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Ohio Northern University
Law Review

Articles

Judicial Elections and Judicial Review: Testing the Shugerman Thesis

DAVID M. GOLD

I. INTRODUCTION

Until 1851, the Ohio General Assembly chose all state judges by majority vote of a joint convention of House and Senate members.[1] The constitution of 1851 took the power of electing judges away from the legislature and gave it to the people.[2] The shift to popularly elected judges in Ohio was part of a widespread movement that occurred in the middle of the nineteenth century.[3] The traditional explanation for the change is that it reflected populist Jacksonian democracy. As one scholar writes, "Perhaps more than anything, the rise of Jacksonian democracy gave more power to the people and raised questions about the accountability of judges. Not electing state judges was considered to be undemocratic, and the Jacksonian era was dominated by beliefs in expanded suffrage and popular control of elected officials."[4] Revisionists have put forward other theories. One rests on the belief of political moderates that elected judges would enhance the competence and prestige of the legal profession by encouraging reforms in

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1. OH. CONST. of 1802, art. III, § 8, *available at* http://ww2.ohiohistory.org/onlinedoc/ohgovernment/constitution/cnst1802.html.
2. OH. CONST. of 1851, art. IV, §§ 2-3, 7, 9-10, *available at* http://ww2.ohiohistory.org/onlinedoc/ohgovernment/constitution/cnst1851.html.
3. *See infra* Part III.
4. Matthew J. Streb, *The Study of Judicial Elections*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 9 (Matthew J. Streb ed., 2007); *see also* Richard L. Vining, Jr., *Elections, Judicial*, *in* ENCYCLOPEDIA OF AMERICAN POLITICAL PARTIES AND ELECTIONS 126, 126 (Larry J. Sabato & Howard R. Ernst eds., 2007) (the genesis of judicial elections in the Jacksonian era was an extension of "efforts to enhance the egalitarian nature of American politics by allowing for more popular control and citizen participation").

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pleading and practice;[5] another sees a broader desire to separate the judiciary from the other branches of government and thereby weaken "officialdom" generally.[6] Two students of Ohio's judicial history conclude that the best explication for the switch in the Buckeye State "takes in aspects of both the standard explanation and the revisionist accounts."[7]

Jed Handelsman Shugerman offers a provocative new interpretation of the adoption of an elective judiciary, not just in Ohio but in many states. In *Economic Crisis and the Rise of Judicial Elections and Judicial Review*[8] and *The People's Courts: Pursuing Judicial Independence in America*,[9] Shugerman locates the origins of the move to an elective judiciary in the economic crises of the late 1830s and 1840s. These crises, he argues, generated a popular antigovernment fervor that resulted in a rash of midcentury, reform-minded state constitutional conventions. One of the reforms these conventions produced was the election of judges by the people rather than by state legislatures. Popularly elected judges, the convention delegates believed, would be independent of the lawmakers and therefore more willing to exercise their power of judicial review to strike down legislation. Shugerman contends that this shift had far-reaching consequences for judicial review. The new elected judges, he maintains, did what was expected. The number of cases in which courts declared statutes unconstitutional rose dramatically in the 1850s. Moreover, the elected judges increasingly adopted a countermajoritarian rationale for judicial review; they were more concerned with protecting individuals and minorities from the power of majorities than with shielding the majority of the populace from an overreaching government. Through their growing use of judicial review and countermajoritarian jurisprudence, the elected judges of the 1850s helped to lay the foundations for the laissez-faire constitutionalism of the late nineteenth and early twentieth centuries.[10]

Shugerman rests his thesis on a three-part understanding of historical causation. First, there was the long-term precondition for judicial elections:

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5. Michael E. Solimine & Richard B. Saphire, *The Selection of Judges in Ohio*, *in* 1 THE HISTORY OF OHIO LAW 213–14 (Michael Les Benedict & John F. Winkler eds., 2004).

6. Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1107–15 (2010).

7. Solimine & Saphire, *supra* note 5, at 214.

8. *See generally* Shugerman, *supra* note 6.

9. *See also generally* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (2012).

10. Shugerman, *supra* note 6, at 1067–68, 1115–16. *Economic Crisis* is devoted entirely to these themes. THE PEOPLE'S COURTS deals with judicial independence and the selection of judges from the early republic to the present, reiterating in three chapters the main ideas of *Economic Crisis*, but in a somewhat modified form and in less detail. *See generally* SHUGERMAN, *supra* note 9, at 84–143. In this article, I generally cite to THE PEOPLE'S COURTS except where *Economic Crisis* goes into greater depth or includes material omitted from the book.

the democratic ideology of the mid-nineteenth century. Second, there were the midterm precipitants: the Panics of 1837 and 1839, the states' fiscal crises, and "systematic abuses of the appointment process." Finally, there were the triggers: "New York's 1846 [constitutional] convention and the wave of constitutional conventions thereafter."[11] Shugerman relies heavily on the New York convention. "Judicial elections suddenly emerged from an isolated practice in the marginal frontier slave state of Mississippi to become a foregone conclusion in New York," he writes.[12] "New York then helped trigger their spread around the country immediately."[13]

As Shugerman relates, New York's success with the Erie Canal sent that state and others around the country on an internal improvements "binge."[14] State funding of canals, roads, and railroads led to enormous public debt, legislatures granted more corporate charters than ever, and poorly planned enterprises failed. The panics and the severe economic depression that followed drove many states to default or to the edge of bankruptcy, and caused huge increases in taxes. Popular antipathy toward public subsidization of economic development led to demands for constitutional conventions to curtail legislative power New York led the way with its convention of 1846.[15]

The constitution adopted at the New York convention reflected the agenda of Radical Democrats: an expansion of individual property rights, limits on state debt, and restrictions on the power of government. But, writes Shugerman, "that constitution was mere paper without judges willing to enforce it against the legislature."[16] Delegates who believed that appointed judges were subservient to the legislature therefore demanded judicial elections. Elected judges, they claimed, would be more independent. The most forceful spokesman for judicial elections, Michael Hoffman, expressly called for more "judicial legislation."[17] Shugerman finds that the pro-election delegates got what they wanted: in the years

11. SHUGERMAN, *supra* note 9, at 12. In *Economic Crisis*, Shugerman states that the New York convention of 1846 "triggered a wave of constitutional conventions over the next half-decade." Shugerman, *supra* note 6, at 1069. Perhaps his purpose in modifying this statement is to make it clear that the New York convention triggered only the adoption of judicial elections and not other states' constitutional conventions, though that may be reading too much into a slight alteration of language. After discussing the New York convention at length, Shugerman observes that "[a]fter New York, constitutional conventions and judicial elections swept the country, demonstrating the power of bandwagons and the cascade effect." SHUGERMAN, *supra* note 9, at 101.

12. SHUGERMAN, *supra* note 9, at 86.

13. *Id.*

14. *Id.* at 85.

15. *Id.* at 84–86.

16. *Id.* at 95.

17. SHUGERMAN, *supra* note 9, at 95.

following the convention, the number of statutes declared unconstitutional by New York courts soared.[18]

Shugerman's conclusions are based on a formidable compilation of information on nineteenth-century constitutional conventions and judicial decisions. However, it is not clear that the information validates his thesis. Even with regard to his prime exhibit, the New York convention, Shugerman may be overstating his case. For one thing, as Shugerman himself observes, judicial elections in that state resulted in large part from fights over patronage involving radical Barnburner Democrats, conservative Hunker Democrats, and Whigs. Both the Whigs and the Barnburners saw in the abolition of some public offices and the popular election of judges the means to break the Hunker patronage power.[19]

In addition, Shugerman's assertion that, in the minds of the convention delegates, the new constitution would be "mere paper without judges willing to enforce it against the legislature" rests on the assumption that the delegates thought appointed judges would ignore plain constitutional language limiting legislative power.[20] Hoffman might have believed that,[21] but he held extreme views and probably did not represent the outlook of Whig or even other Democratic proponents of judicial elections, of whom there were many.[22]

However, even if Shugerman is correct in claiming that New York's advocates of judicial elections wanted to encourage judicial review, he draws too heavily on the New York experience for his general conclusions about the origins and effects of judicial elections. The fact that New York's convention preceded the conventions of other states and was referenced in other states' debates does not necessarily mean that it "triggered" conventions or judicial elections,[23] or what he sees as the consequences of judicial elections, elsewhere.[24] Shugerman's argument needs to be tested by an examination of developments outside of New York.

Ohio figures prominently in *Economic Crisis* and *The People's Courts* as a state that followed New York's lead. In this article, I examine and supplement the evidence adduced by Shugerman for Ohio to test whether

18. *Id.* at 125, 278.

19. *Id.* at 92–96; Shugerman, *supra* note 6, at 1080.

20. *Id.* at 95.

21. *See* James A. Henretta, *The Strange Birth of Liberal America: Michael Hoffman and the New York Constitution of 1846*, 77 N.Y. HIST. 151, 170–71 (1996)

22. Many Whigs and conservative Democrats backed judicial elections. *See* SHUGERMAN, *supra* note 9, at 86. As Shugerman notes, "[j]udicial elections were so widely accepted in New York's 1846 convention that no delegate even called for an up-or-down vote on elections versus appointments." *Id.*

23. *See id.* at 102.

24. *See* Caleb Nelson, *A Re-Evaluation of the Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 192–93 (1993).

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his arguments stand up to scrutiny. Part II considers the relevance of the New York experience to Ohio.[25] Did the New York constitutional convention of 1846 really trigger the Ohio constitutional convention of 1850–51? The answer appears to be no. The Ohio convention resulted from dynamics that were similar to and yet independent of those that brought about the New York convention. Part III deals with the question of why the Ohio constitutional convention adopted an elective judiciary.[26] The evidence indicates that the popular election of judges was part of a nationwide movement favoring the election of all types of public officials at every level of government. While the prospect of increased judicial review from elected judges may have occurred to some proponents of judicial elections, it played almost no role in the thinking of most advocates.

Shugerman's data reveal a substantial growth in the exercise of judicial review by elected judges in the 1850s, as measured by the number of instances in which courts struck down statutes as unconstitutional. Shugerman regards this expansion as evidence of a new aggressiveness on the part of those judges in the use of judicial power against state legislatures. Part IV of this article looks at the Ohio cases cited by Shugerman to see if they support his interpretation and concludes that in most instances there were other reasons for the declarations of unconstitutionality, including a plethora of new constitutional restrictions on legislative power and the binding authority of the decisions of Supreme Court of the United States.[27]

Part V considers Shugerman's contention that the elected judges of the 1850s increasingly adopted countermajoritarian theories of judicial review, a development that he regards as puzzling.[28] There is little evidence that Ohio's judges paid much attention to the subject. A close look at the one Ohio opinion that Shugerman considers to be a prime example of countermajoritarian thought casts doubt on even that evidence.[29] More significantly, Shugerman fails to recognize the significance of countermajoritarian theory in Radical Democratic thought. If there was a rise in countermajoritarian theorizing on judicial review, it was not inconsistent with established Jacksonian ideas.

In his 2010 law review article, Shugerman argues that the state constitutional conventions of the mid-nineteenth century represented an important step in the transition from the "active industry-building state" of the early republic to the laissez-faire constitutionalism of the late nineteenth

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25. *See infra* Part II.
26. *See infra* Part III.
27. *See infra* Part IV.
28. *See infra* Part V.
29. *See infra* Part V.

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century.[30] In *The People's Courts* he retreats somewhat from this bold assertion. Part VI of this article suggests that while Shugerman's thesis about the part an elective judiciary played in this process is unsubstantiated, the process did occur and the midcentury conventions marked an important phase in its progress.[31]

II. THE REASONS FOR CALLING OHIO'S CONSTITUTIONAL CONVENTION OF 1850–51

Ohio experienced the same financial distress as other states in the 1840s—and for the same reasons.[32] In 1818, Governor Ethan Allen Brown called for improved "internal communications" that would "open a cheaper way to market" for Ohio's surplus produce and "raise the character of our State by increasing industry and our resources."[33] Seven years later, the state plunged into the canal-building business, borrowing money for construction and pledging its full faith and credit for repayment.[34] In the 1830s, the General Assembly expanded the internal improvements program even further, going so far as to *require* the state to give financial aid in the form of loans of credit or stock subscriptions to private canal, turnpike, and railroad companies that met certain criteria (not including, as it turned out, adequate planning or honesty).[35] Ohio's state debt increased nearly elevenfold from 1825 to 1830 and almost doubled again between 1836 and 1840.[36] The Panic of 1837 rendered the internal improvements program unsustainable.[37] A few Radical Democrats proposed repudiation of the state debt on the grounds that payment of the debt took money from the people's pockets and gave it to "the British lords and capitalists" who held canal bonds.[38] Ohio survived the fiscal crisis, but with the return of prosperity in the mid-1840s, the legislature started authorizing local governments to issue bonds for or subscribe to the stock of railroad and turnpike companies.[39] Local governments dived headlong into railroad schemes, many of which proved worthless.[40]

The harsh experiences of state and local governments in aiding private corporations contributed to the movement for a constitutional convention—

30. Shugerman, *supra* note 6, at 1068.
31. *See infra* Part VI.
32. This paragraph is based on DAVID M. GOLD, DEMOCRACY IN SESSION: A HISTORY OF THE OHIO GENERAL ASSEMBLY 36–38 (2009).
33. *Id.* at 36.
34. *See generally id.* at 36-38.
35. *See generally id.*
36. *Id.* at 37.
37. GOLD, *supra* note 32, at 37.
38. *Id.*
39. *Id.*
40. *Id.* at 38.

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the only means of amending the constitution[41]—that would limit the ability of government to incur debt and aid private enterprise. But there were other motivations, some of them of longer standing and of equal or greater weight. Nothing overshadowed the need to reform the judicial system. The constitution specified an initial supreme court of three judges—a fourth could be added after five years—and required it to hold a session in every county every year.[42] The court simply could not keep up with the demands of a rapidly growing state and a legislative propensity to create new counties for the peripatetic judges to visit. According to Judge John C. Wright, in 1834 the supreme court had 1,459 cases on its trial docket. To hear these cases, the judges had to travel 2,250 miles through seventy-two counties. After deducting travel time, Sundays, and the month required for the court's meeting en banc, Wright calculated that the judges had to decide seven cases per day, every day, for the rest of the year to keep up with the caseload.[43]

The common pleas courts also came in for criticism. The constitution initially divided the state into three common pleas circuits, each headed by a president judge.[44] A court of common pleas, with a president and two or three associate judges, sat in every county.[45] The General Assembly kept adding common pleas circuits, until by 1851 there were twenty;[46] but the courts still wallowed in a mass of business. The associate judges, often laymen with little legal experience, did not much ease the burden of the president, even though they could form a quorum without him. The presence of lay judges poorly versed in the law brought numerous complaints.[47]

In 1818, Governor Brown proposed the creation of a separate chancery court so that long, tedious equity cases would not block other civil and criminal matters from moving through the system; discontinuation of jury trials in the supreme court; and the establishment of inferior courts in some of the larger towns to take some of the pressure off the common pleas

41. OH. CONST. of 1802, art. VII, § 5, available at http://ww2.ohiohistory.org/onlinedoc/ohgovernment/constitution/cnst1802.html.

