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Judicial Selection in the People’s Democratic Republic of Pennsylvania: Here the People Rule?

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DEMOCRATIC REPUBLIC OF PENNSYLVANIA:
HERE THE PEOPLE RULE?

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I. Introduction

Benjamin Franklin's characterization of the product of the 1787 Convention—"a republic, if you can keep it"—ranks among the truly great soundbites in the history of American politics. Franklin's quip has been described as "a classic case of a politician obscuring the issue," reporting a single area of universal agreement with none of the details critical to its realization.

The meaning of a "republic" has been the great puzzle of American constitutional theory since the Revolution. Bearing a negative connotation as late as 1775, the term "republic" soon thereafter came to be embraced by such disparate theoreticians as Alexander Hamilton and Thomas Jefferson. Although now, as then, we may agree on several constituent features, the specific contours of the system the Convention launched promise to generate debate for at least as long as we still believe we are "keeping it."

Franklin's endearing obfuscation referred to the national government proposed by the Convention. The debate, however, applies equally to the fifty other governments comprising our federal system since, as Article IV of the Convention's product guarantees, each of the fifty states has a "Republican Form of Government." This means that the national puzzle is redrawn, reconfigured, and reargued in each of fifty additional polities.

2. One might argue that to qualify as a "sound-bite," great or small, a spoken communication must be recorded for audio reproduction, and that Franklin's contribution is actually a "sight-bite." But cf. Bernard J. Hibbits, Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse, 16 Cardozo L. Rev. 229 (1994) (suggesting that aural metaphors may be more powerful than visual ones).
4. Id. at 3. At its nadir, "republican" connoted a radicalism or subversiveness akin to that associated with "socialism" in the 1950s. Id.
5. But they had very different meanings in mind for it, with Hamilton approaching political theory from the camp of urban commercial interests and Jefferson from a vision of rural community virtue. Id. at 10-11. "Where Whigs saw community, Federalists saw faction." Id. at 11.
6. Some differences were tempered by age. James Madison, who gave vivid expression to the fear of factions and majority rule in The Federalist No. 10, embraced a more democratic view late in life. "[T]he vital principle of republican government is the lex majoris partis, the will of the majority." Richard Hofstadter, The Idea of a Party System 208 (1969) (quoting James Madison, 4 Writings 520-28 (in an unmailed letter to an unnamed recipient in 1833)).
7. "Republican government, then, was generally understood to include rule by the people, the rule of law, political virtue, and representation. . . . None of these general ideas provided an obvious answer to two crucial questions raised by republican government: who is to be included among the people, and in what sense are the people to rule?" Lutz, supra note 3, at 14-15.
8. That is not to say that the "who" part of the debate, id., has not progressed significantly. See infra note 12.
9. U.S. Const. art. IV, § 4. We do not know, however, what the Guarantee Clause means. The Supreme Court has declined to define it, long holding that claims under the Clause are not justiciable. Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149-51 (1912); Luther v. Borden, 48 U.S. (7 How.) 1, 46-47 (1849).
The central issue posed, at both levels of the debate, is the relationship between the notion of a "republic," and another idea, even less reputable in 1775, called "democracy." This relationship is significant because it defines, in practical terms, the role of the putative "sovereign" in the processes of governance. Although by 1787 even Hamilton could describe the proposed national Constitution as a "representative democracy," nothing in the 1787 document evoked a sense of direct self-governance. Representation was, and is, the defining element of the national compact.

The "democracy" side of "republican" self-governance has had more opportunity to develop in the states. In its most "radical" formulation during the Revolutionary era, "republican" government was indistinguishable from direct democracy. Largely left to theory in the eighteenth century, how-

10. Lutz, supra note 3, at 18.
11. The closest point to direct self-governance in the 1787 Constitution was in the ratification process. See infra notes 30-33 and accompanying text.
13. Lutz, supra note 3, at 18. Without advocating this version of republican government, Jefferson defined it as "a government by its citizens in mass, acting directly, according to rules established by the majority." Id. (citing Thomas Jefferson, 15 Writings of Thomas Jefferson 19 (1907)).
14. Id. Nonetheless, the ultimate form of the theory was expressly included in a number of state constitutions, in their affirmation of an inalienable right of the people to alter or abolish their government as they see fit. Harry L. Witte, Rights, Revolution and the Paradox of Constitutionalism: The Process of Constitutional Change in Pennsylvania, 3 Widener J. Pub. L. 383, 389-90 & 390 n.7 (1993).
15. This "right of revolution" was given practical effect by the "people out of doors" at times of major shifts in governance. For example, people gathered at mass meetings for public debate prior to the call for Pennsylvania's constitutional convention in 1776. Similar mass movements were effective in securing constitutional reform in several states during the first four decades of the 19th century. The right of peaceful revolution, however, came to an effective end with Dorr's Rebellion in Rhode Island in 1841-1842. James A. Henretta, Foreword: Rethinking the State Constitutional Tradition, 22 Rutgers L.J. 819, 828 (1991).
ever, even in state constitutions, democracy came to fuller realization through initiative and referendum processes in the latter part of the nineteenth century. As James Bryce observed:

The peoples of the States have come to distrust their respective legislatures. Hence they desire not only to do a thing forthwith and in their own way rather than leave it to the chance of legislative action, but to narrow as far as they conveniently can (and sometimes farther) the sphere of the legislature.

There is an unmistakable wish in the minds of the people to act directly rather than through their representatives in legislation. The same conscious relish for power which leads some democracies to make their representatives mere delegates, finds a further development in passing by the representatives, and setting the people itself to make and repeal laws.\textsuperscript{15}

The definitional debate can be said to have come full circle, occasioned by today's frequent recourse to the initiative process in the states. Some critics urge that certain applications of that process conflict with the "republican form of government" guaranteed by the federal Constitution.\textsuperscript{16}

Discourse over "republican" government in the states is by no means limited to the initiative, however. Among the richest areas of focus is the state judiciary, where the same "conscious relish for power" that Bryce credits for changes in state legislative mechanisms also led to efforts to make judges accountable to the people. Pennsylvania offers an especially fine illustration,\textsuperscript{17} for no constitutional issue has been debated more contentiously or continuously in the state than the method of selecting judges. Although the

\textsuperscript{15} James Bryce, \textit{The American Commonwealth} 444 (3d ed. 1893). Strains of the peoples' distrust resonate in today's debates over term limits for their representatives.


various recent spectacles involving former justice Rolf Larsen\textsuperscript{18} have added new spice to the debate, they have not affected its content. The basic themes—election or appointment, accountability and independence, and the baggage they carry—all have been discussed in one form or another since colonial times.

This is not a debate in which the protagonists make only modest claims. In 1805, when the major push for popular elections began in Pennsylvania, proponents were certain that "[w]here the magistrate is not elective, it becomes tyrannical."\textsuperscript{19} It took forty-five years, but that principle (with the assistance of more moderate, allied arguments) ultimately commanded a strong majority. Today, 145 years later, critics of the present form of the elective system are equally certain of the "mediocrity" of the state supreme court, and reiterate an assertion that "our court is one of the laughing stocks of the nation and is generally thought to be one of the worst."\textsuperscript{20} That noted, it must be added that the contemporary discourse—perhaps in recognition of the distinctly reticent bent of the Pennsylvania electorate over the past century or so, when invited to amend the basic charter\textsuperscript{21}—tends to reflect an understanding that the question is too complex and too important to be cast as a battle of absolutes.\textsuperscript{22}

The judicial selection process is central to contemporary constitutional debate in Pennsylvania. Placing the issue in its broader context may be useful: Where does it fit into our system of fundamental political values; how does it relate to our conception of self-governance? Looking back to the rationale for the creation of Pennsylvania's system of a popularly elected judiciary may also be instructive: What theory supported its adoption in 1850; what promises did it offer; is the system meeting those promises today?

In this article I plan to examine these questions and to situate the Pennsylvania debate in the larger context of popular sovereignty in our federal system.\textsuperscript{23} I begin by sharing the basic conclusions I intend to develop: First,

\textsuperscript{18} For further discussion of Justice Larsen and the issues surrounding his impeachment, see Geyh, supra note 17.

\textsuperscript{19} Glenn L. Bushey, William Duane, Crusader for Judicial Reform, in 5 PA. HIST. 141, 145 (1938) (quoting William Duane, AURORA, Jan. 15, 1805).

\textsuperscript{20} G. Terry Madonna, Merit Selection of Appellate Judges: Why Its Time Has Come, COMMONWEALTH FOUND., July 1994, at 7 (quoting COMMITTEE OF SEVENTY, JUDICIAL SELECTION GOVERNANCE STUDY 60 (1983)).

\textsuperscript{21} Voters in Pennsylvania rejected six convention calls prior to 1967 and a total of seven of 10 convention calls since the 1700s. Witte, supra note 14, at 441.

\textsuperscript{22} E.g., while invoking the "laughing stock" tag for the Pennsylvania Supreme Court today, Professor Madonna readily acknowledges that 20 years ago—only yesterday, by constitutional time-lines—the court was widely admired as one of the finest in the country. Madonna, supra note 20, at 6-7 (citing Testimony of Professor Bruce Ledewitz before Pennsylvania State Senate Judiciary Committee, March 2, 1993).

\textsuperscript{23} Because the focal points of the debate vary from court to court, by geography and hierarchy, it is important to define the limits of my analysis of the Pennsylvania system of judicial selection. Since 1776, the state constitution has assigned all courts other than those that are now known as district justice courts the same method of selecting judges: appointment prior to 1850 and popular election thereafter. In my historical report, then, there is little reason to distinguish
in general terms, a judicial selection system that relies on popular elections, including partisan elections, can be fully consistent with the American political theories of separation of powers and an independent judiciary. Furthermore, an elected judiciary may be more consistent with the early American theory justifying judicial review than the federal appointive system is today. Second, under the Pennsylvania system as it is presently configured, appellate judges are not, in any reasonably meaningful sense, selected by or accountable to “the people.” Third, again as presently configured, the Pennsylvania Supreme Court exercises powers for which it is essentially accountable to no other institution.

