seized on judicial review and combined it with elections to transform and empower state judiciaries. This combination of reforms integrated with each other in the 1850s reforms to inspire a new conception of democracy among the states.

In one sense, elected judges served as democratic agents, as the peoples' elected judicial representatives. Under this view, when they exercise judicial review, they do so with the consent and legitimacy that accompanies their status as elected representatives. This legitimacy continues to renew itself as these judges survive each election cycle. It would be reasonable to say that the availability of the franchise marks these judges with a cloak of legitimacy that insulates their decision making from at least theoretical objection that has been pinned on federal courts.¹⁴⁹ The elective element, therefore, may refute the

¹⁴⁸ *Marbury* itself was a horizontal exercise because the Supreme Court decided an issue involving President John Adams's delivery of a commission to a justice of the peace in the District of Columbia, which was under federal jurisdiction. The *Fletcher* involved a vertical exercise of judicial review because the Court reached to decide the constitutionality of a Georgia state statute.

¹⁴⁹ See Carrese, Paul, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* at 2-3 (Univ. of Chicago Press 2003); see also Shklar, Judith, "Montesquieu," 81, 88-91, 113, in Rosenblum, Nancy, ed., *Liberalism and the Moral Life* (Harvard Univ. Press 1989) (given the prominence

claim that their exercise of judicial review creates any semblance of a counter-majoritarian difficulty.

V. **Elected Judiciaries Enhance Legitimacy and Dissipate Counter-Majoritarian Concern Under State-Centered Analytic Approach**

This thesis has explained the importance of studying the history of judicial democracy and state court judge decision making to better understand the legitimizing role that courts play under American democracy. I make a very simple point. I question whether the Supreme Court should be viewed as the sole actor in the American judiciary that engages in the allegedly troublesome conduct (i.e., judicial review) that threatens democracy. Despite its simplicity, the choice of approaches has important theoretic consequences. Studying only the Supreme Court's behavior, as Bickel and his followers have done, conveniently supports the counter-majoritarian difficulty analysis, but it does so at the cost of completeness. The approach presumes that the Court acts as an appointed agent that is vulnerable to the attack that it is an undemocratically elected body. The trouble with this approach is revealed, however, as we begin to understand the Court's overly narrow and historically unrepresentative character.

The state-centric approach offers analytic advantages over this traditional theoretic approach. The state view considers the early state court reforms, and how they responded to the early legislative-dominant approach to governance. This governmental model wore out its usefulness as it revealed its undemocratic tendencies with the expansion of democracy during the Jacksonian period. The need to restructure state government

of judicial power in the present case, we should take seriously Montesquieu's core message that "the central and continuous theme of *The Spirit of Laws* is that the independence of the courts of law more than any other institution separates moderate from despotic regimes.").

presented an opportunity to refashion these institutions into true democratically elected organizations. The old legislative-dominant system was democratic only until elections occurred; after these elections took place, voters were left with *trusting* legislators to appoint most other governmental officials, including judges. Voters had limited voice in government; they could only hope that legislators would do the right thing, but such hope did not regularly bear fruit. This unbalanced system lacked effective checks on the legislature, and was exceedingly vulnerable to the corrupting influence of the elite class during the instrumental period early in the nineteenth century, as Horwitz so carefully explained.¹⁵⁰ Overreliance on corrupt government leaders with self-interested incentives led to governmental abuse in law-making, spending, and judicial appointment functions.

In response to the greed of elected legislators, the reforms focused on making judges subject to popular vote rather than to legislative appointment. The emerging national judiciary of elected jurists was composed of judges who would regularly interact with and impact the community through periodic election activities and their decision making responsibility. The state-centric approach allows more careful analysis of the interplay between these elements and the inherent democratic legitimacy this interaction may engender. This legitimacy arises from at least two factors: the peoples' intentional adoption of constitutions that provided for regular judge elections and the holding of periodic judicial elections in which the people elect or retain these judges. Additionally, legitimacy may result from the actual decision making in which elected judges engage which is more local, involves more common issues, and is more proximate to peoples'

¹⁵⁰ Horwitz, *supra*, at 16-30 (section titled, "The Emergence of An Instrumental Conception of Law").

everyday experiences. But as intimated earlier, legitimacy may also flow from the separation of the branches that the dual reforms facilitated.