42. OH. CONST. of 1802, art. III, §§ 2, 10, available at http://ww2.ohiohistory.org/onlinedoc/ohgovernment/constitution/cnst1802.html..

43. JOHN C. WRIGHT, REPORTS OF CASES AT LAW AND IN CHANCERY, DECIDED BY THE SUPREME COURT OF OHIO, DURING THE YEARS 1831, 1832, 1833, 1834, at Preface (1835).

44. F. R. Aumann, *The Development of the Judicial System of Ohio*, 41 OHIO ARCHAEOLOGICAL & HIST. Q. 195, 209 (1932).

45. OH. CONST. of 1802, art. III, § 3, available at http://ww2.ohiohistory.org/onlinedoc/ohgovernment/constitution/cnst1802.html.

46. Act of March 4, 1851, 1850–51 OHIO LAWS 21 (creating the twentieth judicial circuit).

47. *See* Aumann, *supra* note 44, at 209–10 n.39; 1818–19 OHIO HOUSE JOURNAL 103; 1847–48 OHIO HOUSE JOURNAL app. at 45.

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courts.[48] The General Assembly did not take effective action until 1838, when it finally established a superior court in Cincinnati, the first of three new trial courts that would be established before 1850.[49] However, the new courts provided no relief for the supreme court.[50] The supreme court judges themselves recommended limits on the right of appeal from common pleas courts and the abolition of jury trials in the supreme court, but the House and Senate Judiciary Committees thought that popular affection for the jury system would render such changes politically impossible.[51]

The General Assembly clearly could not solve the problems of the judiciary.[52] By 1820, two governors and a legislative committee had called for a convention to address the inadequacies of the judicial system.[53] In fact, the General Assembly placed the issue before the voters in 1819, but in the wake of the Missouri Compromise and fears that slavery would be introduced in Ohio, it went down to overwhelming defeat.[54] Reform-minded lawmakers kept trying during the 1820s, but they could not get the necessary two-thirds vote in each house to put a call for a convention on the ballot.[55] In 1841, Thomas L. Hamer, a Democratic lawyer and former state legislator and congressman, reignited interest in a convention with a pair of articles in the *Ohio Statesman*.[56] The state and nation were then in the throes of a depression, but Hamer's suggestion of a convention rested on the need for judicial reform, not for an end to state involvement in economic affairs.[57]

Other issues also contributed to the movement for a constitutional convention. One was the abiding Jacksonian distrust of banks and the bank notes that passed as paper money, which had been at the center of state politics for years before the Panic of 1837 and remained there afterwards.[58] When the Whigs gained control of the General Assembly in 1844 and

48. 1818–19 OHIO HOUSE JOURNAL 100–02.

49. Act of March 15, 1838, 1837–38 OHIO LAWS 95 (Cincinnati Superior Court); Act of Feb. 4, 1848, 1847–48 OHIO LAWS 17 (Cincinnati Commercial Court); Act of Dec. 21, 1847, 1847–48 OHIO LAWS 21 (Cleveland Superior Court).

50. *See* Aumann, *supra* note 44, at 208-09.

51. 1841–42 OHIO SENATE JOURNAL 127–33.

52. *See* Aumann, *supra* note 44, at 208-09.

53. Aumann, *supra* note 44, at 208–09; *see also* 1817–18 OHIO HOUSE JOURNAL 290–95.

54. WILLIAM T. UTTER, 2 THE HISTORY OF THE STATE OF OHIO: THE FRONTIER STATE, 1803–1825 327 (Carl Wittke ed., 1942).

55. *See, e.g.*, 1821–22 OHIO SENATE JOURNAL 120–27, 157–65; 1826–27 OHIO HOUSE JOURNAL 325–28; 1827–28 OHIO HOUSE JOURNAL 321–24.

56. A Democrat (Thomas L. Hamer), *Letter to the Editor*, *in* OHIO STATESMAN (Columbus), June 15, 1841, at 2; A Democrat, *Letter to the Editor*, *in* OHIO STATESMAN, June 29, 1841, at 3.

57. *Id.*

58. *See* GOLD, *supra* note 32, at 184-85.

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passed bank reform legislation, Radical Democrats in Ohio's largest county responded by calling for a convention to prohibit new banks.[59]

In 1847 and 1848, bills to put the question of a convention to the voters received majorities in one or both houses of the legislature but not the required two-thirds.[60] Peter Hitchcock, a longtime participant in state politics, claimed that the majority party in the legislature, whether Whig or Democrat, had always thwarted a convention.[61] But the General Assembly's inability to deal with judicial backlogs, combined with financial crises, bitter partisan conflicts over racial and sectional issues, bribery and election scandals, clashes between the lawmakers and the press, and unseemly apportionment fights deepened the popular disenchantment with government.[62] If any single event served as a trigger for the convention, it was probably the vicious apportionment battle of 1848–49, which prevented the organization of the legislature for weeks and brought state government to a halt.[63] According to one firm supporter of judicial elections, the bitter apportionment fight was the "chief reason" the convention had been called.[64] Proponents of a convention finally succeeded during that session, when popular disgust with government seemed stronger than ever.[65] Even then, the General Assembly approved the ballot issue only because of astute deal-making by a couple of Free Soilers who held the balance of power between Democrats and Whigs.[66]

With this history, Ohioans hardly needed a New York trigger to bring about a constitutional convention. Ohio, like every state that held a convention in the 1840s and 1850s, had its own political and legal dynamics leading up to it. Some of the causes, especially the financial crises and flawed judicial systems, were similar in many states, but there were unique factors as well. In Kentucky, for example, antislavery activists played an important role in bringing about the convention of 1849,[67] while California,

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59. *See generally id.*; C. C. Huntington, *A History of Banking and Currency in Ohio before the Civil War*, 24 OHIO ARCHAEOLOGICAL & HIST. Q. 235, 421–29 (1915); JAMES ROGER SHARP, THE JACKSONIANS VERSUS THE BANKS: POLITICS IN THE STATES AFTER THE PANIC OF 1837, at 149 (1970).

60. 1846–47 OHIO HOUSE JOURNAL 443–44; 1847–48 OHIO SENATE JOURNAL 456; 1847–48 OHIO HOUSE JOURNAL 639–40, 657–59, index at 84n.

61. 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850–1851, at 685 (J.V. Smith reporter, 1851) [hereinafter DEBATES AND PROCEEDINGS].

62. *See generally* GOLD, *supra* note 32, at 37–38, 172–73, 184–93.

63. *See* MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR 399–401 (1999); Edgar Allan Holt, *Party Politics in Ohio, 1840–1850* (pt. 3), 38 OHIO ARCHAEOLOGICAL & HIST. Q. 260, 319–42 (1929).

64. DEBATES AND PROCEEDINGS, *supra* note 61, at 153–54 (remarks of Daniel A. Robertson).

65. *See* HOLT, *supra* note 63, at 401.

66. *See* GOLD, *supra* note 32, at 391; *see also* HOLT, *supra* note 63, at 401.

67. HAROLD D. TALLANT, EVIL NECESSITY: SLAVERY AND POLITICAL CULTURE IN ANTEBELLUM KENTUCKY 135 (2003).

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Iowa, Texas, and Wisconsin needed to draft constitutions in preparation for statehood.[68] Some of the state constitutional conventions of the 1840s preceded New York's.[69] The Iowa and Texas conventions, as well as conventions in Louisiana, Missouri, and New Jersey, met in 1844 and 1845.[70] It seems likely that even if New York had failed to hold a convention, the causes that impelled other states to do so would have been equally potent.[71]

III. THE ADOPTION OF AN ELECTIVE JUDICIARY BY THE OHIO CONSTITUTIONAL CONVENTION

Shugerman maintains that "without New York's convention, judicial elections would have been perceived as a peculiar institution marginalized in pockets of the frontier. Reformers in other states probably would not have gained the political cover and inspiration to push for the same risky revolution in judicial politics."[72] But if the New York convention did not trigger conventions elsewhere, as I have argued above, then perhaps New York's adoption of judicial elections did not trigger the acceptance of judicial elections elsewhere.

Shugerman states that the judicial reforms demanded by proponents of the constitutional conventions included the creation of a popularly elected judiciary.[73] In most states, judges were appointed by the governor or elected by the legislature.[74] (Shugerman refers to both of these methods of selecting judges as "appointive," reserving the term "elected" for judges chosen by popular vote.)[75] In Ohio, the legislators named the judges by majority vote in a joint convention of senators and representatives.[76] Shugerman rejects the explanations given by other historians for the adoption of judicial elections: that the people wanted to "rein in" the judiciary, that judicial elections belonged to a long-term trend of procedural reforms, that lawyer-delegates at the conventions thought judicial elections would serve their professional interests, or that northern abolitionists hoped elected judges would be more sympathetic toward fugitive slaves.[77] According to Shugerman, people wanted a judiciary strong enough to defy

68. *See generally* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 94-135 (1998).
69. *See generally id.*
70. *See generally id.*
71. *See infra* Part III.
72. SHUGERMAN, *supra* note 9, at 102.
73. *Id.* at 112-13.
74. Shugerman, *supra* note 6, at 1131-32.
75. *See id.*
76. OH. CONST. of 1802, art. III, § 3.
77. SHUGERMAN, *supra* note 9, at 111–22; *see also* Shugerman, *supra* note 6, at 1107–15, 1121–22, 1131–32.

an overreaching legislature. As long as the legislature chose the judges, the judges would feel pressured to defer to the legislature. The solution that convention delegates settled on was to transfer the power to elect judges from the legislature to the people. Popularly elected judges, the delegates believed, would be independent of legislatures and unafraid to exercise their power of judicial review.[78]

Even assuming Shugerman's explanation for the rise of judicial elections holds for New York, it is questionable that the New York convention triggered the adoption of elections elsewhere and even less likely that a desire for more judicial review motivated those adoptions.[79] A trend toward judicial elections, especially in the west, began early in the nineteenth century.[80] In 1816, Indiana adopted a three-tiered system of judicial selection: gubernatorial appointment of supreme court judges, legislative election of the presidents of the circuit courts, and popular election of associate circuit court judges.[81] In 1829, the Indiana General Assembly established probate courts with elected judges.[82] Mississippi adopted the elective system for all judges in 1832.[83] Michigan and Iowa created mixed systems of judicial selection in their first state constitutions in 1835 and 1844, respectively.[84] New York's adoption of judicial elections in 1846 no doubt served as an encouraging example for advocates of elections, as did Mississippi's, but the expansion of the elective judiciary in the constitutions of Michigan in1850, Indiana in1851, and Iowa in 1857[85] was the culmination of a movement begun long before.

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78. SHUGERMAN, *supra* note 9, at 95–99, 105–11; Shugerman, *supra* note 6, at 1088–92, 1097–1104.

79. The notion that New York inspired judicial elections in other states has been around a long time, usually put forth as a bald statement with no supporting evidence. *See, e.g.*, Francis R. Aumann, *The Selection, Tenure, Retirement and Compensation of Judges in Ohio*, 5 U. CIN. L. REV. 408, 410 n.5 (1931).

80. Shugerman acknowledges some of these early examples of popular judicial elections but dismisses them as "outliers." *See* Shugerman, *supra* note 6, at 1072; *see also* SHUGERMAN, *supra* note 9, at 57–58. In THE PEOPLE'S COURTS, Shugerman discusses these early experiments with judicial elections at length. SHUGERMAN, *supra* note 6, at 57–83.

81. *See* IND. CONST. of 1816, art. V, § 7. The associate judges were laymen. *See* CHARLES W. TAYLOR, BIOGRAPHICAL SKETCHES AND REVIEW OF THE BENCH AND BAR OF INDIANA 136 (1895).

82. Act of Jan. 23, 1829, ch. 26, 1828–29 IND. ACTS 33.

83. *See* MISS. CONST. of 1832, art. IV, §§ 2, 3, 5, 11, 16, 18.

84. *See* MICH. CONST. of 1835, art. VI, §§ 2, 4; IOWA CONST. (proposed) of 1844, art. VI, §§ 4, 5, 6, *in* 1 DOCUMENTARY MATERIAL RELATING TO THE HISTORY OF IOWA 163–64 (Benjamin F. Shambaugh ed., 1897). Iowans twice rejected the 1844 constitution in popular referenda. *See* JACK STARK, THE IOWA STATE CONSTITUTION: A REFERENCE GUIDE 3–4 (1998). They narrowly approved a second constitution in 1846. *Id.* The second constitution also provided for a mixed system of elected and appointed judges. *See* IOWA CONST. of 1846, art. VI, §§ 3, 4.

85. *See* MICH. CONST. of 1850, art. VI, §§ 2, 6, 13, 17; IND. CONST. of 1851, art. VII, §§ 3, 9, 14; IOWA CONST. of 1857, art. V, §§ 3, 5.