Pennsylvania’s lack of judicial accountability has had a perverse effect on at least two of the values said to be served by an elected judiciary: popular sovereignty and checks on institutional abuses by the General Assembly. This shortcoming also lends credence to the claim that the Supreme Court of Pennsylvania seems at times simply out of control. This does not mean that the only “fix” is to abandon the popular election of judges, though merit selection almost certainly would be an improvement over the present system. If Pennsylvanians want an elected judiciary, there is no compelling

among these courts. In analyzing how an elective judicial selection system works, however, differences between trial courts and appellate courts, and even among appellate courts, are evident. Because of these differences, my critique of the Pennsylvania system focuses on the supreme court.

24. Steven P. Croley recently has argued that an elected state judiciary poses a “majoritarian difficulty” for “a regime committed to constitutionalism,” by threatening the regime's ability to secure the rights of individuals and minorities against the hostility of the majority. Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. Chi. L. Rev. 689, 694 (1995). At the conclusion of his thoughtful and illuminating piece, Croley suggests that the difficulty cannot be resolved, and that “[e]lective judiciaries are illegitimate and should be dismantled forthwith.” Id. at 789. He steps back however—at least rhetorically—from so “unambivalent” a conclusion, and acknowledges the theoretical possibility that some model he has not considered might offer a defense of an elected state judiciary. Id. at 789-90. Thus, Croley allows that perhaps a defender of the institution can explain how state judiciaries function within state systems in ways fundamentally different from their federal counterpart — how, that is, state constitutional democracies are different from the federal constitutional democracy in ways that implicate the function of state judiciaries and that argue in favor of electorally accountable judiciaries.

Id. at 790.

The analysis I offer here had been completed and was already in this Review’s editing process when Professor Croley’s provocative challenge was published. It cannot, therefore, be considered in any sense a “response.” Nonetheless, I hope that my focus on the important differences between state and federal constitutional regimes—situated within the structure of a single American constitutionalism—will provide a suggestion of what such a response might consider.

25. I say “almost certainly” because there are serious questions of checks and balances in the design of the merit selection system. A plan that created a nominating commission dominated by appointees of legislative officers, for example, might lead to a judiciary insufficiently independent of the General Assembly. Similarly, a commission controlled by representatives of the organized bar might lead to a judiciary partial to the dominant faction. See Steven Davis et al., Judicial Nominating Commissioners: A National Profile, 73 Judicature 328 (1990) (examin-
reason not to have one. The present system, though, fails to produce a judiciary truly "selected by" the people. In order to get what the electorate has said it wants, Pennsylvania must reform the election process, increasing both the level of information available to voters and the voter participation rate. There are ways to accomplish these ends, as will be seen shortly. But now it is time to go to the beginning, and attempt to explain why I believe my conclusions are valid.

II. JUDICIAL POWER, SEPARATION OF POWERS, AND POPULAR SOVEREIGNTY IN NATION AND STATES

When we assign judges special responsibility for ensuring adherence to a rule of law, we acknowledge that judicial independence from political influence—whether originating in another part of the government or from popular forces—is a requisite characteristic of our constitutional system. At the same time, since our judges are bound by the rule of law, we demand judicial accountability as well. How well we achieve and harmonize judicial independence and accountability is a key determinant of the health of our judicial system. There is no single formula for success in this enterprise, since significant differences exist between the national and the state systems, as well as among the state systems.

ing political, social, and economic forces that influence judicial nominating commissioners). "Rather than eliminating politics, the merit plan 'has changed the nature of that politics to include not only partisan forces but also those relating to the interests of the organized Bar, the judiciary, and the court's "attentive publics",' " PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 9 (1980) (quoting RICHARD A. WATSON & RONDAL G. DOWNING, THE POLITICS OF THE BENCH AND THE BAR (1969)).

An interesting example of the potential reach of bar politics in a merit selection system arose recently in Delaware. Critics assert that "a single national law firm" engineered the effective removal in 1994 of a respected member of the Delaware Supreme Court, Andrew G. T. Moore 2d, by blocking what normally would have been an almost automatic reappointment upon the expiration of his first 12-year term. The firm's influence on the selection and retention process was said to be attributable principally to the presence on the nominating commission of a partner in the firm, another partner's service in a key campaign post for Governor Thomas R. Caper, and a former associate of the firm's employment as the Governor's chief counsel. The person appointed to fill the vacancy created by Justice Moore's departure also is a former partner in the firm. In the strongest version of the criticism, it is charged that Justice Moore's involuntary departure from the bench was a form of retaliation for specific positions he took in cases involving an important client of the firm. Even if that charge is "nonsense," as the Governor's and the firm's defenders assert, the incident reveals the degree to which, for example, plaintiff versus defendant bar politics can infect the "merit" selection and retention processes. See Diane B. Henriques, TOP BUSINESS COURT UNDER FIRE, N.Y. TIMES, May 23, 1995, at D-1. In the universe of "merit" selection and retention systems, it should be noted that Delaware is something of a special case, since the judicial nominating commission is a creature of the governor's own making, not mandated by the state constitution. See Del. Const. art. IV, § 3 (providing for appointment of justices of supreme court and other members of judiciary by governor, subject to consent of majority of members elected to senate).
A. Federal Theory and the Fading Popular Sovereign

Separation of the powers of the coordinate branches of government is a pillar of federal constitutionalism.26 Viewing The Federalist papers as a whole, no group of the letters of Publius is more certainly the product of colonial experience and of the constitutional theory and practice of the Revolution, none is more accurate in foreshadowing the institutional development of the next century, than the group concerned with the separation of powers and checks and balances.27

Certainly, significant shifts in the balance among the federal branches have occurred over the years, and, at any given time, there may be significant differences of opinion regarding the requisite degree of separation.28 But that the balance is critical, indeed the most critical feature of the national government, is an article of our constitutional faith.29

Separation of powers is also a critical issue in state constitutional law. However, approaches to the separation of powers and the different solutions tested, altered, amended, or rejected suggest that, in the states, the principle

26. The other pillar, of course, is the division of authority between the national government and the states, or vertical separation of powers. See The Federalist Nos. 45 and 51 (James Madison) (discussing balancing of the powers delegated to the states and to the national government).

"Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).


28. A contemporary example may be found in the debate between Justices Scalia and Breyer in Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995), regarding the authority of Congress to direct the courts to reopen final judgments in private civil actions brought under § 10(b) of the Securities Exchange Act of 1934. The two justices agreed that, at least in the instance before the Court, Congress lacked such power. They agreed that Robert Frost had provided an apt metaphor in his Mending Wall. Underscoring their disagreement, however, over the nature of the separation doctrine, they found the appropriate metaphor in different lines.

Justice Scalia, speaking for the Court, stressed the distinctness of the legislative and judicial powers and took comfort—which might have surprised the poet—in "[g]ood fences make good neighbors." Id. at 1463. Justice Breyer, however, was concerned that "the Constitution blends, as well as separates, powers in its effort to create a government that will work for, as well as protect the liberties of, its citizens." Id. at 1465 (Breyer, J., concurring). He recalled that "[s]omething there is that doesn't love a wall." Id. at 1466 (Breyer, J., concurring) (quoting Robert Frost, Mending Wall, in The New Oxford Book of American Verse 395-96 (R. Ellmann ed., 1976)).

29. This faith is reflected today, for example, in the debate over inserting a balanced-budget requirement into the national Constitution. The amendment's probable, but unknown, effect on the balance between the three federal branches has been a central focus of that debate. The power of Congress would be diminished, certainly, but would the courts' power increase? See Peter Carlson, The World's Greatest Talkative Body, WASH. POST, Apr. 2, 1995 (Magazine), at 30 (quoting Senator Sam Nunn on the proposed balanced-budget amendment: "Adoption of a balanced budget amendment without a limitation of judicial review would radically alter the balance of powers among the three branches of government.").
is as comfortable in the barroom as in the secular cathedral of the Supreme Court Building. This is because the states, unlike the national government, assign "the people" a significant measure of power in the balancing process.

With its express focus on the branches of the federal government, contemporary debate over federal separation of powers demonstrates little interest in the role of the people.\textsuperscript{30} In large part, the disinterest reflects the text of the national Constitution, which provides for direct participation of the people in their national government only in the election of their representatives to the Congress.\textsuperscript{31} Modern discourse, however, has failed to keep faith with the framers' vision. James Wilson, a leading theorist at the 1787 Convention and a powerful proponent of its product, argued that the new Constitution was an expression of and would remain subject to the will of the popular sovereign, who are acknowledged in the Preamble. Wilson observed: "It is announced in [the name of the People of the United States], it receives its political existence from their authority—they ordain and establish. Those who ordain and establish have the power, if they think proper, to repeal and annul."\textsuperscript{32}


\textsuperscript{31} U.S. CONST. art. I, § 2, cl. 1 (House of Representatives); U.S. CONST. amend. XVII (Senate). Although we may believe that we also vote for President, we vote in fact for presidential electors, and we do that by leave of our state legislatures—not by constitutional empowerment. U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. amend. XII.

\textsuperscript{32} Debates of the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 383 (Merrill Jensen ed., 1976). Wilson's comments here addressed the contention that the proposed constitution’s lack of a bill of rights left it fatally flawed. For Wilson, "the Preamble is tantamount to a volume and contains the essence of all the bills of rights that have been or can be devised; for, it establishes, at once, that in the great article of government, the people have a right to do as they please." \textit{Id.} at 383-84.

He readily could distinguish the foundation of liberties in England, where the rights of Magna Charta were "granted" by the king, and the foundation in the United States. \textit{Id.} at 383. Here, "the fee simple remains in the people at large, and, by this Constitution, they do not part with it." \textit{Id.}

Wilson's acknowledgement of the authority of the popular sovereign does not fit comfortably in our notions today of the rule of law. It meshed quite well, however, with the understanding of Wilson’s contemporaries. Wilson read the Preamble as another way of stating what then seemed obvious to anyone familiar with state constitutions. The people reserved the right to "reform, alter, or abolish government in such manner as shall be ... judged most conducive to the public weal." \textit{Pa. Const.} of 1776, art. 5 (Declaration of Rights). Similar provisions have been carried forward in Pennsylvania’s subsequent constitutions. \textit{Pa. Const.} of 1790, art. IX, § 2; \textit{Pa. Const.} of 1838, art. IX, § 2; \textit{Pa. Const.} of 1874, art. I, § 2; \textit{Pa. Const.} art. I, § 2.