One begins to see a pattern emerge under the state-centered approach in which the judicial franchise and the review power were being used to legitimize the courts while securing greater separation between the branches. The dual reforms also created a court system of local judges who were expected to be more responsible and accountable to voters than appointed judges; and who would exercise the recognized judicial review power to protect individual rights and curtail government abuse. These reforms fundamentally changed the state governmental power structure,¹⁵¹ but it cannot be overemphasized that the reforms occurred within a constitutional structure and intent. As a result, these core dual reforms represented the considered judgment of state constitutional framers, and this origin entitles them to an air of legitimacy and deference that the premises underlying the Supreme Court model deny. Under these circumstances it is disingenuous to separate the elective element from judicial review and impugn the latter as an undemocratic force.

¹⁵¹ The Georgia (1798) and Indiana (1816) constitutional conventions displayed an early attempt to replace appointments with judge elections in order to avoid legislative attempts to circumvent the will of the voting majority. Shugerman explains how corrupt legislatures influenced Georgia constitutional efforts to abandon appointments, and how this move fueled the trend toward judicial elections, and contributed to separation between the branches:

Soon after the [Georgia Yazoo Land] fraud came to light, the state had drawn up a new constitution in 1798 to limit the legislature's powers and to replace legislative appointment of the governor with popular election—a new separation of powers. The amendments of the 1798 constitution continued the same trend of shifting power from the legislature to other institutions, and according to a leading historian of Georgia's legal development, the amendment in 1812 for judicial elections was a post-Yazoo check on the legislature.

Shugerman, *supra*, at 62, citing Saye, Albert, *Constitutional History of Georgia: 1732-1945*, at 167 (Univ. Georgia Press 1948).

Democracy contemplates a governmental system ruled by a majority of the people, or by their elected agents in the case of representative democracies. It contemplates popular elections to select trusted representatives. But the American experience does not suggest that majoritarian rule standing alone is an end in itself; it is rather a needed element for accomplishing governmental equilibrium. It is certainly logical that elections for a wide variety of offices (including judges) is infinitely more democratic than a regime in which elected legislatures retain unbridled powers, including the authority to appoint most other offices, including judges. Elections for these other offices were clearly consistent with democratic principles; a regime of appointed judges, however, showed its vulnerability to abusive control. Constitution makers therefore embraced the principles of democracy to shore up a faltering democracy during the wave of state reforms.

Using the state-centered approach helps in the evaluation of whether the dual reforms succeeded in rescuing democracy from the claws of elite self-interest that pervaded the dominant-legislative regime of the early 1800s. As a part of these efforts, reformers may have succeeded in strengthening judicial review power and bolstering judicial independence. Judicial review might have also empowered judges as an effective check against the imprudent actions of the other two branches of state government. These changes conceivably lead state courts to assume their contemporary role as a co-equal branch of government in a way that was more consistent with democratic values. Also, they might have promoted a more balanced power structure similar to the federal tripartite example that operated since the U.S. Constitution's adoption. These observations certainly raise the specter and theoretical possibility that judicial review is more compatible with democracy than contemporary theorists have to date supposed. If

so, it may be that constitutional reformers understood and accepted the evolving power of judicial review as they sought to re-define the judicial office with these recognized powers as an entirely democratic institution.

The point to emphasize is that elected judiciaries offer a level of public legitimacy and acceptability that the federal courts cannot match, either practically or theoretically. The 1850s twin reforms provide important clues for studying the mystery of why judges continue to enjoy democratic legitimacy despite the theoretical expectation that their exercise of judicial review is undemocratic.¹⁵² This historical exploration, it is suggested, provides a practical approach for understanding this theoretic quandary.

The combination of unbridled legislative discretion and elite self-interest in promoting economic development (i.e., private wealth) suffocated the appropriate incentives of a well-functioning democracy. Early attempts to democratize the lower courts of Vermont and Connecticut were intended to empower locally elected judges who were expected to be more accountable to the needs of the community. Whether the local issue of choice in Georgia or Indiana involved debtor rights, slavery, or other locally relevant issues, the electorate quite reasonably expected these elected judges to favor the peoples' interests rather than those of traditional elites in large cities and urban centers.

This early approach served as a building block for later democratization attempts,

¹⁵² Social scientists who have considered questions of judicial legitimacy have studied peoples' responses to political campaigns to determine whether the public views elected judges as legitimate. These studies necessarily include elected state court judges in the national judiciary. James L. Gibson confirms that "while some campaign activities do indeed harm judicial legitimacy, the overall effect of judicial elections is beneficial to legitimacy." Gibson, James L., *Electing Judges*, *supra*, at 22. Gibson finds that "while some campaign activities do indeed harm judicial legitimacy, the overall effect of judicial elections is beneficial to legitimacy. This is a very important finding, one that should fundamentally reframe how we understand the benefits and costs of electing judges." The fact that judicial elections exist, and that this makes them available to study, provides yet another clue to understanding their importance to majoritarian theory in the democratic dialogue.

especially into the later 1800s. Constitution makers in other states keyed in on the idea of expanding the franchise for all courts, as in Mississippi in the 1830s, which would serve as the model for later reforms. These subsequent reforms materialized in the 1840s and 1850s as New York led the wave of constitutional reform in adopting judicial elections and recognizing the importance of judicial review as a key balancing element. Careful study of these reforms, it is asserted, might shed light on whether the counter-majoritarian question actually fits the contemporary reality of modern American courts.