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Ohio could not transition to an elective judiciary after 1802 without a constitutional convention, which, as we have seen, proved impossible to secure before 1849. However, the spirit of "Western Democracy"[86] can be seen in regard to the selection of county prosecutors. County prosecutors were appointed by the courts of common pleas[87] until 1833, when the General Assembly made the position elective.[88] The next year, a House committee rejected a petition to repeal the 1833 law. "[T]he people are qualified to exercise all the rights and privileges belonging to freemen," the committee declared.[89] Those rights included the people's natural right, "essential to the very existence of a free government," to "appoint their own agents."[90] In the country as a whole, the reasons for a transition from appointed to elected prosecutors were similar to those that stimulated a shift from appointed to elected judges: a demand for popular control of government, a desire to reduce the patronage power of the appointing authority, and a hope that elected officials would be more responsive to local communities.[91]

The idea of an elective judiciary appeared in Ohio at least as early as 1840, when the state Senate adopted a resolution offered by Democrat James Mathews instructing the Senate Judiciary Committee to consider a constitutional amendment to provide for popular elections.[92] In 1847, Clement Vallandigham, a rising star in the Democratic Party, made a powerful speech in the Ohio House of Representatives in favor of a constitutional convention. He skewered the court system at length, concentrating on the inability of the judiciary, as it was then constructed, to deal with the growing legal business of the state. But he also urged the popular election of judges. Under the existing system of legislative appointments, he asserted, "Political connection with the party in the majority is . . . made a prerequisite in the candidate."[93] When, he asked, did a Whig legislature ever appoint a Democratic judge or a Democratic legislature choose a Whig judge?[94] Popular elections "could be no worse"

86. BENJAMIN F. SHAMBAUGH, HISTORY OF THE CONSTITUTIONS OF IOWA 208 (1902).
87. *See* Act of Feb. 4, 1807, § 7, ch. 35, 1806–07 OHIO LAWS 98, 100.
88. Act of Jan. 29, 1833, 1832–33 OHIO LAWS 13.
89. 1833–34 OHIO HOUSE JOURNAL 568.
90. *Id.*
91. *See* Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1568 (2012). As Ellis points out, by 1831 Ohioans elected sheriffs, coroners, justices of the peace, county recorders, and county surveyors. *Id.* at 1544.
92. 1839–40 OHIO SENATE JOURNAL 199.
93. SPEECHES, ARGUMENTS, ADDRESSES, AND LETTERS OF CLEMENT L. VALLANDIGHAM 86 (1864).
94. *Id.*

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and would have the advantage of conforming to the "general principle . . . that all elections ought to be by the people direct."[95]

Soon after Vallandigham's speech, another Democrat, Frederick Grimke, a former member of the Ohio Supreme Court, published *Considerations on the Nature and Tendency of Free Institutions*. One of the matters he considered was the selection of judges. Grimke believed that judges ought not to be too independent of the society whose justice they were administering; but he also questioned the competence of the people to choose them. Most people, he wrote, lacked the information necessary to evaluate the "learning and accomplishments" required of judges. That is why the people deputed another, be it the governor or the legislature, to act on their behalf. On the other hand, Grimke viewed the recent advent of the elected judiciary in Mississippi and New York with interest. If the experiment succeeded in those states, as he thought it well might, he would have no objection to its general adoption.[96]

Mathews, Vallandigham, and Grimke all seem to have favored popular elections as a means of separating the selection of judges from party politics and thereby getting better men on the court. Daniel A. Robertson, both a secretary of a constitutional reform convention in New York in 1837[97] and a delegate to the Ohio constitutional convention, agreed.[98] The constitution drafted by the New York reform convention provided for the popular election of all public officers, including judges.[99] At the Ohio convention, Robertson remarked that since 1837, "the direct accountability of the judges to the people" had come to be "considered the best security for their good conduct."[100] The point was not limited to judges. "Direct accountability and responsibility," Robertson continued, "is the secret of insuring the faithful discharge of duty from every public officer."[101] Nothing in the comments of Mathews, Vallandigham, Grimke, or Robertson suggests that any of them wanted the popular election of judges in order to encourage judicial review.

Shugerman makes much of *The New Constitution*, a newspaper published by Radical Democrat Samuel Medary in Columbus in 1849 for the purpose of stirring up enthusiasm for a constitutional convention. As Shugerman correctly notes, some of the paper's contributors demanded

95. *Id.*
96. *See* FREDERICK GRIMKE, CONSIDERATIONS ON THE NATURE AND TENDENCY OF FREE INSTITUTIONS 349, 363–66 (1848).
97. THE ADDRESS, AND DRAFT OF A PROPOSED CONSTITUTION, SUBMITTED TO THE PEOPLE OF THE STATE OF NEW YORK, BY A CONVENTION OF FRIENDS OF CONSTITUTIONAL REFORM (1837).
98. *Id.*
99. *Id.* (proposed const., art. II, § 2).
100. DEBATES AND PROCEEDINGS, *supra* note 61, at 154.
101. *Id.*

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judicial independence from the legislature and the popular election of judges to help secure that independence.[102] However, he overstates the connection between the calls for judicial elections and advocacy of judicial review.

The first item in Medary's prospectus for *The New Constitution* was a complete restructuring of the judicial system and an overhaul of procedure and practice in the courts. The second item read "The election of ALL OFFICERS BY THE PEOPLE!"[103] The paper published many articles on the need to improve the administration of justice, eliminate delays in the courts, and simplify judicial procedures. These were matters having nothing to do with judicial review. Of the numerous articles on the popular election of judges, most focused on the idea that in a republic of self-governing citizens, judges, like other public officials, should be chosen directly by the people. The articles also lamented the baneful effects of logrolling and political partisanship inherent in the legislative selection of judges. As Shugerman notes, several writers debated the question of judicial review.[104] One claimed that judges would not be an effective check on the legislature unless they were elected.[105] But another denied that one branch of government had any authority to make determinations of constitutionality that could bind another branch.[106] In the articles on judicial election, taken as a whole, judicial review remained a minor theme. Moreover, Shugerman's extensive quotes from articles favoring judicial review create a misleading impression that proponents of judicial elections wanted them chiefly in order to empower the judiciary vis-à-vis the legislature.

It is doubtful that even "Madison," one of the writers for *The New Constitution* whom Shugerman quotes in support of his thesis, thought that judicial elections were needed to liberate judges from partisan considerations and thereby encourage judicial review. A defender of judicial review, Madison insisted that even judges who had been active political partisans before taking the bench under the existing system of appointment had never had their integrity questioned. "[T]here is a concentrated weight of responsibility upon a judge," he wrote, "a character

102. SHUGERMAN, *supra* note 9, at 107–09.

103. S. Medary, *Prospectus of The New Constitution*, THE NEW CONSTITUTION 1, 1–2 (1849). Democratic newspapers started publishing similar demands for constitutional reform, including the election of all state and local officials, before Medary established THE NEW CONSTITUTION. *See, e.g., Reforms advocated by the Ohio Democracy*, PORTAGE SENTINEL (Ravenna, Ohio), Sept. 27, 1848, at 2.

104. SHUGERMAN, *supra* note 9, at 108; Shugerman, *supra* note 6, at 1101–02.

105. Veto, *Letter to the Editor*, THE NEW CONSTITUTION 205, 205–06.

106. Homo, *Letter to the Editor*, THE NEW CONSTITUTION 90, 90–91.

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of honesty and integrity to sustain, that the most violent partisan will not dare to disregard."[107]

In *The New Constitution*'s final issue, after the people had voted to hold a constitutional convention, Medary published a speech by delegate R. N. Wickliffe at the Kentucky constitutional convention then in progress. The Kentucky convention's committee on the court of appeals had reported an article giving the judges of that court eight-year terms but permitting their removal on the address of two-thirds of each legislative chamber.[108] Speaking in support of an amendment to lower the required vote to a simple majority, Wickliffe pointed out that courts already possessed "this vast power . . . of striking every act of the legislature dead."[109] That power made the judiciary the supreme and not a coequal branch of government. If the state's highest judges were to have eight-year terms, said Wickliffe, there must be "checks upon them."[110] Because it was difficult to assemble the people, the checks would have to be placed in the hands of the people's representatives. A majority vote of those legislators, Wickliffe insisted, would better ensure judicial responsibility to the people.[111] In other words, the judiciary's dangerous power to strike legislation dead had to be kept in check by the legislature. Wickliffe's speech was Medary's last word on judicial review in *The New Constitution.*

New York's adoption of judicial elections at its 1846 constitutional convention went almost unnoticed in *The New Constitution.* A few articles mentioned it in passing together with events in other states, but Mississippi proved a more potent example[112] and proposals for elective judiciaries in Pennsylvania and Alabama received greater attention than the New York convention.[113]

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107. Madison, *Letter to the Editor*, THE NEW CONSTITUTION 116.

108. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY 149 (R. Sutton reporter, 1849). Under the English Act of Settlement of 1701, the king could remove a judge from office upon address of both houses of Parliament. Many nineteenth-century state constitutions provided for removal by address, but the power was rarely exercised. It fell into disuse after the 1850s when, in a heated political atmosphere, the governors of Maine and Massachusetts removed judges from office upon address of the legislatures because of unpopular opinions the judges had written. Removal by address became so burdened with procedural requirements that it was not much simpler than impeachment. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 137 (1950).

109. *Kentucky State Convention*, THE NEW CONSTITUTION 404.

110. *Id.*

111. *Id.*

112. *See, e.g., Georgia—State Policy*, THE NEW CONSTITUTION 63; *Election of Judges*, *id.* at 271.

113. *See Alabama,* THE NEW CONSTITUTION 37; *Election of Judges by the People, in Alabama*, *id.* at 137; *Alabama: Joint Resolution Proposing Amendments to the Constitution*, *id.* at 143; *Alabama: Joint Resolution Proposing Certain Amendments to the Constitution of the State of Alabama*, *id.* at 149; *The Reform Spirit in Pennsylvania*, *id.* at 176; *Joint Resolutions of the Pennsylvania Legislature in Relation to a Change of the Constitution*, *id.* at 177; *Resolution Relative to an Amendment of the Constitution*, *id.* at 192.

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Shugerman proffers evidence from the Ohio constitutional convention to support his argument that the delegates wanted judicial elections in order to encourage judicial review, but the proof seems less than compelling.[114] He offers first the following quotation from delegate James W. Taylor:

> It seems to me necessary and important, that the Judicial Department, who are representatives of the people, should stand as sentinels to guard the constitutional rights of the people. If a law of the General Assembly should conflict with any right of the people—any constitutional guarantee—there should be a department, proceeding from the people, and responsible to them, which can revert to those great fundamental principles at the foundation of the State government, and preserve the landmarks of the Constitution.[115]

Shugerman's excerpt of Taylor's remarks certainly seems to stand for a strong judiciary. But Taylor, a newspaper editor, continued with a caveat:

> [W]e have seen in this Convention exhibited, all of that awe-struck feeling with which many stand before a judicial edict—a feeling that must stop our mouths. It is against that, which I protest, and I demand for the press . . . the exercise of that right which will authorize us, when anything has passed into the form of a judicial decision, to arraign the grounds of that decision just as freely as we may arraign an act of the General Assembly.[116]

Taylor wanted the courts to act as a check on the legislature, but he apparently did not want any branch of government to be particularly powerful. That was an attitude consistent with the general antigovernment sentiment of Democrats at the convention. Moreover, the issue was neither judicial elections nor judicial independence; it was a proposal to prohibit any authority but the General Assembly from having the power to approve or disapprove laws—for example, the people, by popular referendum. And while Taylor and attorney Rufus P. Ranney spoke up in support of judicial review, they did so only in response to a contrary sentiment expressed by William Sawyer, who chaired the convention's committee on the legislative

114. Shugerman overlooks the most direct evidence in support of his argument, Democratic delegate Samuel Humphreville's comment on the difficulties of getting a court chosen by the General Assembly to declare a law unconstitutional and the hope that popularly elected judges would show their independence from the legislature in their decisions. DEBATES AND PROCEEDINGS, *supra* note 61, at 281. But this was an offhand remark made during a debate over the prohibition of retroactive legislation and elicited no response. *See id.* at 281.

115. Shugerman, *supra* note 6, at 1103; DEBATES AND PROCEEDINGS, *supra* note 61, at 217.

116. DEBATES AND PROCEEDINGS, *supra* note 61, at 217.

department. A nonlawyer, but a seasoned Democratic politician, Sawyer declared that the committee had reported the proposed provision for the express purpose of *preventing* a presumptuous supreme court from assuming the power to declare laws unconstitutional. The power to make and suppress the laws, he said, belonged exclusively to the people's representatives.[117] The proposed provision, in modified form, became part of the constitution.[118]

Shugerman also quotes Whig delegate Joseph Vance, who declared that the people were "the source of all power, and with the people should be left all power, except so far as it became necessary to take a part of it away in order to protect them in their rights and liberties under the form of a government."[119] By delegating a part of their powers, the people could "more effectually . . . guard and protect them in that which they retained in their own hands."[120] Again, the context is telling. The subject under discussion was the appointment of a commission to simplify procedure in the courts.[121] Vance went on to say that there was no need to delegate the people's authority in this instance and no reason to address the subject in the constitution.[122] The debate over procedural reform was long and contentious, but it had nothing to do with the election of judges or judicial review.

The delegates knew from the start that they would put the popular election of judges into the constitution, and they never really debated the issue.[123] The delegates' closest approach to a deliberation came when they had to agree on the length of terms for supreme court judges.[124] In the course of a protracted and sometimes acrimonious debate, Democrat Joseph McCormick said, as quoted by Shugerman:

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117. *Id.* at 216–17. A contributor to THE NEW CONSTITUTION made a similar argument, adverting to the constitutional clause (OHIO CONST. of 1802, art. VIII, § 9) that reserved to the legislature the power of suspending laws in contending that the judiciary had no authority to declare a law unconstitutional. *See* Homo, *supra* note 106, at 269.

118. *See* OHIO CONST. of 1851, art. II, § 26.

119. SHUGERMAN, *supra* note 9, at 109.

120. *Id.*

121. *See* 1 DEBATES AND PROCEEDINGS, *supra* note 61, at 557.

122. *Id.* at 562.

123. By June 1849, the *Toledo Commercial* had observed that the idea of popular election of judges had "already triumphed." *See Election of Judges by the People*, THE NEW CONSTITUTION 91 (reprinting comments from the *Toledo Commercial*).

124. The debate began with a proposed amendment, offered in the committee of the whole, to the report of the convention's judiciary committee. DEBATES AND PROCEEDINGS, *supra* note 61, at 431. The report established terms of three years for justices of the peace and county court judges and a maximum of seven years for all other judges. *Id.* at 431. The amendment would have reduced the ceiling to four years. *Id.* at 676.

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> I hold, sir, that democracy looks to a pure and disinterested judiciary; that democracy seeks for the sacrifice of no right; that it seeks for the promotion of law and order, and for a proper and consistent state of things; that it asks not for the government of lynch law; that it asks not to make the judiciary subservient to the wishes and caprices of individuals or cliques—all these things I openly disclaim as constituting any part of my democracy; yet I am in favor of the election of judges by the people . . . . [As opposed to the partisan appointment process, elections] will have the effect to ensure the strict performance of their duties as judges; it might have the effect of making them more expert; and attend more promptly to their business; labor harder, and with more diligence and efficiency . . . . If the judges are good men, they will be re-elected, and if they are bad men, or bad judges, they will have served too long if their term be but four years.[125]

Shugerman presents this quotation as evidence of the desire of convention delegates in Ohio—and elsewhere—to provide for judges who would be free from the political pressures inherent in legislative appointments. McCormick, however, had no illusions on that score. "The judges are now elected by party," he said, "they have ever been elected by party, and they will ever be so elected, whether by the Legislature or by the people."[126] Furthermore, the principle that McCormick thought would ensure the "strict performance" of judicial duties, which he supported and which no one directly contested at the convention, but short terms of office.[127]

McCormick's remarks followed the Whigs' insinuation that elected judges would be swayed by popular passions. McCormick rose to defend Democrats against the implied charge that they were wild-eyed radicals. He was not making a case for judicial review; rather, he was portraying Democrats as no less sober and sensible than Whigs.

In the extended discussion of judicial terms of office, the delegates said very little that can be connected to judicial review. They argued over the length of terms needed to attract good lawyers to the bench and the

125. Shugerman, *supra* note 6, at 1109 n.307 (quoting 1 DEBATES AND PROCEEDINGS, *supra* note 61, at 691) (ellipses and brackets are Shugerman's).