The "right to revolution" was not limited to the exigencies of 1776, and its means of realization were not limited to armed conflict. Wilson and his colleagues were effecting a second American Revolution by guiding the new Constitution into place. The Convention that drafted the 1787 Constitution had exceeded the authority delegated by the Congress; the system of ratification established by the Convention, and acquiesced in by the Congress, was contrary to the process established by the Articles of Confederation; the form of referendum by which the state ratifying conventions were chosen was unique in American and western political theory. See Laurence H. Tribe, \textit{Taking Text and Structure Seriously: Reflection on Free-Form Method in Con-
In truth, it may be that the single most democratic act of "the people," vis-a-vis the federal Constitution, was their election of the delegates to the state ratifying conventions, a power never again to be exercised. What remains today of the people's power bears little resemblance to Wilson's notion that popular sovereignty is the foundation of our liberty. We retain the theory, espoused by Montesquieu and Madison alike, that separation of powers and checks and balances protect the rights of the people, and that such protection is the end of government itself. But "the people" are not a subject of the debate regarding national separation of powers.

B. Judicial Power and Social Contracts

The role of "the people," or of practical popular sovereignty, is more central to state constitutionalism today, including state issues of separation of powers. An examination of the theory and practice of judicial review illustrates this difference, and provides a foundation for examining Pennsylvania's debate over judicial selection.

By the latter part of the nineteenth century, judicial review had found a comfortable, if not commonplace, niche in American political theory. Its roots, unacknowledged by Chief Justice Marshall in Marbury v. Madison, were established in the revolutionary period. The common justification for judicial review was tied to the theory of popular sovereignty, with the people as the supreme lawmaker, and it applied equally to the national and state systems. According to this justification, both federal and state constitutions are creatures of the popular sovereign, and are superior to legislative law. Judges, therefore, simply and appropriately defer to the people when they strike statutes that conflict with constitutions.


33. U.S. CONST. art. VII; see also Resolution of the Convention (Sept. 17, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 1, at 665-66 (stating that Convention of Delegates in each state should be chosen by "the People" of the state).


35. 5 U.S. (1 Cranch) 137 (1803).

36. See J. GOEBEL, 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 (1971) (discussing state and federal cases from 1770s and 1780s that addressed judicial review).


At the end of the nineteenth century, James Bryce described American theory in these same terms. See BRYCE, supra note 15, at 248-60. By situating sovereignty directly in the people, he explained, the American view is fundamentally different from the British theory of the Parlia-
Hamilton advanced the theory of judicial obeisance to the popular will during the ratification debate:

It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.

Hamilton addressed Federalist paper No. 78 to an electorate that was about to choose delegates to the state conventions that would ratify the federal Constitution, and to the delegates themselves. In a very real sense, the new Constitution was more directly tied to the people, as an expression of their will, than would be the later acts of the Congress it created. After all, the people were to choose only the members of the House of Representa-

ment. In America, the people are the supreme lawmakers, and are therefore supreme. Id. at 250-51. While the only question for a British court confronted with a conflict between two laws is which is later in time, an American court examines the hierarchy of lawmakers:

In America the supreme law-making power resides in the people. Whatever they enact is universally binding. All other law-making bodies are subordinate, and the enactments of such bodies must conform to the supreme law, else they will perish at its touch, as a fishing smack goes down before an ocean steamer. And these subordinate enactments, if at variance with the supreme law, are invalid from the first, although their invalidity may remain for years unnoticed or unproved.

Id. at 250.

38. The Federalist No. 78 (Alexander Hamilton).
39. Publius addressed all of The Federalist "[t]o the People of the State of New York," but the papers were reprinted and circulated throughout the states. By May 28, 1788, when No. 78 was first published, the people of New York already had chosen their convention delegates. The New York convention ran from June 17 through July 26, 1788, ultimately ratifying the Constitution by a vote of 30 to 27.

When No. 78 appeared, two other critical states, North Carolina and Virginia, also were in the balance. The Virginia delegates had been chosen by May 28, and its convention lasted most of the month of June, 1788. Virginia ratified by a slightly wider margin than New York, 89 to 79. North Carolina also had chosen its delegates by May 28, 1788, but its convention refused to ratify until amendments were prepared. In 1789, North Carolina called a second convention and—after Congress proposed a set of 12 amendments, 10 of which would become the Bill of Rights—ratified the Constitution.

Rhode Island, not considered "critical" to the stability of the United States, initially rejected the Constitution on March 24, 1788 by popular referendum, by a vote of 2711 to 239. In March of 1790, the first session of a state convention again failed to ratify. After the United States Senate approved a bill to sever Rhode Island from the union, the convention met in a second session on May 24, 1790. The Rhode Island convention ratified the Constitution on May 29, 1790, by a vote of 34 to 32. See 2 Documentary History of the Ratification of the Constitution, supra note 32, at 19-25 (describing ratification chronology).
The Senate would be named by state legislatures, and the President, who could approve or veto the congressional act would be chosen by electors—named by the states but not necessarily by the voters of the states—or by the House of Representatives.

Thus, Hamilton's argument could be taken quite literally. If the people selected delegates who would approve the Constitution, then the Constitution was fairly said to reflect "the will of the people." If the more remote Congress, with the acquiescence of the President, later ignored that popular will, judicial relief would be appropriate. This theory of judicial review, when first offered, posed no "counter-majoritarian difficulty." It was bottomed on "the existence in the American States of real, explicit social contracts or fundamental law, which came into being in the aftermath of the revolutionary break from England." As expressions of the will of the people, these contracts—constitutions—were contemporaneous instructions to the people's agents in the judiciary, as well as to those in the legislature.

But, oh, what a difference ten generations make! At the national level today, it is a pure construct to say that the judiciary is effecting the will of the people by declaring that an act of the contemporary Congress violates the 1787 Constitution. While the United States Constitution is, indeed, "ours," "we the people" have had no direct hand in making it. The Supreme Court, the Congress, and the President make it, day by day, and we, at most, consent to what those authorities do.

On the other hand, although reduced to fiction at the federal level, a true heir to the early justification for judicial review may still be said to operate in the states. Important differences between state and federal institutions allow state constitutions to be seen as an expression of "real" social contracts,

41. Id. § 3, cl. 1.
42. Id. § 7, cl. 2.
43. Id. art. II, § 1, cl. 2, amended by U.S. Const. amend. XII.
44. The term "counter-majoritarian difficulty" was coined by Alexander Bickel. For his discussion of its meaning, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AND THE BAR OF POLITICS 16-23 (2d ed. 1968).
45. Snowiss, supra note 37, at 2.
46. When, for example, the United States Supreme Court held in United States v. Lopez, 115 S. Ct. 1624, 1650-51 (1995), that the Gun-Free School Zones Act of 1990 violated the Constitution, it did not contend that the Court's interpretation of the 1787 Commerce Clause was more faithful to the will of the people today than was the 1990 Act of Congress. Although one could argue that the Court's view of the Commerce Clause was consistent with that of the Framers and Ratifiers, dead men are not "we the people." The Court's tie to the popular sovereign today is a theoretical one, and is premised on contemporary consent to be governed as we are, not to popular will as a guiding force.

Michael J. Perry calls on "[w]e the people" today to seriously consider modifications of the structure of judicial review to "make it somewhat more responsive to our putative sovereignty." MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS 201 (1994). He offers little hope, however, that such modifications will be adopted. Id. I have suggested elsewhere that structures for popular participation in a national constitutional dialogue already exist—in state constitutional provisions for referenda, legislative initiatives and, most importantly, formal processes of state constitutional change. Witte, supra note 14, at 474-75.
like their counterparts of the founding decade, but modified and renewed by
the people from generation to generation. First, state constitutions are far
easier to amend\textsuperscript{47} than is the federal Constitution,\textsuperscript{48} and are therefore more
realistically the people’s law. Second, when state judges are elected, the ex-
ercise of judicial power to curb legislative or executive excess can be seen
more directly as an act of the people’s chosen agents.\textsuperscript{49} Third, the relative
detail of state constitutions may provide more specific guidance to the state
judiciary.\textsuperscript{50} Together, if taken seriously, these factors invite successive gen-
erations to review and amend their state social contracts, to select the judges
who interpret them, and to respond to differences over interpretation by
changing the text, the judges, or both.

\textsuperscript{47} Witte, \textit{supra} note 14, at 397-98.

\textsuperscript{48} Article V of the United States Constitution provides:

\begin{quote}
The Congress, whenever two thirds of both Houses shall deem it necessary, shall
propose Amendments to this Constitution, or, on the Application of the Legislatures of
two thirds of the several States, shall call a Convention for proposing Amendments,
which, in either Case, shall be valid to all Intents and Purposes, as Part of this Consti-
tution, when ratified by the Legislatures of three fourths of the several States, or by Con-
ventions in three fourths thereof, as the one or the other Mode of Ratification may be
proposed by the Congress; Provided that no Amendment which may be made prior to
the Year One thousand eight hundred and eight shall in any Manner affect the first and
fourth Clauses in the Ninth Section of the first Article; and that no State, without its
Consent, shall be deprived of its equal Suffrage in the Senate.
\end{quote}

U.S. \textsc{const.} art. V.