An example may help illustrate the point by referring to New Mexico's 2013 marriage equality decision in *Griego v. Oliver*, which was an entirely state-court litigated case, from the state district court to the New Mexico Supreme Court.¹⁵³ The court ultimately affirmed the right (under the New Mexico Constitution) of same sex couples to obtain marriage licenses from County Clerks and to marry under New Mexico law. No federal district court was brought into the litigation as is often true in the U.S. Supreme Court cases.¹⁵⁴

Griego may be said to have established one end of the spectrum in which the ruling may be said to exhibit a high degree of democratic legitimacy because the electoral quotient surrounding judicial democracy of New Mexico courts is high. New Mexico constitutional reformers embraced democratic principles when they adopted their judicial

¹⁵³ *Griego v. Oliver*, 2014-NMSC-003, 316 P.3d 865 (filed Dec. 13, 2013) (marriage equality right to marriage decided under N.M. Constitution).

¹⁵⁴ See *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015) (decided marriage equality issue at federal level).

selection process in 1988, despite its adoption of the commission-based model.¹⁵⁵ The New Mexico system provides that the temporary appointee must run in the general election after being recommended to and appointed by the governor for the interim post. The people also have an opportunity to vote these elected judges out of office in subsequent retention elections, where the candidate must receive at least 57 percent “Yes” votes to retain their position for subsequent terms. Because the *Griego* case was an entirely state-litigated and state supreme court decided case, it never reached the U.S. Supreme Court, or a lower federal court, which again increases its locality and legitimacy potency for purposes of dissipating the counter-majoritarian concern. The democratic touch New Mexico judges experience (where *Griego* was decided) clearly exceed those that accompanied the Supreme Court Justices to approved the *Obergefell v. Hodges* case in 2015 where the marriage equality issue was decided nationally.

The *Griego* case met the criteria of being an exercise of judicial review because it interpreted the New Mexico Constitution and affirmed the County Clerk’s right to issue marriage licenses on a non-discriminatory basis. But the local judge’s locale in Albuquerque, and the N.M. Supreme Court’s location in Santa Fe, NM, and their subjection to popular elections, makes them majoritarian-based judges. Their decisions, therefore, by definition cannot collide with decisions of a co-equal, democratically elected branch, i.e., the legislature that promulgated the marriage licensing law in the state. Elected judges cannot engage in counter-majoritarian conduct because they are themselves majoritarian agents, which resolves Bickel’s objection at the inception.

¹⁵⁵ See Notes 39-41, *supra*, and accompanying text for a discussion of New Mexico’s modified Missouri Plan for selecting temporary judges followed by a general election to fill the permanent position for New Mexico state court judges.

Evaluating whether the counter-majoritarian difficulty continues to be a viable concern was one object of this thesis. But this review is a means to the end of understanding how the courts and democracy actually fit together. Studying these issues helps to foster greater clarity about whether studying state-based judicial review and elections provides a superior approach toward that understanding which is not practically available under the Supreme Court analytic approach. One possible benefit of the state-centered inquiry includes assessing whether the check of judicial review among the states has proven its value as a safeguard against governmental excess. Or, one might consider whether or how the mechanisms of the review power and judicial elections promote judicial independence. As a part of this assessment, one might develop objective criteria for assessing whether or how the dual reforms of the 1850s have contributed to stability of state governments, or whether they have made the courts more effective actors in the tripartite system of governance under the umbrella of American federalism.

VI. CONCLUSION

This thesis attempts to expand the theoretical debate by moving beyond the Supreme Court model that Bickel and other traditional theorists have used in their theoretical musings. An unspoken premise of the federal view is that an appointed Supreme Court is somehow representative of the national judiciary. The Court, however, is not a representative body. Also, the content and frequency of the Court's decision making does not compare with the innumerable decisions daily filed in state courts around the nation. Neither does the Supreme Court compare to elected judges in its proximity to the people or in its ability to regularly affect their daily lives through state decisions. If we are speaking of the judiciary's ability to affect social control, it must be elected judiciaries

rather than the high court where the vast majority of impactful decisions occur. As a result, the thesis proposes a state judge-centered model. This approach considers state court judge decisions and the historical underpinnings of these courts; and also includes acknowledgement of the predominant elective element that accompanies how these judges are voted into office. This view provides a broader conception of the judicial actors who regularly exercise judicial review and impact the arena of public opinion.