126. DEBATES AND PROCEEDINGS, *supra* note 61, at 691. Daniel A. Robertson, another Democratic advocate of judicial elections, agreed with McCormick on the inevitability of partisanship in the selection of judges. *Id.* at 627, 638. Robertson tried to amend the judiciary committee's report to increase the number of common pleas districts, wanting to bring the judges "as near to the popular voice as possible" because he feared judicial power and "judicial legislation." *Id.*

127. *Id.* at 691. Two years earlier, the DEMOCRATIC REVIEW had argued that it was the tenure of office and not the mode of selection that determined whether a judge was "independent of all law, of all public sentiment, and of all responsibility." *Elective Judiciary*, 22 U.S. MAG. & DEMOCRATIC REV. 199, 202 (1848).

likelihood that elections would really free judges from political pressures. When Whigs spoke of judicial independence, they usually had in mind independence from the people, not independence from the General Assembly: Could elected judges resist popular prejudice and passion?[128] Could they remain impartial when the people wanted to see a criminal defendant hang?[129] Would they risk abuse from the press and the possible loss of office in a libel suit brought against a partisan newspaper?[130] Democrats emphasized judicial accountability rather than independence: of whom, asked Democrat M. H. Mitchell, did the Whigs want the judiciary to be independent? Did they want judges "to be entirely free from all accountability? I trust not."[131] The people might occasionally be "led astray by passion, or prejudice," Mitchell conceded, but they were less prone to such "aberrations than the aristocratic portion of our race."[132]

With the popular election of judges taken for granted and therefore not debated at the convention, the length of judicial terms served as a sort of proxy for judicial elections. Whigs who favored longer terms made arguments that could have been used against elections (even as Whigs proclaimed their support for elections). The rhetoric of Democrats who favored shorter terms could have been deployed just as well in favor of elections. In the course of the debate over judicial terms, some Whigs exchanged vituperations with Charles Reemelin, a German immigrant and Radical Democrat. Reemelin declared that he favored impartial courts but not independent courts:

> Impartial between man and man, and not independent of public opinion, popular feeling, and even, if you please, popular impulses. . . . I want a judge to act under the feeling that there is a higher judge above him, to whom he must soon render an account, and that judge is the people of Ohio.[133]

The very purpose of judicial elections, insisted Reemelin, was to bring the judiciary under "the chastening and reforming hand of American public opinion."[134]

Reemelin appeared to be arguing for judicial review of an extraordinary kind. The German "red republican," sneered conservative Whig Simeon Nash, "says there is a certain class of questions—all constitutional

128. *See* DEBATES AND PROCEEDINGS, *supra* note 61, at 689 (remarks of Benjamin Stanton).
129. *See id.* at 687.
130. *See id.* at 689.
131. *See id.* at 691-92.
132. *See id.*
133. DEBATES AND PROCEEDINGS, *supra* note 61, at 682.
134. *Id.* at 697.

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questions—wherein he wishes to appeal from the courts to the people."[135] Nash would have none of it. Under a written, American constitution, he lectured, the judiciary "is appointed to settle and determine what the law is . . . and for that reason the judiciary power is made independent of all human power except in order that it may not be left under any sinister influence to depart from the rule of rectitude."[136] It was the job of a judge "to construe the constitution."[137] If the people did not like the judicial construction, they had the right to amend the constitution.[138] Similarly, Whig Benjamin Stanton declared:

> When a constitution, or a law has received a settled judicial construction I will abide by it, until it is changed by the proper authority, and not seek to work a revolution by an appeal from the court to the ballot box . . . . I will never consent that the independence of the judiciary shall be destroyed, and the constitution changed by construction on an appeal to the people in the election of judges—*never*, NEVER![139]

Nash and Stanton, men who stood for long judicial terms of office and expressed skepticism about the popular election of judges, implicitly accepted and even revered the power of judicial review.[140] Reemelin, who wanted short terms and judicial accountability to the electorate, seemed to place judges and legislators on the same plane, as public officers responsible to the people. It is true that Radical Democrat Rufus P. Ranney supported both judicial elections and judicial review,[141] but he did not connect the two (that is, he did not favor elections *in order to strengthen judicial review*). In short, there is precious little evidence from Ohio to support Shugerman's contention that delegates to the midcentury constitutional conventions put forward the popular election of judges for the purpose of fortifying judicial review.

Why, then, did the convention adopt judicial elections? Shugerman himself provides the most likely answer in the resolution quoted above: the legislature had proved itself, in the eyes of the citizenry, too corrupted by

135. *Id.*
136. *Id.*
137. *Id.*
138. DEBATES AND PROCEEDINGS, *supra* note 61, at 703.
139. *Id.* at 689.
140. *See, e.g.*, *id.* at 688 (Stanton), 704 (Nash).
141. *See* Ranney, who sat on the convention's judiciary committee, disagreed with the committee's report on the court system and submitted a minority report. Both reports provided for the popular election of judges. *See* DEBATES AND PROCEEDINGS, *supra* note 61, at 430–31, 551. For Ranney's position on judicial review, *see* DEBATES AND PROCEEDINGS, *supra* note 61, at 216; Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm'rs of Clinton Cnty, 1 Ohio St. 77, 81 (1852).

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party spirit to be trusted with the power of appointment. Therefore, "all State, County, and Township officers" should be directly elected by the people.[142] Medary had called for the popular election of all public officers in *The New Constitution*,[143] and at the convention Reemelin insisted:

> [W]e must expect to have a General Assembly stripped of certain important powers which it before possessed; stripped of the power to enact special laws or creating special corporations; *stripped of the appointing power*; stripped of the apportionment power, and of the power of special legislation. We shall . . . thus take away from them as much as possible all temptation to the abuse of their powers. All this will be done with special reference to the complaints that we have too much legislation, which have come up from all quarters.[144]

Judges were not singled out for the purpose of guarding against legislative grants of special privilege or other abuses of legislative power. The delegates addressed those questions in other ways: by imposing a debt ceiling, prohibiting the state and local governments from aiding private enterprise through loans of credit or stock subscriptions, prohibiting state debt for internal improvements, barring special acts conferring corporate powers, subjecting to a referendum all laws that granted banking powers to associations, requiring uniformity in the tax laws. Shugerman's suggestion that judges who were not popularly elected might disregard such explicit restrictions on legislative authority[145] never occurred to anyone (or was at least not overtly expressed)[146] and indeed seems excessive. Rather, judges were swept along with other officials formerly chosen by the General Assembly: the state auditor, state treasurer, secretary of state, and attorney general. Disgust with the General Assembly ran so deep that the delegates even removed the legislature's sole authority to name the trustees of state institutions and transferred it to the governor (with the advice and consent of the Senate).[147]

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142. SHUGERMAN, *supra* note 9, at 109.

143. Medary, *Prospectus, supra* note 103, at 1–2.

144. DEBATES AND PROCEEDINGS, *supra* note 61, at 174 (emphasis added).

145. SHUGERMAN, *supra* note 9, at 95.

146. A contributor to THE NEW CONSTITUTION raised such a concern, however, by asking, "Why have a constitution at all, if the legislature is unrestrained and may violate its plainest provisions with impunity?" Veto, *supra* note 105, at 206. Shugerman quotes this writer in THE PEOPLE'S COURTS. *See* SHUGERMAN, *supra* note 9, at108.

147. *See* OHIO CONST. of 1851, art. VII, § 2. The trend toward the popular election of all types of public officials was widespread in Jacksonian America. *See* Ellis, *supra* note 91, at 1531; G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 121–22 (1998).

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If the delegates to the Ohio convention had really been concerned with checking the power of the legislature through another branch of government, they could have provided for an executive veto. The governor was already popularly elected and independent of the legislature, and in most of the country the veto operated as a restraint on legislative power. Some Democrats at the convention saw the veto as an instrument for the preservation of liberty. The standing committee on the executive department recommended its adoption.[148] But a Democratic opponent declared that

> the power which the people have to elect their representatives was wisely conferred for the purpose of enabling the people to direct and control all the subjects of legislation as they might desire . . . I would rather the people should check the will of the Governor, than the Governor should check the will of the people.[149]

In the end, the delegates rejected the veto. They wanted to take power away from the General Assembly but did not want to give it to another branch of government. The new constitution revealed the progress of what Reemelin called the "American principle" of "gradually tak[ing] more and more power from the government and leav[ing] more to the individual man."[150]

IV. ELECTED JUDGES AND JUDICIAL REVIEW IN OHIO

Shugerman writes that the proponents of a stronger judiciary as a check on the legislature achieved their goal: the elected judges of the late 1840s and 1850s generated a dramatic increase in the number of decisions striking down legislation. In other words, the postconvention rise of judicial review grew directly out of the implementation of judicial elections. Shugerman acknowledges that an elective judiciary was neither necessary nor sufficient for the spread of judicial review in the 1850s. Rather, he says, judicial elections "influenced" and "contributed to" increased judicial review.[151] But the whole point of his argument is that that influence was powerful. Judicial elections, he writes, harnessed popular antilegislative sentiments and "made them more influential to judges."[152] The constitutional convention delegates secured their objective when they adopted judicial elections: "blocking more legislation."[153] The evidence from Ohio,

148. *See* DEBATES AND PROCEEDINGS, *supra* note 61, at 300.
149. *Id.* at 310 (remarks of William Hawkins).
150. DEBATES AND PROCEEDINGS, *supra* note 61, at 474.
151. SHUGERMAN, *supra* note 9, at 124–25.
152. *Id.*
153. *Id.*

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however, suggests that Shugerman's contention should be adjudged "not proven."

In the debate over the length of judicial terms at the constitutional convention, Radical Democrat Charles Reemelin and conservative Whig Peter Hitchcock traded poisoned barbs. Hitchcock was nearing the end of a distinguished political and legal career that included twenty-one years as Ohio's chief justice. Twice he had lost his seat on the bench because of changes in the political makeup of the General Assembly. Reemelin accused Hitchcock of being afraid of judicial elections. Had popular opinion controlled the supreme court, Reemelin proclaimed, "we would have had less subservient tools to the money power of this State."[154] Hitchcock, who noted that he had twice been "hurled from the bench"[155] by Democrats in the General Assembly, was incensed by the insinuation that he or any other judge would tailor his decisions to suit the wishes of either a party in the legislature or a partisan majority of the electorate:

> When I took my seat upon the bench, Mr. Chairman, I took an oath to support the constitution of the United States and of the State of Ohio. I further took an oath that I would administer justice without respect to persons, and do equal justice to poor and rich; that I would faithfully and impartially discharge and perform all the duties incumbent upon me as a judge of the supreme court, to the best of my ability, understanding, and *agreeably to the constitution and laws of this State*. That is the oath upon me. And shall I sacrifice that oath in order to meet the wishes of a political cabal or a political party? Is that the desire? I can assure gentlemen that so long as I retain my senses, so long will I decide every case presented before me, whether between individuals or the public, or individuals with individuals or corporations—I will decide them according to my understanding of the constitution and the law of the State, independent and regardless of those opinions. I say to gentlemen, that whenever a different principle is permitted to prevail in this country, we may bid farewell to our courts of justice and all our other institutions. What! a judge to decide according to the wishes of those who appointed him![156]

Aside from aspersing the character of the judges, Shugerman's thesis assumes too much political prescience on their part. Under the first Ohio constitution, the one that the delegates were going to replace, the General

154. DEBATES AND PROCEEDINGS, *supra* note 61, at 683.
155. *Id.*
156. *Id.* at 684.

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Assembly appointed supreme court judges to seven-year terms.[157] Every year the entire House of Representatives and half the Senate were up for election.[158] After the Whig Party arose in the 1830s, Ohio was a competitive two-party state.[159] Legislators may have chosen their friends and political associates to sit on the bench, but judges could not shape their opinions just to satisfy the lawmakers and protect their jobs. They had no way of knowing who would control the General Assembly from one to seven years down the road. Even when one party dominated Ohio politics, that party—the first Republican Party— was riven by factions.[160] It would have been impossible for judges to know whom to please.

Ohio's first controversy over judicial review arose during the early days of statehood.[161] The issue stemmed from the General Assembly's passage of the Fifty Dollar Act, which allowed justices of the peace to hear civil cases involving claims of up to fifty dollars. The limit when the constitution took effect was twenty dollars. Justices of the peace heard cases without a jury. In 1806, in an opinion by Judge Calvin Pease, the common pleas court in Jefferson County held that the Fifty Dollar Act violated the constitutional right to trial by jury by allowing nonjury trials of claims for more than twenty dollars.[162] In August of 1807, a two-judge majority of the Ohio Supreme Court, probably knowing that they would be impeached for their decision,[163] came to the same conclusion. Judges Huntington and Tod insisted that the General Assembly could not be the sole judge of the validity of its acts.[164] The constitution placed limits on legislative power, but if no other body could check the power of the General Assembly, then the constitution was a "blank paper."[165] The function of the courts, said the judges, is to say what the law is. The constitution is the supreme law, and if it conflicts with an act of the legislature, the courts have a duty to say that the act cannot be a valid law. The House of

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157. OHIO CONST. of 1802, art. III, § 8.

158. OHIO CONST. of 1802, art. I, §§ 3, 5.

159. Ohio's nine gubernatorial elections between 1834 and 1850 reflect the state's political competitiveness. Whigs won five of those elections, Democrats four. *See* OHIO HISTORICAL SOCIETY, THE GOVERNORS OF OHIO 35–67 (2d ed. 1969).

160. *See generally* DONALD J. RATCLIFFE, PARTY SPIRIT IN A FRONTIER REPUBLIC: DEMOCRATIC POLITICS IN OHIO, 1793–1821 (1998). For examples of closely contested elections to the Ohio Supreme Court before the rise of the second party system of Whigs and Democrats, *see* 1806–07 OHIO SENATE JOURNAL 71; 1815–16 OHIO HOUSE JOURNAL 323–24; 1822–23 OHIO HOUSE JOURNAL 169–70.

161. *See generally* DONALD F. MELHORN JR., LEST WE BE MARSHALL'D: JUDICIAL POWERS AND POLITICS IN OHIO, 1806–1812, at 21-26 (2003).

162. *See id.* at 193–95.

163. *See id.* at 63.

164. *See* Rutherford v. McFadden, *in* OHIO UNREPORTED JUDICIAL DECISIONS PRIOR TO 1823, 72–83 (Huntington, C.J.) and 83–94 (Tod, J.) (Ervin H. Pollack ed., 1952).

165. *Id.* at 76.

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Representatives impeached Judges Pease and Tod—Huntington escaped through his election as governor—but the Senate narrowly failed to convict.