Because the text of the federal Constitution is so difficult to amend, constitutional change is
effected most often through interpretation, and that is accomplished most obviously by the
Supreme Court. Witte, \textit{supra} note 14, at 395-97. The only textual change made in the national
Constitution during the last 34 years was the Twenty-seventh Amendment. The validity of that
change is not even universally recognized, since it represents the product of the wills of long-
dead state legislators expressed shortly after the amendment was proposed by the first Congress
in 1789, of contemporary legislators in the states necessary for the three-fourths super-majority
demanded by Article V, and of many others in between. \textit{See generally} William Van Alstyne,
\textit{What Do You Think About the Twenty-Seventh Amendment?}, 10 \textsc{const. commentary} 9 (1993)
(examining the problem of the transgenerational ratification path of Twenty-seventh
Amendment).

\textsuperscript{49} Similarly, Burt Neuborne identifies several factors that provide a “democratic imprimatu-
rum” for state judicial determination of “positive” rights: (1) state constitutions are relatively easy
to amend; (2) more than half of state judges are elected in either partisan or retention elections;
(3) state constitutions enumerate the power of judicial review; and (4) state judges may create
common law, which may be overruled by legislation. Burt Neuborne, \textit{Foreword: State Consti-

\textsuperscript{50} The detail added to state constitutions generally during the latter part of the nineteenth
century often is seen as a directive by the people to the courts to ensure that the will of the
former is not frustrated by action or inaction of the other branches and particularly the legisla-
tive branch. \textit{See, e.g.}, Rice v. Howard, 69 P. 77, 79 (Cal. 1902) (arguing that such detailed provi-
sions of state constitutions reflect both “distrust of the legislatures and the natural love of
power” on part of the people, and that the provisions are, therefore, self-executing).
C. Popular Sovereignty and Judicial Independence

The question of judicial independence in state constitutional law involves two distinct separation of powers issues. One issue is identical to a problem in the federal Constitution; the other is wholly different from the federal model. The common issue is the degree of separation of the judicial branch from the other two branches of government, and was resolved fairly early. Although some theoreticians, and several of the first state constitutions, aligned the judicial power more closely with the executive or the legislative branch, the theory of three distinct and independent branches of government quickly predominated. The issue that is unique to the states is the judiciary's relationship to (or, if you wish, independence from) the popular sovereign. This issue has never been settled.

The 1787 federal Convention's choice of an appointed judiciary reflected the dominant view of the states in the founding period. Virtually all of the early state constitutions opted for some method of appointment of most or all judicial officials, usually with life tenure. At the end of the eighteenth century, Georgia alone elected its higher court judges.

The successive Jeffersonian and Jacksonian movements toward expanding democracy changed that pattern dramatically. By the first part of

51. For an excellent overview of the very different traditions of separation of powers generally as between the states and the national government, see Henretta, supra note 14, at 819. For a comprehensive argument rejecting federal precedent and an analysis of state constitutional approaches to legislative involvement in the selection of administrative officials, see John Devlin, Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions, 66 Temp. L. Rev. 1205 (1993).

52. See William F. Swindler, Seedtime of an American Judiciary: From Independence to the Constitution, 17 Wm. & Mary L. Rev. 503, 503-09 (1976) (examining judiciary structures in early state constitutions). The English theory regarded justice as a function of the executive power, contrary to the "prevailing doctrine of separation of powers." Id. at 505.

53. See Swindler, supra note 52, at 508 (stating that state constitutions "implicitly or explicitly" accepted concept of separation of powers).

54. This is not to say that the United States Supreme Court is unconcerned about its relationship to the people. "The Court's power lies... in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands." Planned Parenthood v. Casey, 112 S. Ct. 2791, 2814 (1992). At the national level, however, the people exercise only indirect influence over the judiciary, rather than a constitutional power of their own.

55. Henretta, supra note 14, at 833 (citing Richard E. Ellis, The Jeffersonian Crisis: Courts and Politics in the New Republic (1971)). The Pennsylvania Constitution of 1776 differed from the majority in that terms for judges were limited, Pa. Const. of 1776, § 23, and justices of the peace were elected, id. § 30.


57. Faced with the Federalist domination of the judiciary after he and his allies had taken control of the "political" branches of the federal government, Jefferson gladly would have imposed limited terms on federal judges. "That there should be public functionaries independent
the twentieth century, all but eleven states had moved to a popularly elected judiciary. This change held significant implications for checks and balances in the states. Most obviously, it represented a massive return of power from governors and legislators to the popular sovereign. This shift was seen as advantageous by "radical" democrats and moderates, including leaders of the legal profession. While the arguments of the democrats would tend toward the ideological, the legal profession supported the change for instrumental reasons. Removing judicial selection from the spoils system of an appointive process would enhance the quality of the judiciary and, with it, the reputation of the legal profession.

If enhancement of the power of the electorate was an obvious outcome of the shift, the impact on the power of the judiciary seems less certain. Not surprisingly, proponents of the elective system disagreed on this point. Some "radicals," including essayist Samuel M. Smucker of Pennsylvania, believed that popular election of judges would promote accountability and discourage judicial interference with popularly elected legislatures: "From the radical perspective, judicial activism, instead of protecting minority rights, had worked to the detriment of debtors and of fugitive slaves and their benefactors, and in favor of vested rights, corporations, and slavery." Other democrats believed that accountability to the people would encourage judicial checks against legislative defalcations, and saw this as a benevolent increase in judicial power. Conservatives, the odd persons out in this debate, favored a measure of judicial activism to counter legislative encroachments of property rights, and were comfortable with the level of judicial independence from the people that they believed an appointive system ensured.

The actual results were mixed, but one thing is clear: the wave of constitutional change favoring popular election of judges was followed by a period of the nation, whatever may be their demerit, is a solecism in a republic, of the first order of absurdity and inconsistency." Emily F. Van Tassel, Resignations and Removals: A History of Federal Judicial Service—And Disservice—1789-1992, 142 U. Pa. L. Rev. 333, 334 (1993) (quoting 7 THE WRITINGS OF THOMAS JEFFERSON 256 (H.A. Washington ed., 1859)).


59. Hall, supra note 58, at 341-46. While conservatives also disdained the political spoils aspect of an appointive judiciary, they nonetheless believed that method was "the best means of protecting property rights." Id. at 346.

60. Id. at 341.

61. Id. at 348.

62. Henretta, supra note 14, at 834-35. Under this theory, judges would "serve as the guardians of the people, protecting their interests against corrupt legislatures and self-interested corporations..." Id. at 835.

63. Hall, supra note 58, at 341, 346. This group included Philadelphia attorney Horace Binney. Id. at 341.
of intense state judicial oversight of legislative action. The constitutional theory of classical liberal democracy thus enhanced both the power of the people and that of the judges.” The new judicial power, however, was not necessarily attuned to the values of its advocates. While some courts did guard against legislative abuses of the public trust, others were indifferent. And while many progressive-era regulations of economic imbalances were upheld, state courts also developed the constitutional theory that led to the federal judicial vice of Lochner. Despite arguable lapses, however, in the greater measure “the state courts performed the tasks assigned to them by classical liberal democratic constitution-makers in a credible fashion. They afforded taxpayers some protection against corporate exploitation of the power and financial resources of state government while validating legislation that extended protections and rights to various groups of citizens.”

The apparent victory of the proponents of popular elections did not end the debate over the appropriate relationship between the judiciary and the people, however. In one of the more profound, if unique, expressions of concern, President Taft vetoed the 1911 Arizona statehood bill because the proposed state constitution permitted the recall of judges. For Taft, even if

64. *Id.* at 338. In making this point, Hall disputes the contention of James Willard Hurst and other scholars that there is a paradox in the fact that the move to popular elections was followed by a great surge in judicial activism. For Hall, the “democratic” move to elected judges was controlled by moderate Whig and Democrat lawyers who joined forces in the interest of enhancing the quality and independence of the judicial branch, goals not inconsistent with judicial review. *Id.* at 338-43.


66. *Id.* at 835-36. Ninety years after deciding *Lochner v. New York*, 198 U.S. 45 (1905), and 60 years after abandoning it in *Nebbia v. New York*, 291 U.S. 502 (1934), the Court’s use of substantive due process to strike economic and social legislation continues to haunt its decisions. In *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2812-16 (1992), for example, the Court thought it necessary to explain, in some detail, why the error of the *Lochner* line of cases ultimately had compelled its rejection, while no similar error had been shown to inhere in *Roe v. Wade*, 410 U.S. 113 (1973).

However problematic economic substantive due process has been for several generations of federal judges, however, a form of the doctrine continues to flourish in some state courts, where it began. The Florida Supreme Court, for example, struck statutory regulations of insurance commissions which the court found to “unnecessarily limit the bargaining power of the consuming public,” grounds reminiscent of *Lochner*. Department of Ins. v. Dade County Consumer Advocate’s Office, 492 So. 2d 1032, 1033 (Fla. 1986). Of course, it can be argued that state courts ought to protect majoritarian interests in the economic arena. *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1498-99 (1982). This is fully consistent with the notion of state judges as agents of the people, particularly when a perceived state judicial error is corrected relatively easily by state constitutional amendment.


state judges were elected, recall was too great a threat of popular interference with judicial independence.69

Still, in his 1915 classic, *Growth of American State Constitutions*, James Q. Dealey reported:

Theorists regularly declaim against the election of a judiciary, yet the practice and experience of our states point the other way. The decisions of the American bench compare most favorably with similar decisions enunciated by appointed judges elsewhere, and the results justify the practice. As a sort of concession, however, to this opinion, there are movements in several states looking towards the development of a system of non-partisan nominations and elections for judges.70

Over time, however, the movements Dealey wrote of formed the basis of a new debate, and of a slow swing away from popular election systems. By a current count, Pennsylvania is one of eight states retaining partisan elections for both appellate and general jurisdiction trial court judges. Twelve states use non-partisan elections; thirteen have adopted some form of “merit selection,” with a formal nominating commission; six have an appointment system without a nominating commission; and eleven have a mix of selection methods.71

III. JUDICIAL POWER, SEPARATION OF POWERS, AND POPULAR SOVEREIGNTY IN PENNSYLVANIA

Pennsylvania’s approach to the institutionalization of a judicial system that is accountable yet independent has been marked by a series of highly disparate constitutional experiments and incessant debate over the need to

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69. *Id.* at 305. The recall provision was restored to the Arizona Constitution in the first election held after admission to statehood. *Id.* at 298-99. See Coyle v. Smith, 221 U.S. 559 (1911) (holding that states joining Union possess same right to amend their constitutions as original states and are not bound by conditions created in enabling acts providing for their admission to Union).