Clarifying *who* overturns legislative or executive actions, and who is thereby responsible for any counter-majoritarian difficulty that the people may experience clarifies the question under consideration. By virtue of the continuing elective origin of their service, when elected judges exercise judicial review it may be fairly asserted that they do so with approval of the majority who elected or retained them in office. The potential to remove these judges, whether or not the option is exercised, is “of the essence” of democracy, as Bickel suggested in another context.¹⁵⁶ It would appear that this conclusion dispels the potential existence of a counter-majoritarian difficulty.

This thesis has shown that the Supreme Court model simply fails to consider the historical experience dating to mid-nineteenth century that state constitution makers relied upon in responding to dominant legislatures (and their appointed judges) who in Horwitz’s view were ensnared under the influence and spell of dominant elites. State constitutional framers needed an alternative governmental design, one that injected balance into the lopsided legislative governmental model. Their goal was to strengthen judiciaries by abandoning the legislative appointment process, among other key reforms.

¹⁵⁶ Bickel, *supra*, at 17 (Bickel confirmed that the power of reversal was “of the essence” of the democratic process).

To replace this former regime, constitutional reformers adopted popular elections and promoted judicial review to better balance state government. The state court centered model of the judiciary shows this development and offers a more suitable analytic device for considering the historical record, judicial democracy, and contemporary questions about the compatibility of judicial review with democracy.

Studying the historical record of judicial elections and the review power may also help to determine whether these reforms effectively contributed to a re-balanced state governmental power structure. The apparent resuscitation of state government after these constitutional improvements may evidence the beneficial role that judicial review has played in maintaining that balance, but further study is necessary to evaluate valid criteria for studying and confirming these possible conclusions.

Certainly, it is clear that the Civil War's intervention in 1861 for a period of time fundamentally altered the power structure among the states, the courts, and the federal government. The war presents a substantial challenge in attempting to evaluate state court governmental development during this subsequent period. Nevertheless, at some point during and after Reconstruction, as governments and the courts started to stabilize, past and continuing constitutional judicial reforms took hold in the legal community.

The journey from appointments, to elections, commission-based hybrids for selecting judges is one that is likely to continue as threats to judicial independence and democracy receive attention in the popular press. The variety of systems that eventually evolved among the states represents a mismatch of judicial selection processes of haphazard reforms that attempt to put out fires as policy makers use the threats to judicial independence as reasons for the latest reform. Understanding the history and theory of the

courts and democracy, including the need for judicial/legislative/executive balance, may help in such future reform efforts.

The fact that the 1850s reforms occurred demonstrates, in part, the importance of reconsidering assumptions underlying the traditional analytic approach to democratic theory. Studying the dual reforms and their aftermath may provide clues for understanding how to draft alternative judicial selection procedures, in determining whether the elective element is a worthy holdover, and in deciding whether judicial review actually harmonizes with American democracy.

Practically speaking, people who vote for judges reasonably expect that the candidate in whom they bestow their trust will at some point need to decide whether certain legislative or executive actions violate constitutional mandates. History demonstrates the reasonableness of the public expectation that courts will exercise this power, which dates back to at least 1803 when the U.S. Supreme Court first constitutionalized the review power on a national scale in *Marbury v. Madison*. On an individual basis, voters have occasionally removed elected judges whose conduct they found unacceptable. On a systemic level, however, although the people have utilized the ballot to remove individual judges, they have neither rebelled in any decisive manner to overturn democratic institutions nor worked to overturn the exercise of such traditional state court functions. The people's right to vote for or to remove judges, whether or not it is actually exercised, may indeed represent the essence of democracy and fulfill important legitimacy-enhancing functions under American democracy.

The twin reforms of judicial elections and judicial review may have served to simultaneously strengthened state courts and, fortunately, contributed to an appropriate

state governmental power balance that is more consistent with democratic principles than the appointment model. The integration of these dual reforms into a majority of state governmental systems, therefore, may have contributed to a well-functioning and healthy democracy across the states within the framework of American federalism. Admittedly, further study of these and other questions is warranted.

Nevertheless, although leading theorists have not considered the question, it may be true that elections and judicial review have played critical roles in rescuing democracy in the states at an important moment of American history. This often overlooked point is meaningful because it goes to the core of connection between the courts and democracy. At the very least, this point certainly supports the need for a focused study of the importance of considering state court judge decision making in considering whether or how our system for the fair administration of justice contributes to democratic legitimacy.

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