All the fuss over judicial review dissipated within a few years of the impeachments. Long before the constitutional convention, judicial review became an accepted fact of judicial life. In 1816, the General Assembly elected Pease to the supreme court and Tod to the presidency of a court of common pleas.[166] In 1825, the supreme court observed that the judiciary had a duty to refuse to enforce statutes that conflicted with the constitution.[167] By the 1830s, attorneys were regularly asking courts to declare statutes unconstitutional, and courts took for granted their right to do so.[168] In what may be the supreme irony, Ohio's justices had to remind those who daily called upon the judiciary to restrain the legislature that courts, too, had to observe constitutional limitations.[169]

According to Shugerman, the Supreme Court of Ohio invalidated just two laws in the 1840s but eleven in the 1850s.[170] If judicial review was well established by 1850, why was there such a dramatic increase in declarations of unconstitutionality? (And, one might ask, why the dramatic drop-off in the first half of the 1860s, also documented by Shugerman?) Shugerman believes that the newly elected judges, being no longer dependent on the General Assembly, felt freer to exercise their powers in defense of the people's rights. However, an examination of the cases that he cites indicates that Shugerman's explanation is questionable.

Because Shugerman's point is to show a causal connection between judicial elections and judicial review, one case must be dropped from his roster of 1850s cases. *Myers v. Manhattan Bank*[171] was decided by the old court, before the elected judges took office.[172] Moreover, the *Myers* court did not find an Ohio law unconstitutional; it refused to enforce a note payable at a bank located in Manhattan, Ohio, because the bank had been incorporated under Michigan law at a time when both Michigan and Ohio

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166. MELHORN, *supra* note 161, at 183.

167. McCormick v. Alexander, 2 Ohio 65, 75 (1825).

168. *See, e.g.*, Cooper v. Williams, 4 Ohio 253 (1831); Hunt v. McMahon, 5 Ohio 132 (1831); Bates v. Cooper, 5 Ohio 115 (1831); Lessees of McMillan v. Robbins, 5 Ohio 28 (1831); State *ex rel.* Loomis v. Moffitt, 5 Ohio 358 (1832).

169. *See* Way v. Hillier, 16 Ohio 105 (1847).

170. *See* SHUGERMAN, *supra* note 9, at 278. For a list of the cases, see Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review: Appendices and List of State Judicial Review Cases*, 1780–1865 (Jan. 27, 2010), at 42-43, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542870. However, Shugerman's lists may be incomplete. *See* JOSEPH H. HIXSON, THE JUDICIAL VETO IN OHIO xxiv–xli (1922) (unpublished M.A. thesis, Ohio State University). Hixson, a student of judicial review in Ohio, counted four cases in the 1840s in which the Ohio Supreme Court declared state statutes unconstitutional and eighteen in the 1850s. *See id.*

171. 20 Ohio 283 (1851).

172. *See generally id.*

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claimed ownership of the area.[173] Manhattan ended up in Ohio, leading the court to hold that the bank was unauthorized by Ohio law.[174] By statute, all notes payable at an unauthorized bank were void.[175]

One reason for the increase in declarations of unconstitutionality was that the new constitution was chock full of restrictions of which the General Assembly could run afoul. In the two 1840s cases cited by Shugerman, the decisions rested on cherished but vague constitutional principles: the inviolability of property and of rights vested by virtue of judgments.[176] By contrast, three cases from the 1850s involved specific constitutional provisions that had no counterparts in the previous constitution. In *Kelley v. State*,[177] the court struck down a statute that gave the common pleas courts of some counties different criminal jurisdiction from that given to the common pleas courts in other counties.[178] The act, said the court, violated the constitutional requirement that all laws of a general nature have a uniform operation throughout the state.[179]

In *State ex rel. Attorney General v. Kennon*,[180] the court invalidated two statutes that created two boards consisting of the same three named individuals.[181] One board was to appoint commissioners of the statehouse, which was then under construction; the other was to appoint directors of the state penitentiary.[182] In enacting these laws, the legislators were trying to evade the new constitution's denial to the General Assembly of the power to appoint public officers. But the court held that members of the board of appointment were themselves public officers and therefore could not be appointed by the legislature.[183] In his opinion for the court, Judge Jacob Brinkerhoff made a point of showing that the decision conformed to the spirit of the constitutional convention:

> The existence of legislative patronage was a prominent mischief, inducing the calling of a constitutional convention. The annihilation of such patronage was a leading remedy aimed at by it. With or without foundation, it was generally believed that a practice had grown up, among members of the legislative bodies, to barter votes for offices in exchange for votes for

173. *See id.* at 302-03.
174. *Id.* at 300-02.
175. *Id.* at 302.
176. *See, e.g.*, Lessee of Good v. Zercher, 12 Ohio 364 (1843); Schooner Aurora Borealis v. Dobbie, 17 Ohio 125 (1848).
177. 6 Ohio St. 269 (1856).
178. *Id.* at 275.
179. *Id.* at 269, 274-74; OH. CONST. of 1851, art. II, § 26, *available at* http://ww2.ohiohistory.org/onlinedoc/ohgovernment/constitution/cnst1851.html.
180. 7 Ohio St. 546 (1857).
181. *Id.* at 563-67.
182. *Id.* at 554-55.
183. *See id.* at 557-59.

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laws, and votes for laws in exchange for votes for offices; thus corrupting the streams of legislation at the fountain-head. And it was sought by the convention and the people . . . to place an impassable barrier between the legislature and even the temptation to corrupt or unworthy action; and to confine it to its single, and legitimate, and highly honorable function—the passage of general, well considered, and durable laws, for the promotion of the permanent well-being of the people.[184]

The third case involving a new constitutional restraint on the General Assembly, *State ex rel. Huston v. Commissioners of Perry County*,[185] stemmed from a rivalry between Somerset, the county seat of Perry County, and New Lexington, a growing village that aspired to replace Somerset as the locus of county government.[186] In 1851, the General Assembly passed a law authorizing the voters of the county to move the county seat to New Lexington if the "friends of removal" obligated themselves to pay for the construction of public buildings.[187] Residents of New Lexington raised the money, but the commissioners abandoned the construction when it was nearly complete.[188] In 1853, the General Assembly authorized a move back to Somerset upon approval of the voters but penalized the county financially if the people voted against the move.[189] In an election tainted by fraud on both sides, the pro-Somerset forces prevailed.[190] The supreme court invalidated the whole proceeding. The new constitution, unlike the old, expressly prevented any law for the removal of a county seat from taking effect until it had been approved by the county's electors.[191] "This limitation of legislative power would be quite nugatory," said the court, "if the voters of a county may be dragooned into a ratification of legislative acts, by the imposition of penalties and forfeitures, as a consequence of a majority vote against removal."[192]

In light of the new constitutional restraints on the General Assembly, could *Kelley*, *Kennon*, or *Huston* reasonably have been decided other than as they were? There were dissents in *Kelley* and *Kennon*.[193] In the former case, Judges Brinkerhoff and Joseph Swan dissented without opinion.[194] According to the court reporter, the dissenting judges believed that the

184. *Id.* at 566.
185. 5 Ohio St. 497 (1856).
186. *See id.* at 503-05.
187. *Id.* at 502-03
188. *Id.* at 504-06.
189. *Id.*
190. *See* CLEMENT L. MARTZOLFF, HISTORY OF PERRY COUNTY, OHIO 131–32 (1902).
191. *See id.* ; *see also* OH. CONST. of 1851, art. II, § 30.
192. *Huston*, 5 Ohio St. at 506.
193. State v. Kelley, 6 Ohio St. at 275; State ex rel. Attorney General v. Kennon, 7 Ohio St. at 573.
194. *Kelley*, 6 Ohio St. at 275.

language of the judiciary article authorized the General Assembly to give inferior courts different jurisdiction in different counties.[195] It is unfortunate that the dissenters did not produce an opinion because, with the possible exception of the section on the probate court, it is not obvious how they arrived at their conclusion. Chief Justice Thomas Bartley dissented without opinion in *Kennon*;[196] but he held such extreme views that even other Radical Democrats tended to leave him alone way out on his limb. Justice Brinkerhoff, a former Democrat whose antislavery sentiments had led him to join the new Republican Party, invalidated the statute in *Kennon* reluctantly. No one doubted the court's duty to pass upon the constitutionality of legislative acts, he wrote, but the task was one of "great delicacy and responsibility, and by no means to be coveted."[197] But whether the court acted reluctantly or enthusiastically, it was duty-bound to strike down statutes that conflicted with the new constitution's restraints on the legislature.[198] There is no reason to read into *Kelley*, *Kennon*, or *Huston* a strengthened resolve on the part of the elected judges to exercise their power of judicial review.

Another decision, *Work v. State*,[199] dealt with a section of the constitution unchanged by but briefly debated at the convention. At issue was the guarantee of the "inviolate" right to trial by jury. The mid-nineteenth century witnessed significant and occasionally successful attempts to alter the jury system. One major innovation was the six-man jury. However, the twelve-member jury was sacrosanct, and Ohio's constitutional convention sternly rebuffed the idea of a smaller panel.[200] When the General Assembly nevertheless authorized trials in probate court before six-man juries, the supreme court, in an opinion by Judge Ranney, struck down the law. In addition to relying on deeply entrenched tradition, Judge Ranney pointed out that a new constitutional provision ensured that whenever a corporation appropriated private property for a right-of-way, "compensation shall be ascertained by a jury of twelve men, in a court of record."[201] Judge Ranney had been one of the most active members of the convention. It was on his motion that the convention added to the general eminent domain provision the requirement that compensation be assessed by a jury.[202] The purpose of the right-of-way section, he wrote, was

195. *See id.*
196. *Kennon*, 7 Ohio St. at 573.
197. *Id.* at 553.
198. *See id.* at 554.
199. 2 Ohio St. 296 (1853). Bartley again dissented without opinion. *Id.* at 308.
200. *See* DEBATES AND PROCEEDINGS, *supra* note 61, at 326.
201. Work v. State, 2 Ohio St. 296, 307 (1853).
202. DEBATES AND PROCEEDINGS, *supra* note 61, at 290.

> to afford the party the same protection as in other cases of jury trial-no more and no less; and if any inference is to be drawn from specifying the number of the jury, it is very strong evidence of the sense of the convention, that that was what had already been secured by the other sections, to suitors in other cases.[203]

Given this history, it seems clear that the court could not have upheld the statute without violating the spirit of the convention.

Of the remaining six cases cited by Shugerman, two, *State ex rel. Morgan v. Moore*,[204] and *Ross County Bank v. Lewis*,[205] arose from disputes over one section of a comprehensive banking law. Section 60 of the Kelley Banking Law of 1845 required each bank that chose to organize under the law to set off six percent of its net profits to the state in lieu of taxes. When the General Assembly levied new taxes on the banks, the banks claimed that Section 60 had been incorporated into their charters and that the new taxes were an impairment of their contracts in violation of the United States Constitution. The question had already gone to the Supreme Court of the United States in *Piqua State Bank v. Knoop*[206] and been decided in favor of the banks.[207] In that case, ironically for Shugerman's thesis, the Ohio court had *upheld* the tax, finding no impairment of contract.[208] In *Morgan* and *Ross*, the Ohio court, except for Chief Justice Bartley, felt bound by the U.S. Supreme Court's decision.[209]

Matheny v. Golden[210] also involved the legislature's power to bind the state contractually to a tax exemption. Justice Brinkerhoff wrote the majority opinion. He was unhappy about having to do so, for he was "very far from being friendly to the policy of such exemptions."[211] Nevertheless, he ruled, on the basis of *Knoop* and other U.S. Supreme Court decisions and over Chief Justice Bartley's customary dissent, that the state could not tax land it had contractually agreed would not be taxed. Justice Brinkerhoff at least had the satisfaction of observing that the tax exemption had been given

203. *Work*, 2 Ohio St. at 307–08. There are occasional remarks scattered throughout the convention debates to support Ranney's contention that the delegates understood "jury" to mean a panel of twelve. *See, e.g.*, DEBATES AND PROCEEDINGS, *supra* note 61, at 181, 447, 477.

204. State ex rel. Morgan v. Moore, 5 Ohio St. 444 (1856).

205. Ross County Bank v. Lewis, 5 Ohio St. 447 (1856).

206. Piqua State Bank v. Knoop, 57 U.S. 369 (1854).

207. *See generally id.*

208. *See generally* Knoup v. Piqua Branch of the State Bank of Ohio, 1 Ohio St. 603 (1853).

209. Brinkerhoff also dissented on the grounds that section sixty did not satisfy the legal requirements for a contract. *Moore*, 5 Ohio St. at 444; *Ross County Bank*, 5 Ohio St. at 449–50.

210. Matheny v. Golden, 5 Ohio St. 361 (1856).

211. *Id.* at 374.

under the old constitution and that the new constitution prohibited such exemptions.[212]

If Shugerman's purpose is to demonstrate a new activism on the part of elected judges, it is not unreasonable to subtract from his count the cases in which the court had little leeway—those that applied new constitutional provisions, that construed a continued provision in the spirit of the convention, or that followed decisions of the U.S. Supreme Court). Omitting those decisions, plus the one decided by the old court, we are left with three cases in which the Supreme Court of Ohio struck down statutes in the 1850s[213]—just one more than in the previous decade. That is not a figure to inspire confidence in the portrait of an invigorated court robustly exercising its power of judicial review, especially when, according to Shugerman's own figures, the total number of reported Ohio cases increased by a third from the 1840s to the 1850s.[214]

At the constitutional convention, Joseph McCormick, a supporter of judicial elections, predicted that judges would be no more or less partisan when elected by the people than when appointed by the legislature. Under either system, the judges would be chosen by party.[215] In the cases cited by Shugerman, the outcomes probably would have been the same if the judges had been chosen by the General Assembly instead of the voters. The judges themselves might even have been the same men. Indeed, two members of the last legislatively selected court, Democratic Judges Ranney and William B. Caldwell, were nominated by their party and duly elected in 1851. The other Democratic nominees also won, as the Democrats crushed the Whigs in the 1851 elections. It is hard to see why these men, who owed their offices to the same people who elected their political friends to the General Assembly, should have been more inclined to strike down laws when popularly elected than when chosen by the legislature.

Ohio's constitutional convention not only provided for the election of judges[216] but reduced their terms from seven to five years.[217] That reduction is not consistent with the creation of a stronger, more independent judiciary; it *is* consistent with a desire to make the judiciary more accountable to the people.

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212. *See id.*

213. *See generally Ex parte* Logan Branch, 1 Ohio St. 432 (1853); McCoy v. Grandy, 3 Ohio St. 463 (1854); Reeves v. Treasurer of Wood Co, 8 Ohio St. 333 (1858). Shugerman missed Exchange Bank v. Hines, 3 Ohio St. 1 (1853), in his search for exercises of judicial review by elected courts in the 1850s, but this was another case decided on the basis of a new constitutional provision. *See* SHUGERMAN, *supra* note 9, at 279.