It is perhaps ironic that the evil described by Taft in his veto message comes to pass under merit selection and retention systems. The refusal of the Delaware nominating commission to recommend Justice Moore for a second term on that state’s supreme court, see *supra* note 25, suggests for some a level of interference with judicial independence greater than that feared by President Taft, coming from a special interest with business before the court rather than from the electorate. As for merit retention elections, although these differ from recall in that the former occur on a fixed schedule while the latter is at the beck of a significant segment of the electorate, retention elections have been used to target judges on the basis of their judicial decisions. In recent examples, a chief justice in Florida was retained despite a concerted attack on her positions on criminal procedure and abortion issues, but a justice in Wyoming was defeated after a campaign charged that he was too lenient on criminals. Jennifer Friesen, *Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law*, 3 WIDENER J. PUB. L. 25, 35-36 (1993).

70. *Dealey, supra* note 56, at 175-76 (footnote omitted). Professor Dealey cited Pennsylvania among the states in which movements toward non-partisan elections were underway, together with Minnesota, Idaho, Iowa, Kansas, Nebraska, and Wisconsin. *Id.* at 176 n.1.

try again. Similar experimentation has marked the path of the Common-
wealth’s legislative and executive branches, but the swings have not been so
dramatic and the debate not so consistent. The focus of the debate over the
judiciary, and the point on which the seriatim experiments have swung, has
been the role of the popular sovereign in the selection process.

A. Revolution and Counter-Revolution, 1776-1790

When Congress issued its call to the states to suppress all authority exer-
cised under the British crown and to form, as necessary, new governments
subject to the authority of the people,72 Pennsylvania revolutionaries imme-
diately began a series of mass meetings that culminated in the proclamation
of a popularly elected constitutional convention.73

The constitution adopted by the convention on September 28, 1776, was
the “most radical” of the various state charters framed during the founding
era.74 The government that it established was intended to give maximum
effect to the popular will. To its critics, however, “while ‘the perfection of
government consists in providing restraints against the tyranny of rulers on
the one hand and the licentiousness of the people on the other,’ the Penns-
ylania constitution left its citizens ‘exposed to all the miseries of both with-
out a single remedy for either.’ ”75 Theory and rhetoric aside, experience
under the revolutionary constitution demonstrated that the Commonwealth’s
judiciary was to be both visible and powerful.

“Radical” for the democratic principles it embodied, the Pennsylvania
Constitution of 1776 also was radical in its distance from the efforts else-

72. The call was made in two resolutions of the Second Continental Congress, adopted May
10 and 15, 1776. The Constitutional Convention and the Formation of the Union 28-
29 (Winton U. Solberg ed., 2d ed. 1990). Directed to the colonies generally, Congress’s call was
intended primarily to influence the abandonment of the colonial government of Pennsylvania,
which had refused to support the rebellion against British rule. “In effect Congress invited the
Pennsylvania extremists to throw the old proprietary government overboard.” Robert L.
Brunhouse, The Counter-Revolution in Pennsylvania: 1776-1790 12 (1942). For a dis-
cussion of the events in Pennsylvania, see J. Paul Selsam, The Pennsylvania Constitution
of 1776: A Study in Revolutionary Democracy 108-16 (Levy ed., Da Capo reprint 1971)
(1936).

Although Congress’s call to Pennsylvania had the intended result of ejecting the old govern-
ment, that victory did not lead to full participation of the state in the war with Great Britain, the
real goal of Congress. The Pennsylvania revolutionaries were more interested in the question of
ruling themselves at home than in home rule, and the continued debate over the 1776 constitu-
tion absorbed much of the state’s energy. Id. at 253-54.

73. Rosalind L. Branning, Pennsylvania Constitutional Development 12 (1960);
The Proceedings Relative to the Calling of the Conventions of 1776 and 1790 35-45
(Harrisburg, Pa., John S. Wiestling 1825).

74. Lutz, supra note 3, at 129; see generally Robert F. Williams, The State Constitutions of
the Founding Decade: Pennsylvania’s Radical 1776 Constitution and Its Influences on American
Constitutionalism, 62 Temp. L. Rev. 541 (1989) (discussing “[t]he radically democratic Penn-
sylvania Constitution of 1776”).

75. Mary A.Y. Gallagher, Reinterpreting the “Very Trifling Mutiny” at Philadelphia in June
Rush 240 (L.H. Butterfield ed., 1951)).
where in the new states to form governments on the basis of separation of powers and checks and balances among the branches. The 1776 constitution created a twelve-member Supreme Executive Council, whose members—after expiration of the initial staggered terms—were limited to terms of three years, to be followed by four years of ineligibility.\textsuperscript{76} The president and vice-president were elected from the membership of the council by joint ballot of the general Assembly and council.\textsuperscript{77} The council possessed powers and duties we now tend to associate with the executive branch, including the appointment of public officers and faithful execution of the laws.\textsuperscript{78} But the council also had the power to determine the outcome of impeachments,\textsuperscript{79} and its members were empowered to act as justices of the peace throughout the commonwealth.\textsuperscript{80}

The greatest power was vested in the Assembly,\textsuperscript{81} which, in addition to having principal say in the selection of the president and vice-president, was authorized to enact laws, appoint the state treasurer and other officers, redress grievances, grant charters of incorporation, and “have all other powers necessary for the legislature of a free state or commonwealth.”\textsuperscript{82} The Assembly also had the power to appoint and replace at will the commonwealth’s representatives to the Continental Congress,\textsuperscript{83} and to impeach executive and judicial officers, subject to final disposition by the executive council.\textsuperscript{84}

Several components of the 1776 constitution contributed to its highly democratic character. The unicameral legislature, elected annually,\textsuperscript{85} meant that legislation would be relatively easy to pass and popular review would occur on a regular basis. Neither of these provisions was an innovation in Pennsylvania, however, as both had been fixtures of the colonial government established by William Penn.\textsuperscript{86}

\textsuperscript{76.} \textit{PA. CONST.} of 1776, § 19. Section 19 explained:
By this mode of election and continual rotation, more men will be trained to public business, there will in every subsequent year be found in the council a number of persons acquainted with the proceedings of the foregoing years, whereby the business will be more consistently conducted, and moreover the danger of establishing an inconvenient aristocracy will be effectively prevented.

\textit{Id.}

\textsuperscript{77.} \textit{Id.}

\textsuperscript{78.} \textit{Id.} § 20.

\textsuperscript{79.} \textit{Id.}

\textsuperscript{80.} \textit{Id.} § 19.

\textsuperscript{81.} “The Legislature was supreme.” \textit{SELSAM, supra} note 72, at 191. The “supreme power of the assembly” is explained, in large part, by the weakness of the executive power. \textit{BRUNHOUSE, supra} note 72, at 14-15.

\textsuperscript{82.} \textit{PA. CONST.} of 1776, § 9.

\textsuperscript{83.} \textit{Id.} § 11.

\textsuperscript{84.} \textit{Id.} §§ 20, 22.

\textsuperscript{85.} \textit{Id.} § 9.

\textsuperscript{86.} See \textit{SELSAM, supra} note 72, at 191 (tradition of annual elections); \textit{CHARTER OF PRIVILEGES FOR PENNSYLVANIA} (1701), \textit{reprinted in 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS} 273-79 (William F. Swindler ed., 1979) (unicameral legislature since 1701).
Dramatic departures from the colonial experience, as well as from the paths taken by other emerging states, occurred with the extension of the right to vote and of the right to hold public office to virtually all free males, and the abolition of the executive veto of laws. The theory of popular control also was thought to be advanced in the provisions for term limits, the requirement that the doors of the assembly “remain open for the admission of all persons who behave decently,” and the requirement that all public laws other than emergency legislation be considered by two successive sessions of the assembly. The latter provision, requiring also that bills be printed for public consideration, was intended to ensure that debate over proposed laws would be an important part of the annual election of representatives. In short, “[i]n no state were the leveling principles of democracy so thoroughly carried out as in Pennsylvania.”

Consistent with its democratic aims, the 1776 constitution created a judiciary that seemed likely to become beholden to the elected agents of the people. Judges were appointed by the president of the executive council (or vice-president, in the absence of the former), with the consent of the council, five of whom constituted a quorum. Judges of the supreme court were granted only seven-year terms, and were subject to removal by the assembly

deed, even as to powers, the 1776 constitution appears to have been modeled on Pennsylvania’s 1701 charter of rights and privileges. Compare CHARTER OF PRIVILEGES FOR PENNSYLVANIA, supra, § 2 (power to choose speaker and officers, judge qualifications and elections of members, sit upon their own adjournments, appoint committees, prepare bills, enact laws, impeach criminals, redress grievances) with PA. CONST. of 1776, § 9 (power to choose speaker, treasurer of state, and other officers; sit on their own adjournments; prepare bills and enact laws; judge elections and qualifications of members; administer oaths or affirmations to witnesses; redress grievances; impeach state criminals; grant charters of incorporation; constitute towns, cities, etc.).

87. PA. CONST. of 1776, §§ 6, 7; SELSAM, supra note 72, at 188-190.
88. The Charter of Privileges of 1701 allowed the executive veto: “And no Act, Law or Ordinance whatsoever, shall at any Time hereafter, be made or done, to alter, change, or diminish the Form of Effect of this Charter . . . without the Consent of the Governor . . . .” CHARTER OF PRIVILEGES FOR PENNSYLVANIA (1701), supra note 86, art. VIII, para. 2. Compare that provision with the provision for the enumeration of executive power of the Pennsylvania Constitution of 1776: “[the president, vice-president and council] are also to take care that the laws be faithfully executed; they are to expedite the execution of such measures as may be resolved upon by the general assembly . . . .” PA. CONST. of 1776, § 20. In a weak alternative to the executive veto, the Constitution of 1776 established a Council of Censors with “authority . . . to recommend to the legislature the repealing such laws as appear to them to have been enacted contrary to the principles of the constitution.” Id. § 47.
89. PA. CONST. of 1776, § 19 (Executive Council); id. § 11 (General Assembly).
90. Id. § 13. The exception, “when the welfare of the state may require the doors to be shut,” id., may have had the capacity to swallow the rule.
91. Id. § 15. The exception, “on occasions of sudden necessity,” id., did, in practice, swallow this rule.
92. “In actual practice this check proved to be worthless.” BRUNHOUSE, supra note 72, at 14.
93. SELSAM, supra note 72, at 190.
94. PA. CONST. of 1776, § 20. Only justices of the peace were elected. Id. § 30.
for misbehavior "at any time."\textsuperscript{95} Unlike legislators and counselors, however, they were eligible for reappointment,\textsuperscript{96} suggesting perhaps that the convention's concern for the "danger of establishing an inconvenient aristocracy"\textsuperscript{97} in the executive branch did not apply to the supreme court.\textsuperscript{98} They also were promised "fixed salaries."\textsuperscript{99} 

The power of the principal courts\textsuperscript{100} was set forth largely in general terms: "The supreme court, and the several courts of common pleas of this commonwealth, shall, besides the powers usually exercised by such courts, have the powers of a court of chancery . . . and such other powers as may be found necessary by future general assemblies, not inconsistent with this constitution."\textsuperscript{101} 

Opposition to the 1776 constitution in the legal community made it difficult for the new government to open its courts.\textsuperscript{102} Joseph Reed, the executive council's first choice for chief justice of the supreme court, refused the commission, citing his opposition to the constitution.\textsuperscript{103} The council's second choice also was openly critical of the constitution,\textsuperscript{104} but, "to the surprise of many,"\textsuperscript{105} accepted the nomination.

\textsuperscript{95} Id. § 23.
\textsuperscript{96} Id.
\textsuperscript{97} Id. § 19.
\textsuperscript{98} Alternatively, the different treatment of judicial terms may evidence faith in the people's ability to control their executive and legislative agents and, through them, the judiciary.
\textsuperscript{99} The record of the 1776 convention is sufficiently sparse that most statements regarding its intent must be drawn from the language of the constitution itself or from political discourse extraneous to the convention. \textit{See generally The Proceedings Relative to the Calling of the Conventions of 1776 and 1790, supra note 73, at 45-66 (providing no indications of intent or purpose)}. Without specific reference to the record of the convention, historian Paul Selsam reports "much agitation for a judiciary holding office for good behavior," to promote "independence and efficiency." J. Paul Selsam, \textit{A History of Judicial Tenure in Pennsylvania}, 38 Dick. L. Rev. 168, 171 (1934).
\textsuperscript{100} Pa. Const. of 1776, § 23. This guarantee was not always honored by the assembly. Selsam, \textit{supra} note 98, at 172 (citing \textit{Report of the Council of Censors} (Phila., Frances Bailey 1784)).
\textsuperscript{101} The other courts mentioned in the 1776 constitution included Judge of the Admiralty and Justices of the Peace. Pa. Const. of 1776, §§ 20, 30.
\textsuperscript{102} G.S. Rowe, \textit{Embattled Bench: The Pennsylvania Supreme Court and the Forging of a Democratic Society} 1684-1809 130 (1994). For all the uproar, the form of the judicial system put in place by the "radical" government most closely resembled that of the predecessor, colonial government. Id.
\textsuperscript{103} Selsam, \textit{supra} note 72, at 245-46.
\textsuperscript{104} Rowe, \textit{supra} note 102, at 131.
Having come to the office almost by accident, Chief Justice Thomas McKean left Pennsylvania’s high court only after ensuring that he would rank among the most influential justices in its history. The historical portrait of McKean that survives describes a seeming mass of contradictions and suggests that he was uniquely appropriate as the independent commonwealth’s first chief justice.  

That McKean could become influential at all is the first surprise, since he appears to have had the capacity to offend, without distinction, persons of all stations. An admiring biographer described him as a “stern and despotic man;” critics were less charitable. McKean defied the President and Council who appointed him, and the Assembly as well. When criticized by the press, he sought indictments for seditious libel. When the grand jury refused to indict, he castigated the grand jury. McKean’s critics complained that he was offensively passionate, terrorizing lawyers, jurors, and witnesses with courtroom tirades. Political, religious, professional, and military groups who found no relief at his bench complained of his biases when his browbeating offended them.

Politically, McKean was a leading revolutionary, and presided at the Provincial Conference that issued the call for the 1776 convention, but he opposed that convention’s product and later helped draft its more conservative replacement. The Assembly criticized McKean for his actions on the court, yet called on him as its trusted advisor for assistance in drafting legislation.

The 1776 constitution prohibited judges of the supreme court from sitting in the Continental Congress, the Executive Council, or the General As-

107. See Ellis, supra note 55, at 158; Coleman, supra note 105, at 112-13.
108. EASTMAN, supra note 106, at 287. Nonetheless, McKean was “still one quite susceptible of flattery, fond of official display, and by no means averse to the blandishment of titles.” Id. at 286. He was “rough and overbearing” in guarding his authority, yet, even with his lack of civility, he was “a judge of great decision and force of character.” Id. at 287.
109. Coleman, supra note 105, at 117.
110. BRUNHOUSE, supra note 72, at 64 (ignorant declaration regarding plural office-holding).
111. Rowe, supra note 102, at 170-71.
112. Id. at 171.
113. Rowe, supra note 106, at 38.
114. Id. at 42-44.
115. THE PROCEEDINGS RELATIVE TO THE CALLING OF THE CONVENTIONS OF 1776 AND 1790, supra note 73, at 35-45.
116. ELLIS, supra note 55, at 157-58. Richard Ellis describes McKean as “[a] radical on home rule but a conservative about who should rule at home.” Id. at 157.
117. Rowe, supra note 102, at 133-36.
sembly, or holding any other civil or military office. McKean himself embraced the doctrine of separation of powers, and strongly advocated adoption of the federal Constitution and the 1790 Pennsylvania Constitution, both of which were rather stronger on separation than the 1776 Pennsylvania Constitution had been. Nonetheless, while Chief Justice of Pennsylvania, McKean also represented Delaware in the Continental Congress, and served as the Congress' President during the Yorktown campaign. His tenure on the Pennsylvania bench also overlapped a period of service as acting chief executive and commander-in-chief for the state of Delaware.

For all of this, McKean was reappointed to a second term under the 1776 constitution, and subsequently to a life term under the 1790 constitution. In 1799, McKean moved to the head of Pennsylvania's executive branch, where he served three terms as Governor, until 1808.

Most significant for our purposes, despite the structure established in 1776, McKean is credited with setting the standard for an independent judiciary in the Commonwealth. McKean's stewardship in this regard may help explain why, despite the seemingly profound textual differences between Pennsylvania's approach to the judiciary under its 1776 Constitution and the federal approach in 1787, Alexander Hamilton could offer the Pennsylvania Constitution as one of "those models . . . highly to be commended" for the independence of its judiciary from the legislative branch.

118. PA. CONST. of 1776, § 23.
120. Id. at 113. Responding to critics, McKean asserted that Delaware was not bound by the Pennsylvania Constitution, and that he represented Delaware in Congress for several years before he became Pennsylvania's Chief Justice. Id. McKean's participation in the Continental Congress enhanced the powers of the Pennsylvania Supreme Court, as the "Continental Congress was not a legislature, but a revolutionary committee for the entire country" that relied on individual states to perform legislative and judicial functions. Id. at 117. As the only Delaware representative, McKean became an influential member of the most important committees of Congress, including those that directed imports of weapons, applications for military service, and prisoners of war. Id. at 118-20.
121. Id. at 113. Although McKean was quite aware of the need for separation of powers, full adherence to the theory was considered impractical during the Revolutionary War years. Id. at 117.
122. Id. at 129. McKean presided as Chief Justice of Pennsylvania from 1777 to 1799. Rowe, supra note 106, at 37.
123. EASTMAN, supra note 106, at 286. McKean's gubernatorial career seems to have replayed the turmoil of his years as Chief Justice. Although he had been a Federalist at the 1787 Convention and in the ratification debate, McKean was first elected governor as head of the Jeffersonian Republican ticket, helping mark the beginning of the end of the Federalist Party. HIGGINBOTHAM, supra note 106, at 25. Abandoned by the Democrat wing of the Republican party in 1805 but regaining the support of surviving Federalists, he was reelected on the Constitutional Republican ticket. Id. at 87-89, 99.
124. Coleman, supra note 105, at 130. McKean even made an effort, only partially successful, to moderate judicially the legislature's treatment of Quakers and others whose loyalty to the revolution was questioned. BRUNHOUSE, supra note 72, at 43; Rowe, supra note 102, at 133-35, 150-63.
125. THE FEDERALIST No. 81 (Alexander Hamilton). In fact, the Legislature and the Executive Council frequently asked McKean and the Supreme Court Justices for formal advisory
The move to revise the 1776 constitution began even before the government it created was in place, and the critics of the 1776 constitution finally succeeded in calling a state convention shortly after the national Constitution was ratified. It is again a tribute to the first Chief Justice that, by the time the Pennsylvania Constitution of 1790 was drafted, it could be argued that the only branch of government that did not need substantial reorganization was the judiciary.

In fact, significant changes were made in the judicial branch, but in the new order that prevailed after ratification of the federal Constitution, those who controlled the 1790 Convention saw these changes as a restoration of equilibrium. In important respects, the new judicial system in Pennsylvania mirrored the federal system, with judges appointed by the Governor and enjoying life tenure.

opinions and informal conferences on many vital issues. Coleman, supra note 105, at 125. Their opinions were received with great respect and established a national trend in which government agencies implemented these “expert” opinions. Id. Indeed, President Washington sought advisory opinions from the United States Supreme Court in the same vein. Id. The United States Supreme Court, however, refused to render advisory opinions, justifying its refusal on the system of checks and balances and the distribution of power among the three branches with the Court in the last resort. Paul M. Bator et al., Hart & Wechsler’s The Federal Courts and the Federal System 65-66 (2d ed. 1973).