214. SHUGERMAN, *supra* note 9, at 279.

215. DEBATES AND PROCEEDINGS, *supra* note 61, at 691.

216. OHIO CONST. of 1851, art. IV, §§ 2, 3, 7, 9, 10.

217. OHIO CONST. of 1802, art. III, § 8; OHIO CONST. of 1851, art. IV, §§ 10, 11, 12.

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V. MAJORITARIAN AND COUNTERMAJORITARIAN JUDICIAL REVIEW AMONG OHIO'S ELECTED JUDGES

"The appointed judges of the early republic," writes Shugerman, "had relied mainly on [a] majoritarian theory [of judicial review]: the defense of popular majorities and their constitutional rights against the excesses of the ruling elites."[218] These judges saw themselves as defenders of the people against the people's "untrustworthy and unrepresentative" agents in the legislatures.[219] The delegates at the midcentury constitutional conventions embraced that view of the courts in pushing for judicial elections. But once they took office, Shugerman continues, the elected judges "wrote as skeptics of democracy and increasingly turned to countermajoritarian theories, defending individual rights against majoritarian abuses."[220] This curious turn, he argues, had momentous consequences; it "set the stage for the expansion of judicial review . . . the rise of laissez-faire constitutionalism and the rise of countermajoritarian understandings of judicial review."[221] Shugerman does not claim that judicial elections by themselves produced these phenomena. However, he does contend that the "antilegislature sentiments" that produced the midcentury constitutional conventions and the elective judiciary adopted by those conventions to check the legislatures were "mutually reinforcing."[222]

There is almost no evidence from Ohio to support the notion of a connection between judicial elections and a transition from majoritarian to countermajoritarian rationales for judicial review. Indeed, there is nothing to show that such a transition even took place. The number of cases before 1850 in which Ohio courts declared laws unconstitutional was miniscule.[223] The first two, a court of common pleas decision in 1806 and a supreme court decision in 1807 involving the same statute, created a storm over judicial review and led to the impeachment and near-conviction of two judges.[224] The Supreme Court of Ohio did not strike down another general

218. SHUGERMAN, *supra* note 9, at 123–24.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 125.

223. *See* F. R. Aumann, *The Course of Judicial Review in the State of Ohio*, Judicial Organization and Procedure, 25 AM. POL. SCI. REV. 367, 371–72 (1931) (claiming that the Ohio Supreme Court held state statutes unconstitutional in whole or in part seven times in the first half-century of statehood, but he mentioned only two of the cases: *Rutherford v. McFadden*, reprinted in POLLACK, *supra* note 164, at 71–94, and *Bingham v. Miller*, 17 Ohio 445 (1848)). Another study, cited by Aumann, counted three cases before 1843. HIXSON, *supra* note 170. Some of these decisions were limited in scope. For example, in State v. Commercial Bank of Cincinnati, 7 Ohio 125 (1835), the court did not declare the statute in question unconstitutional but held that the contracts clauses of the federal and state constitutions prohibited the application of the statute to a particular bank. *See generally id*.

224. *See* MELHORN, *supra* note 161.

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statute until 1843 in *Lessee of Good v. Zercher*,[225] and it overruled that decision four years later.[226] In an appendix to *Economic Crisis*, Shugerman cites *The Schooner Aurora Borealis*,[227] an 1848 case in which the supreme court declared a law unconstitutional. That decision, however, invalidated the statute only to the extent that the statute instructed the court how a previously enacted law should be construed in pending cases.[228]

Ohio's appointed judges rarely indulged in language that could be construed as either majoritarian or countermajoritarian. In *Lessee of Good*, the court proclaimed:

> It is the principal object of our political organization to secure each individual in the enjoyment of his natural rights. And the chief glory of every citizen, however humble or weak, is to feel, in the omnipotence of constitutional protection, that there is no power under God can deprive him of his property or his rights. That the government itself, under which he lives, is less than the individual man, except as it acts within the legitimate sphere prescribed by the people who made it. The right of property is coupled with the right of life, since the day that man first ate his bread in the sweat of his brow. Hence it is declared in the Constitution that the rights of acquiring, possessing, and protecting property are natural, inherent, and inalienable.[229]

This paean to individual rights can be seen as a majoritarian defense of the people's rights against governmental assault or as declaration of constitutional protection for the liberty of every citizen, even a minority of one. In any event, the decision stood for only four years before being overruled.

Occasionally before 1850, Ohio courts adverted to the *power* of judicial review in upholding statutes. Perhaps the case in which a judge came closest to suggesting a *theory* of judicial review was *State v. Commercial Bank of Cincinnati*,[230] in which Judge Peter Hitchcock declared that a law made in contravention of the constitution

> could not be enforced, unless we adopt the principle that an unconstitutional legislative enactment is a binding law of the land;

225. 12 Ohio 364, 368-69 (1843).
226. *See generally* Chesnut v. Shane's Lessee, 16 Ohio 599 (1847).
227. 17 Ohio 125 (1848).
228. Schooner Aurora Borealis v. Dobbie, 17 Ohio 125. As to future cases, the court held that the act in question had "the force and effect of a law." *Id.* at 128.
229. *Good*, 12 Ohio at 367–68.
230. 7 Ohio 125 (1835).

> unless we adopt the principle that the law-making power is above the constitution under which it acts; unless, in fact, we adopt the principle, that, in this country, where we boast of constitutional and limited governments, legislative supremacy is co-extensive with parliamentary omnipotence.[231]

This statement could be pressed into service in either the majoritarian or the countermajoritarian cause; but it was not an audacious assertion of judicial power. Judge Hitchcock always maintained that the court could not strike down a statute unless there was absolutely no doubt that the statute violated both "the letter and the spirit" of the constitution.[232]

The paucity of evidence from Ohio, of course, does not disprove Shugerman's general assessment of the theories of judicial review employed by courts nationwide. To evaluate that assessment, one must look beyond Ohio. Shugerman asserts that "there are almost no examples of countermajoritarian justifications [for judicial review] from appointed judges, and few examples from before 1850."[233] He did find four, pre-1850, countermajoritarian opinions by appointed judges, including three from southern states and one from Delaware, and he quotes the Delaware opinion as an illustration of countermajoritarian reasoning: "These co-ordinate branches are intended to operate as balances, checks and restraints, not only upon each other, but upon the people themselves; to guard them against their own rashness, precipitancy, and misguided zeal; and to protect the minority against the injustice of the majority."[234]

There were, in fact, other opinions in which appointed judges used similar language before 1850. As early as 1831, for example, a Tennessee judge declared:

> Legislation is always exercised by the majority. Majorities have nothing to fear; for the power is in their hands. *They* need no written constitution, defining and circumscribing the powers of the government. Constitutions are only intended to secure the rights of

231. *Commercial Bank*, 7 Ohio at 129–30.
232. *McCormick*, 2 Ohio at 75; *see also* Armstrong v. Treasurer of Athens County, 10 Ohio 235, 237 (1840).
233. SHUGERMAN, *supra* note 9, at 132.
234. *Id.* (quoting Rice v. Foster, 4 Del. 479, 487 (1847)). The other cases Shugerman cites are Jones' Heirs v. Perry, 18 Tenn. 59 (1836), Wally's Heirs v. Kennedy, 10 Tenn. 554 (1831), and Goddin v. Crump, 35 Va. 120 (1837). *Id.* at 334 n.48.

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> the minority. They are in danger. The power is against them; and the selfish passions often lead us to forget the right.[235]

Shugerman cites a dozen cases dating from 1848 to 1856 to show the rise of countermajoritarian theory among the elected judges.[236] He does not say that the list is exhaustive, but he does claim, no doubt accurately, that *Economic Crisis* is "[b]ased on the most comprehensive study yet undertaken of the state courts' historical practice of judicial review."[237] Even if the extensive roster of cases is merely illustrative, though, it raises questions about the strength of Shugerman's claim. Of the twelve opinions he cites, five were written by appointed judges,[238] and several of these arguably had little relation to theories of judicial review.[239] Of the seven opinions by elected judges, four were from New York, which suggests that the Empire State may not have been typical.[240] The remaining three cases provide a slim foundation for an argument for a nationwide trend among elected judges.

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235. Bank of State v. Cooper, 10 Tenn. 599, 606 (1831). The Tennessee court seems to have had a particular penchant for this type of thinking, but there are examples from elsewhere. *See generally, e.g.*, Parker v. Commonwealth, 6 Pa. 507 (1847); City of St. Louis v. Allen, 13 Mo. 400 (1850).

236. *See generally* Shugerman, *supra* note 6, at 1124-32.

237. *Id.* at 1068.

238. *See* SHUGERMAN, *supra* note 9, at 129–32 (citing De Chastellux v. Fairfield, 15 Pa. 18 (1850); Ervine's Appeal, 16 Pa. 256 (1851); Greenough v. Greenough, 11 Pa. 489 (1849); Donnell v. State, 3 Ind. 480 (1852); Griffith v. Comm'rs of Crawford County, 20 Ohio 609 (1851)); *see also* Shugerman, *supra* note 6, at 1127–30. As Shugerman relates, John B. Gibson, who wrote the court's opinions in *De Chastellux* and *Greenough*, and Richard Coulter, the author of the *Ervine* opinion, were both subsequently elected to the Pennsylvania Supreme Court. Shugerman writes that Gibson "had been a prominent critic of judicial review. Then in 1850, as he was running in the state's first judicial elections to retain his seat, he embraced judicial review." SHUGERMAN, *supra* note 9, at 129–30. Shugerman thus suggests that the electoral process somehow caused this eminent jurist to suddenly change his mind on a fundamental constitutional principle. In fact, Gibson's understanding of judicial review as of 1850 was consistent with views he had expressed long before then. *See* Donald Grier Stephenson Jr., *Gibson, John Bannister*, *in* 1 GREAT AMERICAN JUDGES: AN ENCYCLOPEDIA 287, 290–92 (John R. Vile ed., 2003); s*ee also generally* Stanley I. Kutler, *John Bannister Gibson: Judicial Restraint and the "Positive State*,*"* 14 J. PUB. L. 181 (1965). Shugerman concedes that Gibson "appeared to acknowledge the validity of judicial review" in 1845 (Shugerman*, supra* note 6, at 1127 n.401), but Stephenson and Kutler indicate that Gibson's acceptance of judicial review went back even further than that. *See* Stephenson, *supra* note 238, at 292–93; *see* Kutler, *supra* note 238 at 190.

239. In both *De Chastellux* and *Greenough* the court asserted judicial power vis-à-vis legislature, but such assertiveness is not inherently majoritarian or countermajoritarian. In any event, the principle that legislatures cannot interfere with judicial proceedings by undoing the judgments of courts, as the legislature attempted to do in *De Chastellux* and *Greenough*, was not new. *See, e.g.*, Dash v. Van Kleeck, 7 Johns. 477, 489–90 (1811); Merrill v. Sherburne 1 N.H. 199 (1818); Lewis v. Webb, 3 Me. 326 (1825).

240. Shugerman acknowledges that New York was unusual, "striking down more statutes than other courts" and "rel[ying] on antimajoritarian arguments more overtly than other courts." SHUGERMAN, *supra* note 9, at 127.

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Shugerman cites two Ohio opinions as examples of a turn towards countermajoritarian theory after 1850.[241] One, as Shugerman notes, was authored by an appointed judge shortly before the era of the elective judiciary began.[242] The other case, *Cincinnati Gas Light and Coke Company v. Bowman*,[243] Shugerman describes as a "remarkable" example of the shift to a countermajoritarian rationale for judicial review.[244] In that case, he says, the Cincinnati Superior Court struck down "a tax statute that gave special privileges and deductions to particular individuals and corporations."[245] Here is Shugerman's excerpt from Judge William Gholson's opinion:

> I do not admit that, in this respect, a whole community should be more favored than the most helpless individual member. . . . It is a trite saying, that eternal vigilance is the price of liberty; and so it is of a good government, and of freedom from oppression. A single individual, however vigilant, may sometimes suffer unjustly at the hands of a community. But communities rarely, if ever, suffer any injustice at the hands of those vested with authority, which cannot be traced to their own want of vigilance. Those who will not take that part in governing themselves, to which they are entitled under the constitution and laws, and will not exert, in this respect, that weight and influence which they may justly claim, must not be surprised if others take the trouble to govern them, and do not, at all times, do so in a satisfactory manner. But the remedy for any such oppression is not, and should not be, to ask a departure, on the part of a judge, from the strict line of duty, but rather a resort to that vigilance which has been neglected. A community thus suffering under oppression, cannot apply to any Hercules for help, for it is with the people alone, under our system of government, that any such Herculean power resides. It is with them to make or unmake constitutions, laws, and officers.[246]

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241. Shugerman, *supra* note 6, at 1128-30.

242. *See* Griffith v. Comm'rs of Crawford County, 20 Ohio 609 (1851). Shugerman notes that the judge, Rufus Spalding, was an appointed judge of the old court. Shugerman, *supra* note 6, at 1130 n.420. Spalding decried the "internal improvement *piracy*" represented by a law authorizing a county to subscribe to the stock of a railroad corporation upon approval by a majority of the county's voters. He observed that "if the rights of *minorities* are not observed, it will not be long before the *majorities* will be in bondage." *Griffith,* 20 Ohio at 623.

243. 12 Ohio Dec. Reprint 147 (Super. Ct. Cincinnati 1855).

244. Shugerman, *supra* note 6, at 1128.

245. *Id.*

246. SHUGERMAN, *supra* note 9, at 131 (quoting Cincinnati Gas Light & Coke Co. v. Bowman, 12 Ohio Dec. Reprint 147, 157–58 (Super. Ct. Cincinnati 1855)).

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Shugerman interprets Judge Gholson to say that the people, having the power to fight against government abuse, have no one to blame but themselves if they are, in fact, abused. "Their remedy is the next election, not litigation."[247] Individuals, on the other hand, "are powerless against the tyranny of the majority"; the courts are their only salvation.[248] "Thus," concludes Shugerman, "courts have a countermajoritarian duty—and perhaps *no majoritarian duty*."[249]

In fact, the superior court did not strike down the tax statute (or, to be more precise, one section of the statute) or even grant the plaintiff's request to enjoin the collection of the tax. As Judge Gholson observed, the Supreme Court of Ohio had already declared the controverted section unconstitutional in *Exchange Bank v. Hines*[250] and reiterated its position in *Ellis v. Linck*.[251, 252] Judge Gholson ruled emphatically that he had no choice but to follow the supreme court. The plaintiff, arguing that the superior court was not bound by *Hines*, made a "strong appeal . . . on the ground of the great magnitude of the question, and the important bearing which its decision may have on this community, and other communities of the state."[253] Judge Gholson denied that such considerations could influence the determination of questions of law.[254] "The legislative, the executive, and the judiciary are but ministers and servants of the people," he wrote.[255] All had to obey the constitution and the laws.[256] "If a deviation from it proves oppressive to one individual, or many individuals, the proper redress should be applied, and in the proper manner."[257] Then came the passage quoted by Shugerman.[258] The "strict line of duty" that Judge Gholson felt obliged to follow was adherence to the law as laid down by a higher court.[259] He would not deviate from that duty just because the community at large might benefit.[260] Shugerman construes his extract from Gholson's opinion as a countermajoritarian rationale for judicial review, but

247. *Id.*
248. *Id.*
249. *Id.*
250. 3 Ohio St. 1 (1853).
251. 3 Ohio St. 66 (1853).
252. *Cincinnati Gas Light & Coke Co.*, 12 Ohio Dec. Reprint at 157 (citing Exchange Bank v. Hines, 3 Ohio St. 1.
253. *Id.*
254. *Id.*
255. *Id.*
256. *See id.*
257. *Cincinnati Gas Light & Coke Co.*, 12 Ohio Dec. Reprint at 157.
258. *Id.*
259. *Id.* at 158.
260. *See id.*

it was actually an exercise in judicial restraint.[261] The holding was based on superior judicial authority.[262]

Shugerman counts eleven cases in the 1850s in which the Supreme Court of Ohio struck down laws as unconstitutional.[263] One is hard-pressed to find countermajoritarian justifications for judicial review in those opinions. They offer no evidence that the judges were suspicious of democracy or "the people."[264] If anything, some of the opinions may lean toward majoritarian thinking.[265] But Ohio's judges did not engage much in the kind of rhetoric that can be marshaled for or against a particular theory of judicial review.