126. Selsam, supra note 72, at 229-30. The Conservatives met in Philadelphia and demanded that the new constitution be revised before it was executed. Id. Although there was a clear conservative majority in Philadelphia, radicals carried most of the western counties and dominated the assembly. Id.

127. See Coleman, supra note 105, at 129 (stating that 1790 constitutional convention “eliminated or drastically reorganized every branch of the government except the judiciary”). But see The Council of Censors, in The Proceedings Relative to the Calling of the Conventions of 1776 and 1790, supra note 73, at 70, 76, 108 (recommending extensive changes, particularly in the terms of judicial office). The Council of Censors suggested that judges should be appointed for life and should receive fixed salaries because “[j]udges should have nothing to hope or fear from any one.” Id. at 108. The Council subsequently voted not to call a convention to amend the constitution. Selsam, supra note 98, at 172 nn.27 & 28.

128. Indeed the changes may be largely attributed to McKean’s important role in drafting the 1790 Constitution. See Coleman, supra note 105, at 129 (describing how McKean, serving as Chief Justice of Pennsylvania Supreme Court and Chairman of Committee of the Whole, took prominent part in debates at 1790 constitutional convention); see also The Proceedings Relative to Calling the Conventions of 1776 and 1790, supra note 73, at 145, 202-14 (noting McKean served as Chairman of the Committee of the Whole and was very involved in the revision process).

129. Pa. Const. of 1790, art. V, § 4. Under the federal Constitution, the President and the Senate share the power to appoint Supreme Court Justices and other federal judges. U.S. Const. art. II, § 2, cl. 2. In Pennsylvania, judges of the Supreme Court and the Court of Common Pleas held their offices “during good behavior.” Pa. Const. of 1790, art. V, § 2. They were subject to impeachment, id. art. IV, § 3, and were also subject to removal on grounds insufficient for impeachment upon the “address” of two-thirds of both the House of Representatives and the Senate, id. art. V, § 2. Even justices of the peace were appointed and held office during good behavior subject to impeachment or removal upon address of both houses. Id. art. V, § 10. When the legislature sought the removal of a judge, Governor McKean noted the permissive nature of the governor’s authority to remove upon address by two-thirds of both legislative
B. The Democratic Response, 1805-1850

1. Impeachment as Prologue

History seems at times not so much to repeat as to parody itself. If the interest today in judicial reform draws energy from the Justice Larsen scandals and impeachment, this interest parallels the circumstances of another movement for judicial reform that began nearly two hundred years ago. While “reform” today is believed by many to mean a “merit” appointment system of judicial selection, “reform” then was taken by many to mean replacing the appointive system of 1790 with popular elections. Whatever the ultimate effect of the successful impeachment of Justice Larsen on reform today, the failed effort to impeach supreme court justices in 1805 was critical to the ultimate success of the call for popular elections. It is, therefore, a story worth telling.

While the focus of this story is the democratization of the judicial selection process in Pennsylvania, the context is national. The dramatic shift of national power in 1800 from the Federalists to the Jeffersonian Republicans was previewed by the election of Thomas McKean as the Republican Governor of Pennsylvania in 1799. Jeffersonians in the Commonwealth claimed much of the credit for the national triumph, and went on to take a leading role in the eventual national restructuring of state judicial systems.

Judicial reform moved to prominence on the state agenda during McKean’s second term, which began in 1802. All Republicans believed reform of the judiciary was needed, but differed on its scope. McKean wanted a judicial system capable of keeping stride with the growth of commerce and population. The more democratic, “radical” members of his party in the Assembly wanted a simplified legal system, with a code of laws understandable by laypersons, and a judiciary more accountable to the people.

The fact that the Governor and the Assembly had different agendas regarding the judiciary is hardly surprising. Many of the democratic concerns house: “I will let the Legislature know that may means I won’t!” Charles R. Buckalew, Constitution of Pennsylvania 126 (1883).
130. Higginbotham, supra note 106, at 1.
131. Ellis, supra note 55, at 160. During McKean’s first term, the Republican party was plagued by factional quarrels that occupied most of his attention. Id.
132. Id. at 161. As a result of dramatic industrial and population growth, the court system as structured was inadequate and ineffective. Id.
133. Id. In his 1800 and 1801 addresses, McKean set forth his position—seeking moderate reform, including increases in the number of supreme court justices and revisions to the lower court system to meet the needs of the growing population. Id.
134. Id. at 161. Life tenure for judges appointed under the 1790 Constitution meant that most members of the state judiciary were Federalists. Thus, the Republican accession to power in the executive and legislative branches in 1799 and 1802 was tempered by continued Federalist control of the judiciary. The political topography of the Keystone State reflected almost precisely that at the national level, where Jefferson and the Republican-controlled Congress in 1800 faced a Federalist judiciary. On the executive side, though, Governor McKean was not the Jeffersonian the President was.
dated back to the supreme court as it was shaped by Chief Justice McKean, and some to McKean himself. 135

The general public perception that the high court represented an elitist institution, and that its policies and practices mirrored aristocratic, European values and prejudices began early and became more pervasive as the nineteenth century neared. By 1799 a substantial number of Pennsylvanians held the position that the high court stood as a barrier to legitimate democratic and egalitarian aspirations within the state, and must be either weakened or removed if those hopes were to be fully realized. 136

The differences between the governor and the dominant wing of the Republican Assembly led to an early stalemate in the legislative arena. The Assembly would not pass McKean's reforms, and McKean vetoed the Assembly's. 137 As for federalist domination of the bench, the two wings agreed on the need to remove "the transmontane Goliath of federalism," President Judge Alexander Addison of the state's Western Fifth Circuit. 138 Addison's partisanship on the bench was so far beyond even the relaxed standard of the day that the Federalists themselves did not strenuously oppose his impeachment. 139

Judge Addison was quickly dispatched early in 1803, and the radical wing turned its attention to the supreme court. 140 Fearing a potentially greater danger from their own party than from the now "subdued" Federalists, McKean and other moderates opposed the radicals' new plans. 141 The

135. For a detailed description of McKean and the controversy that surrounded him, see supra notes 106-25 and accompanying text.

136. Rowe, supra note 106, at 48.

137. ELLIS, supra note 55, at 161-64. The defeat of the Hundred Dollar Act suffices to illustrate the stalemate. Id. McKean vetoed the bill, which would have extended the jurisdiction of justices of the peace, twice—first on its own, and then as a provision to an unrelated bill. Id.

138. Id. at 164 (quoting Letter from Thomas McKean to Thomas Jefferson (Feb. 4, 1803), in McKean Papers (Hist. Soc'y of Pa.)). Judge Addison was well known for his uncompromising partisanship and his disrespect towards his associate judges. Id.

139. Id. at 165. The House voted to impeach Addison by a vote of 65 to 8. The Senate held a nine-day trial, and voted to convict Addison by a vote of 20 to 4.

140. Id. Judicial impeachment efforts in Pennsylvania paralleled impeachment efforts in the federal government. The national effort began with John Pickering, a federal judge in the District Court of New Hampshire, who was removed by the Senate in 1804. A dilemma arose with Pickering's impeachment, however, because many members of the Senate were reluctant to find him guilty of high crimes and misdemeanors when his defense was insanity. Id. at 72-73. This respect for the legal notion of "high crimes and misdemeanors" may be somewhat surprising in light of Alexander Hamilton's assertion that impeachment is a political function. The Federalist No. 65 (Alexander Hamilton). Nonetheless, Pickering's impeachment was still a fairly easy case because he was a terrible judge, and impeachment was the only method available to remove him. ELLIS, supra note 55, at 172-75. After the Pickering episode, Republicans took on Justice Samuel Chase, who may have been intemperate and politically biased, but was certainly not insane. He also had the benefit of a good defense team and many supporters. Id. at 76-82. Justice Chase was not removed. Id. at 96-107.

141. ELLIS, supra note 55, at 165 (quoting Letter from Thomas McKean to Thomas Jefferson (Feb. 4, 1803), in McKean Papers (Hist. Soc'y of Pa.)).
1803 fall elections, however, increased the power of the radical wing of the Republican party in the General Assembly. The elections gave the radicals the votes needed to override vetoes of the bill that extended the jurisdiction of the justices of the peace as well as the bill which provided for voluntary arbitration.\textsuperscript{142} The following March, the House impeached the chief justice and two associate justices. The Senate scheduled their trial for the beginning of the next legislative session.\textsuperscript{143}

This time, annual elections worked against the radical wing. The moderate Republicans, labeled "Quids" by their adversaries in the party,\textsuperscript{144} sought Federalist support to regain control of the Assembly. Although the moderates found little sympathy for their position, radical domination was diminished in the next legislative session. In the subsequent impeachment trial a majority of the Senate voted to convict, but the vote was well short of the two-thirds necessary to remove the judges.\textsuperscript{145}

2. William Duane—Redefining the Debate

The Senate's failure to remove the impeached Federalist justices marked the end of the alliance between the two wings of the Jeffersonian Republican party in Pennsylvania.\textsuperscript{146} It also moved the debate over the judiciary to another level, with the democratic forces calling for a constitutional convention and popular election of judges.\textsuperscript{147} The\textit{ Aurora}, edited by William Duane in Philadelphia, was the principal organ of democratic reform.\textsuperscript{148} As early as March 31, 1803, Duane challenged the theory of judicial tenure as a necessary ingredient of American justice:

\begin{itemize}
  \item \textsuperscript{142} Id. at 168. These measures, replacing bills vetoed a year earlier, were intended to simplify civil litigation.
  \item \textsuperscript{143} Id.
  \item \textsuperscript{144} The term "Tertium Quid" came to enjoy widespread usage as a description for those trying to occupy a middle ground between the confirmed democrats among the Republicans and the dwindling Federalists:
    