Shugerman calls the "minority-protection emphasis"[266] that he sees in opinions such as Judge Gholson's a "surprising reversal"[267] and a "puzzle."[268] Why would popularly elected judges move away from a traditional, majoritarian theory of judicial review and replace it with a countermajoritarian conception? Shugerman discusses several possible explanations. Northern antislavery judges, observing the chaos in Bleeding Kansas, may have become disenchanted with the idea of popular sovereignty.[269] Elected judges, perhaps, bent over backwards to protect individual rights to quiet the fears of opponents of judicial elections.[270] The democratic reforms of the Jacksonian era may have convinced judges that the people no longer needed courts to protect them from legislatures, inducing them to turn their attention to protecting individuals and minorities.[271] But Shugerman seems inclined toward an explanation based on the fragmented politics of the 1850s. "As parties were splitting into

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261. *See* SHUGERMAN, *supra* note 9, at 131.

262. Judge Gholson's superior court colleague, Judge Bellamy Storer, in a separate opinion, also stressed the court's duty to adhere to rulings of the Ohio Supreme Court. *Cincinnati Gas Light & Coke Co.*, 12 Ohio Dec. Reprint at 163–65.

263. Shugerman, *supra* note 170, at 3.

264. *See id.* at 127.

265. *See Work v. State*, 2 Ohio St. at 306 ("We have deemed it our duty to meet and arrest, at the outset, what we cannot but regard as an infringement of a great constitutional right [trial by jury]."). Shugerman summarizes McCoy v. Grandy, 3 Ohio St. 463 (1854), as holding that a certain "transfer of property infringed 'inviolate' vested rights." Shugerman, *supra* note 170, at 42. Since Shugerman links the protection of property to countermajoritarian theory, as when the New York court in Wynehamer v. People, 13 N.Y. 378 (1856), offered "a robust argument for judicial review as a check against majoritarianism" and "popular abuses" (SHUGERMAN, *supra* note 9, at 129; *see also* Shugerman, *supra* note 6, at 1126), it may be that he regards *McCoy* as a countermajoritarian decision. But there is no reason why a property right should be seen as less of a popular right or less deserving of constitutional protection from overreaching legislatures than any other right, nor is there anything in *McCoy* to suggest a fear of democracy.

266. SHUGERMAN, *supra* note 9, at 128.

267. *Id.* at 127.

268. *Id.* at 126.

269. *See id.* at 138.

270. *See id.* at 139.

271. *See* SHUGERMAN, *supra* note 9, at 141.

battling factions," he writes, "some judges unsurprisingly saw that the center could not hold. They were losing faith in the mechanics of democracy and the claims of popular majorities."[272] Moreover, exposure to the difficult and dirty business of electoral politics might have turned judges against majoritarianism. "The first generation of elected judges," suggests Shugerman, "might have reacted against democracy once they experienced running in elections themselves."[273]

Shugerman furnishes no evidence to show that any of the judges he quotes for their countermajoritarian opinions turned against majoritarianism because of their newly jaundiced views of democracy. Furthermore, the idea that staunch Democrats such as Judges Daniel Pratt of New York, Rufus P. Spalding of Ohio, or Samuel E. Perkins of Indiana, all of whom Shugerman quotes for their countermajoritarian views, suddenly became High Federalists after being exposed to electoral politics is implausible. Most judges, whatever their party affiliations, whether appointed or elected, were political animals. Pratt was a "Democrat of the Jeffersonian school," an "unwavering supporter of the party" whose "counsels [were] often consulted by party leaders."[274] Perkins, whose "reputation was chiefly political," edited Democratic newspapers during the Jacksonian era and again after the Civil War.[275] Spalding, a former Democratic Speaker of the Ohio House of Representatives, took part in the Free Soil movement and the formation of the Republican Party and served three terms in Congress.[276]

In searching for an explanation for the supposed turn toward countermajoritarian justifications for judicial review around the middle of the nineteenth century, Shugerman overlooks a key component of Democratic ideology. Democrats dominated most of the constitutional conventions of the 1840s and 1850s.[277] Their primary political principle

272. *Id.* at 137.

273. *Id.* at 140.

274. W. H. MCELROY AND ALEX. MCBRIDE, LIFE SKETCHES OF GOVERNMENT OFFICERS AND MEMBERS OF THE LEGISLATURE OF THE STATE OF NEW YORK FOR 1874, at 39 (1874).

275. 1 COURTS AND LAWYERS OF INDIANA 206–07, 248–49 (Leander J. Monks ed., 1916).

276. *See* JOHN SAMUEL STILL, THE LIFE OF RUFUS PAINE SPALDING, AN OHIO POLITICIAN, 43–46, 61–76, 86–93 (1948) (unpublished M.A. thesis, Ohio State University). Spalding served as an appointed judge and did not run to retain his seat when the new constitution took effect. *Id.* at 55, 58–59. But Ranney, who shared Spalding's views of the "internal improvements piracy," and concurred with Spalding in *Griffith v. Commissioners of Crawford County*, 20 Ohio 609 (1851), was a Democratic Party activist and three-time candidate for Congress by the time he ran successfully for the Ohio Supreme Court in 1851. Ranney's congressional races are documents in MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS, 1788–1997: THE OFFICIAL RESULTS OF THE ELECTIONS OF THE 1ST THROUGH 105TH CONGRESSES 135, 147, 153 (1998).

277. Shugerman notes the triumph of Radical (Barnburner) Democrats in the election of delegates to the New York convention of 1846. SHUGERMAN, *supra* note 5, at 93. Democrats held a majority of delegates in most of the conventions, with Radicals making up a strong if not dominant contingent. *See, e.g.*, EUGENE H. ROSEBOOM, 4 THE HISTORY OF THE STATE OF OHIO: THE CIVIL WAR ERA, 1850–1873 129 n.11 (Carl Wittke ed., 1944); Ray A. Brown, *The Making of the Wisconsin Constitution*, 1949 WIS.

was popular government. As Shugerman notes, the national Democratic platform of 1848 lauded "the sovereignty of the people."[278] Radical Democrats harped continuously on the theme that a wealthy elite used the power of government to lord it over the majority of the people.[279] President Jackson himself said in his message vetoing the recharter of the Second Bank of the United States "that the rich and powerful too often bend the acts of government to their selfish purposes."[280] Democrats were forever tarring Whigs as the successors to the aristocratic Federalists, whose creed, according to the Illinois state Democratic convention of 1839, was "that *the few should be provided for at the expense of the many*, that the *few* were the *rich* and the *well-born*, and the *many consisted of the mass of the people*."[281]

But there was also a limited government component to Jacksonian Democracy. As a leading student of Jacksonian thought has explained, Democrats recognized that the human tendency to accumulate power and oppress their fellows operated upon the majority as well as the minority. While government had to be in the hands of the majority, "political power had to be curbed and restricted to the point where government exercised only administrative duties."[282] Shugerman recognizes the influence of this limited government perspective at the constitutional conventions, particularly in New York.[283] However, he seems to forget about it in looking for reasons for the rise of countermajoritarian judicial review. To illustrate the transition to countermajoritarianism, Shugerman quotes Democratic Judge Seward Barculo as declaring in 1848 that "*excessive legislation*" was "the great legal curse of the age . . . drawing every thing within its grasp."[284] This was standard Democratic fare. The Washington

L. REV. 648, 657 (1949); 1 LOGAN ESAREY, A HISTORY OF INDIANA FROM ITS EXPLORATION TO 1850, at 515 (2d ed. 1918); BENJAMIN F. SHAMBAUGH, HISTORY OF THE CONSTITUTIONS OF IOWA 175–76, 291–92 (1902); JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS 30 (1972); SUSAN P. FINO, THE MICHIGAN STATE CONSTITUTION: A REFERENCE GUIDE 8 (1996).

278. SHUGERMAN, *supra* note 9, at 103.

279. *Id.*

280. *Quoted in* HARRY L. WATSON, LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA 145–46 (rev. ed. 2006).

281. *Quoted in* GERALD LEONARD, THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS 189 (2002) (emphasis added).

282. JOHN ASHWORTH, "AGRARIANS" AND "ARISTOCRATS: PARTY POLITICAL IDEOLOGY IN THE UNITED STATES, 1837–1846 17–18 (Cambridge University Press 1987) (1983).

283. SHUGERMAN, *supra* note 9, at 91, 93–94, 103–05. Only in connection with the New York convention does Shugerman note that Radical Democrats dominated the convention. *Id.* at 93. He describes the limited-government view at the conventions generally as bipartisan. *Id.* at 104. In fact, Democrats dominated most of the conventions, usually with a strong, if not predominant, radical contingent. *See supra* note 277 and accompanying text.

284. SHUGERMAN, *supra* note 9, at 128. Shugerman notes that Barculo had been appointed by a Democratic governor. Shugerman, *supra* note 6, at 1125 n.387. In 1838, Barculo ran for the New York Assembly as a Democrat. *New-York Nominations*, 6 NEW-YORKER 74 (October 20, 1838).

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Globe, established in 1830 as the unofficial mouthpiece of the Jackson administration, had as its motto, "the world is governed too much."[285]

In 1833,Virgil Maxcy, Andrew Jackson's solicitor of the Treasury, addressed the Brown University chapter of Phi Beta Kappa. The "selfish principle" was part of human nature, Maxcy averred,

> and a majority of numbers is no more exempt from it than individuals. The majority will therefore oppress and throw an undue share of the burthens of government upon the minority, or promote its own interest at the expense of the minority, unless there be interposed, for the protection of the latter, some check upon this selfish principle.[286]

Bills of rights were classic examples of such checks, shielding individual rights from legislative action, "however large the majority."[287]

In the first issue of the *Democratic Review* in 1837, editor John O'Sullivan raised the fundamental question of Jacksonian majoritarianism: the rights of minorities in a democracy. O'Sullivan conceded the plausibility of the antidemocratic argument that "[m]ajorities are often as liable to error of opinion, and not always free from a similar proneness to selfish abuse of power, as minorities."[288] "A strong and active democratic *government*," he declared, "is an evil, differing only in degree and mode of operation, and not in nature, from a strong despotism."[289] Because majorities could no more be trusted with power than minorities, the "best government is that which governs least."[290]

To be sure, before the Panic of 1837, many Democrats desired the support of state and local governments for internal improvements. Americans had a deeply rooted tradition of public promotion of internal improvements and other private enterprise that went back to the earliest colonial days.[291] Only after the Panic of 1837 did an antipromotional view come to dominate the Democratic Party.[292] Even then, though, the regional and economic heterogeneity that characterized all major political parties in the nineteenth century ensured that some Democrats would look to the government for assistance in economic development. At the Ohio

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285. WATSON, *supra* note 280, at 240.
286. *Mr. Maxcy's Oration,* 1 EXAMINER & J. POL. ECON. 99, 102 (1833). The *Examiner* was published by Condy Raguet, whose previous publication, the *Free Trade Advocate,* bore the motto "Laissez-Nous Faire."
287. *Id.*
288. John O'Sullivan, *Introduction*, 1 U.S. MAG. & DEMOCRATIC REV. 1, 3 (1837).
289. *Id.* at 6.
290. *Id.*
291. 1 VICTOR S. CLARK, HISTORY OF MANUFACTURES IN THE UNITED STATES 31–72 (1929).
292. *See id.* at 282-83.

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constitutional convention of 1850–51, one Democratic delegate, proclaiming "*vox populi, vox Dei*," demanded that the voters be allowed to decide whether the state should incur debt to finance internal improvements.[293] Another Democrat declared that the prosperous portion of the state, having "waxed fat at the public crib," had no right to deny "their poorer, because less favored, fellow citizens, the humble privilege of helping themselves with their own money."[294]

But these were by then minority views that were decisively defeated at the Ohio convention.[295] Radical Democrat Rufus P. Ranney denied the right of the majority to tax the minority for any purpose "beyond the support of government" and the execution of the laws.[296] When another delegate suggested allowing local governments to vote funds for the completion of internal improvements on which work had already begun, Ranney denounced the proposal as "amount[ing] to about this: that where the minority has been robbed once, it shall be proper to do it again."[297] Ranney, of course, voted for a constitutional provision to prohibit local governments from assisting private enterprise.[298] The convention adopted that provision by a vote of 78–16.[299]

Without endorsing Shugerman's claim that judges turned to a countermajoritarian way of thinking in the late 1840s and 1850s—the dearth of evidence from Ohio, at least, throws it into question—I would suggest that any increase in such modes of thought in those years, far from being a puzzle, might have been the natural product of well-established, limited government principles. As an example of "the new critics of democracy," Shugerman quotes Ohio judge Rufus Spalding's denunciation of the "internal improvement *piracy*" represented by a law authorizing a county to subscribe to the stock of a railroad corporation upon approval by a majority of the county's voters.[300] But Judge Spalding was expressing a Democratic, not an antidemocratic, view, in which limited government was the guardian principle of the people's liberty. After all, as Spalding went on, "if the rights of *minorities* are not observed, it will not be long before the *majorities* will be in bondage."[301]

293. DEBATES AND PROCEEDINGS, *supra* note 61, at 123 (remarks of James Loudon).
294. *Id.* at 308 (remarks of John L. Green).
295. *See id.* at 426-27.
296. *Id.*
297. *Id.*
298. DEBATES AND PROCEEDINGS, *supra* note 61, at 427
299. *Id.*
300. SHUGERMAN, *supra* note 9, at 131–32.
301. *Id.* at 132 (quoting Griffith v. Comm'rs of Crawford County, 20 Ohio 609, 623 (1851)).

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VI. FROM THE "ACTIVE, INDUSTRY-BUILDING STATE" TO LAISSEZ FAIRE

The purpose of this article has been to test Jed Shugerman's argument that the economic crises of the late 1830s and 1840s led, through constitutional conventions in New York and other states, to a desired increase in the exercise of judicial review by elected judges and to an unexpected rise in countermajoritarian justifications for judicial review. Based primarily on the evidence from Ohio, I am skeptical of Shugerman's arguments and his conclusions. I cannot say conclusively on the basis of this evidence that Shugerman is mistaken. There is surely more proof to be dug up in Ohio, and Ohio may not be typical of the country as a whole.[302] But, having examined the proof adduced by Shugerman for one important state, I believe the verdict on his thesis must be "not proven."

In one important respect, though, Shugerman may be right: the midcentury constitutional conventions represented the beginnings of laissez-faire constitutionalism. This subject is beyond the main theme of this article, but after so many pages of misgivings, a few words in Shugerman's defense seem only fair.

In *Economic Crisis*, Shugerman links the midcentury constitutional conventions to the "transition from the early republic's active industry-building state to the laissez-faire constitutionalism that dominated the late nineteenth century and early twentieth century."[303] He describes Samuel Medary's *New Constitution* as a "libertarian manifesto"[304] with an "anti-

302. According to Shugerman's data, the number of cases in which courts declared statutes unconstitutional increased by four or more in nine states from the 1840s to the 1850s (considering only those states that had entered the Union by 1821). *Id.* at 278. In addition, in the latter decade there was a large number of such cases in California, which became a state in 1850. *Id.* Two of these states, Maine and North Carolina, had appointed judges throughout the nineteenth century. New York, Ohio, Louisiana, Indiana, Illinois, and California all adopted constitutions in the middle of the nineteenth century that contained numerous restrictions on legislative power. It may be that these restrictions accounted for a significant percentage of the invalidations of statutes. Tennessee had a history of declarations of unconstitutionality—as many by appointed judges in the 1830s than by elected judges between 1853 (when the state adopted an elective judiciary) and 1864. *Id.* Shugerman discusses the Tennessee phenomenon in *The People's Courts*. *Id.* at 52–53.

Shugerman's data show that Missouri had the biggest percentage increase in declarations of unconstitutionality, going from one in the 1840s to eight in the 1850s. Shugerman, *supra* note 170, at 58. But one of the eight was decided by the old appointed court (*see generally* Butler v. Chariton County Ct., 13 Mo. 112 (1850)), a second was decided on the basis of longstanding precedent (Bryson v. Bryson, 17 Mo. 590 (1853); *see also generally* State v. Fry, 4 Mo. 120 (1835)), and a third followed the dictate of a recent constitutional amendment. *See generally* State ex rel. Douglass v. Scott, 17 Mo. 521 (1853). In a fourth case, the supreme court agreed in dictum with the lower court that the statute in question was unconstitutional, but the court rejected the appeal because it had not been properly brought before the court. *See generally* Boggs v. Caldwell County, 28 Mo. 586 (1859). In the eight decisions (Shugerman appropriately counts State v. Sloss, 25 Mo. 291 (1857) and State v. Todd, 26 Mo. 175 (1858) as one), the court had little or nothing to offer in the way of theories of judicial review.

303. Shugerman, *supra* note 6, at 1068.

304. *Id.* at 1099.

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legislature and anti-regulation perspective"[305] and asserts that the elected judges of the 1850s "developed judicial review and substantive due process for property rights, the core weapon and doctrine of the *Lochner* era"[306] (that is, the era of laissez-faire constitutionalism).

In a critique of *Economic Crisis*, Matthew J. Lindsay contends that Shugerman "overstates both the extent to which the adoption of judicial elections in the mid-nineteenth century was animated by an 'an overall laissez-faire, anti-regulation, anti-legislation ideology' and the extent to which the first generation of elected judges laid the doctrinal foundation for the so-called *Lochner* era several decades later."[307] The main Jacksonian theme that appeared in *The New Constitution*, writes Lindsay, was not laissez faire but antagonism toward special privilege.[308] "Read through a populist Jacksonian lens, *The New Constitution* begins to look less like a 'libertarian manifesto' steeped in the ideology of laissez faire than a critique of legislative favoritism for the wealthy at the expense of the poor that sometimes opportunistically adopted libertarian, laissez-faire rhetoric."[309] The Jacksonian aversion toward "class legislation" contributed to the development of *Lochner*-era laissez-faire constitutionalism.[310] Furthermore, argues Lindsay, the development of substantive due process in the late nineteenth century did not derive from property-rights decisions of the judges elected in the 1850s, as claimed by Shugerman.[311] Instead, it emerged from a new conception of economic liberty that drew upon "the anti-slavery movement and the neoclassical political economy of the industrial era."[312]

Taking Lindsay's critique into account,[313] Shugerman tempers his position in *The People's Courts*.[314] He deletes the libertarian label for *The New Constitution*, omits the reference to the paper's "antilegislature and antiregulation perspective," and claims only that the elected judges of the 1850s "helped lay a foundation for the *Lochner* era."[315] However, he

305. *Id*.
306. *Id.* at 1123.
307. Matthew J. Lindsay, *In Search of "Laissez-Faire Constitutionalism*,"123 HARV. L. REV. F. 55, 58 (2010).
308. *Id.* at 58.
309. *Id.* at 65.
310. *Id.*
311. *Id.* at 67-68.
312. Lindsay, *supra* note 307, at 77.
313. Dan Ernst, *Lindsay on Shugerman and Lassez-Faire Constitutionalism*, LEGAL HISTORY BLOG, http://legalhistoryblog.blogspot.com/2010/12/lindsay-on-shugerman-and-lassez-faire.html.
314. *See* SHUGERMAN, *supra* note 9, at 107.
315. *See id.* at 107, 331.

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continues to suggest that the free-market ideology of the midcentury conventions influenced later laissez-faire constitutionalism.[316]

Lindsay is correct in identifying hostility toward special privilege as an animating force behind the mid-nineteenth century movement to rewrite the state constitutions and in dismissing antiregulatory fervor as a key component of that movement. However, he too readily dismisses the degree to which the Democrats who dominated state politics and the constitutional conventions embraced laissez-faire thought. Shugerman's perception of a shift away from support for an "active, industry-building state" is on the mark.[317] The widespread opposition to governmental economic development schemes and public promotion of private enterprise gave the conventions their laissez-faire character.

One important reason why resistance to, as opposed to promotion of, economic regulation played such a small part in the conventions is that legislative regulation of the economy hardly existed. The administrative state, with its railroad commissions and factory inspectors, lay in the future. William J. Novak has shown the ubiquity of regulation in the "well-ordered market" of the nineteenth century, but most of the laws he discusses were local ordinances designed to maintain public order, suppress nuisances, or prevent fraud.[318] They did not interfere directly in economic arrangements between buyers and sellers or employers and employees.[319] A midcentury compilation of Cincinnati's municipal ordinances reveals the efforts of Ohio's largest city to ensure the honesty of weights and measures,[320] make the sale of gunpowder safer,[321] and restrict the sale of wood and hay to specific market locations.[322] But ordinances limiting the rates charged by common carriers were the only direct interference in economic relations.[323] "Were the legislature now to regulate the price of labor, fix the price of every bushel of wheat or corn, and establish an invariable standard of price for all articles," wrote Maine attorney John Appleton in 1831, "the monstrous absurdity and impolicy of such proceedings would be immediately recognized."[324]

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316. *Id.* at 107, 330–31 n.3.

317. Shugerman, *supra* note 6, at 1068.

318. *See generally* WILLIAM J. NOVAK, THE PEOPLE' WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 83–113 (1996).

319. *See generally id.* at 83-113.

320. LAWS AND GENERAL ORDINANCES OF THE CITY OF CINCINNATI 95 (candles), 138 (tobacco) (Wm. G. Williams comp., 1853). The tobacco ordinance also provided for the inspection of tobacco by an elected tobacco inspector. *Id.* at 138.

321. *Id.* at 115–16.

322. *Id.* at 154–56.

323. *Id.* at 100, 120. Midcentury Columbus had a collection of similar ordinances, but with no rate regulations. *See* ORDINANCES OF THE CITY OF COLUMBUS (1848).

324. A.J. [John Appleton], *Usury Laws*, 6 AM. JUR. & LAW MAG. 282, 290 (1831).

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A few Radical Democrats opposed, on multiple grounds, even the types of laws that Novak describes. William Leggett attacked New York City's attempts to regulate auctions, securities, and weights.[325] "The weighing of merchandise," he declared, "is a matter with which legislation has nothing to do: the laws of trade would arrange that business much more to the satisfaction of all parties concerned than the laws of the state ever can do."[326] But Leggett was as much put out by the misuse of patronage as he was by the abuse of the laws of trade.[327] He decried the appointment of weighmasters as nothing more than a way for politicians to reward their supporters.[328] Similarly, as Shugerman himself observes, the extreme antiregulation positions adopted by some delegates at the New York convention of 1846 were based as much on patronage concerns as on the ideology of free trade.[329]

As Leggett's position on weighmasters shows, "populist" Jacksonianism and laissez-faire thought mingled in the Radical Democratic mind. The laissez-faire, small government political and economic thought of Radical Democrats undeniably influenced the mid-nineteenth century constitutional conventions. When financial disaster hit state and local governments after the Panic of 1837, the collapse of legislatively chartered banking, canal, and railroad companies resulted in defaults in payments on bonds issued by state and local governments, skyrocketing public debt, tax increases, and the debasement of a currency consisting largely of bank notes.[330] For many Democrats, anger at legislatures may have been rooted, as Lindsay maintains, primarily in the misuse of legislative power for the benefit of the wealthy.[331] *But the solution to the problem was* laissez-faire. At the Ohio constitutional convention, delegates furious over state subsidization of private companies that produced no public benefits and ran up huge public debts insisted that government "leave railroad, canal, turnpike and other corporate associations, to get along upon their own credit, without any connexion or partnership with the State whatever"[332] and that "debt-contracting, loan laws, and money squandering may forever be put an end to—that the whole system may be dug up by the roots, and no

325. 1 A COLLECTION OF THE POLITICAL WRITINGS OF WILLIAM LEGGETT 259 (Theodore Sedgwick Jr. ed., 1840).

326. *Id.* at 259.

327. *Id.* at 258-59.

328. *Id*.

329. SHUGERMAN, *supra* note 9, at 92–96.

330. *See id.* at 85, n.2; *see also generally* Peter L. Rousseau, *Jacksonian Monetary Policy, Specie Flows, and the Panic of 1837*, 62 J. Econ. Hist. 457 (2002).

331. *See* Lindsay, *supra* note 307, at 63-65.

332. DEBATES AND PROCEEDINGS, *supra* note 61, at 523 (remarks of Henry H. Gregg).

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single sprout ever permitted to shoot up again."[333] This was laissez-faire with a literal vengeance. But it is important to note that all this ire was directed at economic development schemes that put the taxpayers at risk. It was not aimed at the police power.

Rank-and-file Democrats probably cared more about special privilege than economic theory, but important Radicals believed in "free trade" for the sake of economic efficiency as well as liberty. At the Ohio convention, Radical Democrat Ranney asked his fellow delegates to consider who was responsible for the transformation of Ohio from a wilderness to a land of "cultivated farms" and "thriving cities and towns."[334] It was not by actions of the legislature that "forests were cleared, railroads were built and our vast system of canals constructed," he answered.[335] Rather, "it was by the hard industry of the people that it was effected, without any aid from the Legislature; it was their energy, their industry, and their stern enterprise that made the State as it was, without Legislative aid."[336] At the Indiana constitutional convention occurring at the same time, delegate Daniel Read, a Jacksonian professor at Indiana University, insisted that the internal-improvement and banking businesses were "most safely and economically accomplished by individual sagacity and enterprise."[337]

Ranney and Read proved prescient. In the 1850s, as the new constitutions of Ohio and Indiana forced those states away from the "active industry-building" model, private capital poured into both states and financed the construction of extensive rail networks.[338] That does not mean that enthusiasm for public financing of economic development disappeared altogether. The tug of war between promotionalism and laissez faire has continued ever since.[339] But the midcentury conventions threw constitutional obstacles in the way of subsidization that remain effective to this day.[340]

After the Civil War, some courts wielded free-market economics as a weapon against the legislative promotion of private enterprise, usually in

333. *Id.* at 469 (remarks of Henry H. Gregg).
334. *Id.* at 248.
335. *Id*.
336. *Id*.
337. 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 645 (H. Fowler reporter, 1850).
338. HARRY N. SCHEIBER, OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1812–1861, at 293 (2012) (1968); Victor M. Bogle, *Railroad Building in Indiana, 1850–1855*, IND. MAG. OF HIST. 211 (1962).
339. *See generally* David M. Gold, *Eminent Domain and Economic Development: The Mill Acts and the Origins of Laissez-Faire Constitutionalism*, J. LIBERTARIAN STUD., Summer 2007, at 101.
340. *See generally* David M. Gold, *Public Aid to Private Enterprise Under the Ohio Constitution: Sections 4, 6, and 13 of Article VIII in Historical Perspective*, 16 U. TOL. L. REV. 405 (1985); Sarah Osmer, Comment, *Faster. Cheaper. Unconstitutional: Why the Public's Subsidy of Jobs Ohio Violates Article VIII, Sections 4 & 6 of the Ohio Constitution*, 62 CASE W. RES. L. REV. 919 (2012).

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conjunction with animadversions on special privilege or class legislation. In 1870, Michigan judge Thomas M. Cooley, an old Jacksonian, wrote in *People v. Salem*[341] that the state "cannot compel an unwilling minority to submit to taxation in order that it may keep upon its feet any business that cannot stand alone."[342] If liberty and equality were to be preserved, the state should leave economic development to "the law of demand and supply."[343] This was good, old-fashioned Radical Democratic doctrine. When John Appleton, then chief justice of Maine, declared two years later that "[t]he sagacity shown in the acquisition of capital is best fitted to control its use and disposition,"[344] he did so to strike down a governmental loan to a private company.[345] This was the same laissez-faire economic doctrine he had been preaching since the 1820s.[346] Moreover, Chief Justice Appleton rested his decision in part on Maine's equivalent of a due process clause.[347] That clause, he wrote, was meant to protect the individual from "the arbitrary exercise of the powers of government."[348] What could be more arbitrary than the forced collection of money from one man to loan to another?[349] Judge Cooley and Chief Justice Appleton did not have to choose between "free trade" and opposition to special privilege as the basis for their holdings. In the minds of these eminent jurists, at least, the two principles were inextricably linked. The extent to which such laissez-faire economic thought bolstered the animus against class legislation and helped shape substantive due process in the *Lochner* era is a subject to which Professor Shugerman might want to return.

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341. 20 Mich. 452 (1870).
342. *Id.* at 487.
343. *Id.* at 484, 486–87.
344. Allen v. Inhabitants of Jay, 60 Me. 124, 129 (1872).
345. *Id.*; *see also* DAVID M. GOLD, THE SHAPING OF NINETEENTH-CENTURY LAW: JOHN APPLETON AND RESPONSIBLE INDIVIDUALISM 8–9 (1990).
346. *See* GOLD, *supra* note 344, at 8–10.
347. *See Allen*, 60 Me. at 137-38.
348. *Id.* at 138.
349. *Id.*

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