    Moderation in the sense used by certain men is . . . a half-way-house between virtue and vice, between truth and falsehood, where souls devoid of energy, and minds twisted with corruption may repose. . . . What an hermaphrodite thing, partaking of two characters, and yet having neither! A tertium quid from the combination of good and evil, of the mule-kind, incapable of propagating itself!
  \item \textsuperscript{145} Higginsbotham, supra note 106, at 63 (quoting Tenche Coxe, AURORA, June 22, 1803).
  \item \textsuperscript{146} Id., supra note 55, at 170.
  \item \textsuperscript{147} Id. at 171. McKean continued to do battle with the Assembly, and moved generally back toward the Federalists. Id. at 172-73. In the election of 1805, "one of the bitterest in the history of the state," he ran for reelection, with Federalist backing, on a coalition ticket against House Speaker Simon Snyder, the (radical) Republican nominee. Id. at 174. McKean was the narrow victor. Id. at 181.
  \item \textsuperscript{148} Bushey, supra note 19, at 141-42. According to Bushey, the\textit{ Aurora} was "perhaps the most powerful and influential Republican journal of the period." Id. at 142.
\end{itemize}
The frequent abuse of power by judges of the courts and justices of the peace will one day render a total revision of the received maxims concerning the tenure of judicial office necessary. It will one day be a subject of enquiry, why judges and justices of the peace should be more independent of the control of a free people, than those who have the formation and execution of the laws entrusted to them. It will become a subject of enquiry, whether there is any analogy between what is called the independence of the judges in England, and the independence of the judges in America—and whether making the former independent of the king justifies the making of the latter independent of the people.  

Duane’s concession that tenure for “good behavior” might be an appropriate means of ensuring independence of English judges from the king was possible because of the English removal system, which was controlled by Parliament. In short, English judges were insulated from the king, but accountable to Parliament. This was consistent with a theory situating sovereignty in the king-in-Parliament. But, where sovereignty is located in the people, Duane believed the argument for total independence of the judiciary “was a direct contradiction of the principle of representative democracy.” Or, as Duane framed the argument, “[w]here the magistrate is not elective, it becomes tyrannical.”

The *Aurora* published a draft of a petition to the Assembly to call a constitutional convention, chiefly for the purpose of addressing judicial reform. When that effort failed, the struggle shifted to the 1805 election. The moderates’ narrow victory effectively ended the dispute for the moment. However, a theory of holding the judicial power directly accountable to the people by popular elections—almost unimaginable in 1790—not only had been openly debated, but had attracted widespread support.

3. The Compromise of 1838

The issue of judicial accountability continued to surface, and resolutions calling for a convention were introduced in both houses in 1812. The resolutions failed, and the War of 1812 interrupted the debate. Interest in con-


150. Bushey, *supra* note 19, at 144. Judges held office during “good behavior,” but were removed by an “address” of the Parliament. *Id.* Removal by “address” was allowed by the Pennsylvania Constitution of 1790, art. V, § 2 as well, but required a two-thirds supermajority of each chamber of the Assembly, plus the concurrence of the Governor. Thus, while theoretically available to the Assembly for circumstances that were deemed insufficient to merit impeachment, the “address” process in fact was much more difficult to conclude than was the impeachment process, since the latter required only a simple majority in the House, two-thirds of the Senate, and no action by the Governor. *Pa. Const.* of 1790, art. V, § 2.


153. *Id.* at 151.

154. *Id.* at 151-52.

stitutional revision was revived in 1820 and culminated in the Convention of 1837. The convention was closely divided, with a coalition of Whigs and Anti-masons holding a bare majority over the Democrats but lacking sufficient strength to effectively control the proceedings.\(^{156}\) This division led to extended, acrimonious debate, and to compromise.\(^{157}\)

The Democrats recognized that they could not command the votes needed to adopt popular election of judges, so the focus of judicial reform shifted to life tenure.\(^{158}\) While other issues also consumed much debate, life tenure was among the most contentious.\(^{159}\) The convention's committee on the judiciary reported that "it is inexpedient to make any amendment" to the 1790 provision.\(^{160}\) A minority report recommended ten year terms for judges on the supreme court, seven for president judges of common pleas, and five for associate judges of common pleas, with all eligible for reappointment.\(^{161}\) The debate spanned a number of days, with Joseph Hopkinson leading the proponents of life tenure and George Woodward, later a Chief Justice of the Pennsylvania Supreme Court,\(^{162}\) as the principal advocate for limited tenure.

Parts of the 1837 debate elaborated on the theme identified by Duane thirty-four years earlier—the difference between a judiciary independent of the king in England and one independent of the people in the United States.\(^{163}\) Hopkinson appealed to the heightened security of the freedom enjoyed by the people of England since judicial tenure had been removed from the will of the king.\(^{164}\) Woodward countered that however independent English judges had become of the king, they were "not in any degree independent of the people," since the people, through their representatives in Parliament, could "remove judges at their pleasure, withhold salaries, or abolish their courts."\(^{165}\) Thus, argued Woodward, tenure for good behavior in England carried with it "a responsibility, a wholesome responsibility to the

\(^{156}\) Id. at 22.

\(^{157}\) Id. at 22-23.

\(^{158}\) Id. at 24.

\(^{159}\) Id. Regulation of banks and other corporations was the only issue to provoke more bitter debate in the 1837 Convention. Id. at 24, 26.

\(^{160}\) 4 Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania, To Propose Amendments to the Constitution 277 (Packer et al. eds., Harrisburg, Pa. 1837) [hereinafter Proceedings and Debates]. The 1790 provision gave judges life tenure with good behavior unless they were impeached or removed by the Governor and two-thirds of the legislature. Id.

\(^{161}\) Id. The minority initially had reported recommendations that the gubernatorial appointment power be made subject to the advice and consent of the Senate, and that the terms of associate judges of common pleas be three years. 1 id. at 357. Senate approval of gubernatorial appointments gained general support, making that part of the minority report unnecessary, and the minority itself reconsidered its proposed term for associate judges. 4 id. at 277.

\(^{162}\) Branning, supra note 73, at 23.

\(^{163}\) See supra notes 149-52 and accompanying text.

\(^{164}\) 4 Proceedings and Debates, supra note 160, at 286.

\(^{165}\) Id. at 321.
people."¹⁶⁶ Such responsibility to the people is perfectly appropriate here as well, since "our only sovereign is the people."¹⁶⁷

Hopkinson also offered a classical argument for judicial independence: [The] object and effect [of tenure for good behavior] is to secure to the people a fearless and impartial administration of the laws; to protect the property and person of every citizen, from the power, usurpation, caprice and oppression of every department of the government, of the Legislature, as well as the Executive; from the hostility and cupidity of every other citizen, who, from his wealth, his connections, his popularity or party influence may have the power to injure him; and finally, in relation to the government itself, to keep each constitutional power and authority in its right place, directing and preserving a proper, safe and uniform action in the whole.¹⁶⁸

In order for the judicial check to be effective, the judiciary must be "a third power, independent of both the others, to hold them within their prescribed limits."¹⁶⁹ Hopkinson believed that the judiciary itself could "in no possible way make any encroachment on the liberties of the people."¹⁷⁰ In contrast, "[t]he legislative branch has been declared to be that most prone to the usurpation of authority, for, calling itself the immediate representation of the people, it is apt to believe it holds, and may exercise, all the original rights of the people."¹⁷¹ And, as for the executive, "the loudest complaints of the people have been against Executive power and patronage."¹⁷² Given this state of affairs, "can it be denied, that all the power you give the judiciary is for your own protection; and all that you take from it, is necessarily so much added to those who are already too powerful?"¹⁷³

Having appealed much earlier to the virtues of the British system of judicial tenure, Delegate Hopkinson's final "and most important" argument drew on the contrast between the "omnipotent Legislature" that was the Parliament and the limited legislative power "peculiar to our American governments."¹⁷⁴ These limits are prescribed on "the authority of the people, by whom, and for whom the whole fabric of government was created and

¹⁶⁶. Id. Woodward insisted that English judges could be removed by "a mere majority of the two houses of [P]arliament—the ordinary law making power of England." Id. It seems a reach, however, to refer to the House of Lords as representatives of the people.

¹⁶⁷. Id. at 322.

¹⁶⁸. Id. at 286.

¹⁶⁹. Id.

¹⁷⁰. Id. at 310 (implying, presumably, that unlimited judicial tenure presented no danger). The judiciary, according to Hopkinson, was responsible only for executing and administering the laws "as they apply to cases and persons brought before them." Id.

¹⁷¹. Id. at 311.

¹⁷². Id. According to Hopkinson, the proposed limits on judicial terms would dangerously enlarge the power of the governor over the judiciary. Id.

¹⁷³. Id. Of course, the argument that the judiciary must be independent of the other two branches also can be made, at least as readily, in favor of a system of popular elections.

¹⁷⁴. Id. at 313.
framed."  That is what the constitution is all about, and it is only the courts, by the power of judicial review, that can sustain the "supreme law of the land."  

While urging the convention to uphold the "authority of the people," Hopkinson did not believe the constitution ought to be revised according to the will of the people. "We come here to serve the people, not to flatter them; to attend truly and faithfully to their best interests, not to submit ourselves to their errors and prejudices; to do our duty to our country, uncontaminated by any selfish views of our own."  

Delegate Woodward minimized the power of judicial review, arguing that while the authority had been claimed by the judiciary, it had not been exercised. He argued strongly, however, for the principle of accountability of all of the government to the people, a principle that, he said, pervaded the 1776 constitution. "We are struggling to get back to the first principles from which we ought never to have departed." 

Woodward saw no conflict between accountability and judicial independence:

We have a written Constitution which prescribes the orbit of each department of the government; we have no arbitrary power, no lawless licentious faction to fear; but a sober, staid and honest people who want the justice of the State administered by men in whom they can confide, according to law, and without sale, denial or delay. They know what a judge should be, and after all, the people are the best judges of the judges. . . . Make it the interest, sir, of the judges to serve such a people well, and you will promote their independence and all the judicial virtues.

Appealing to "the authority of that august body of patriots" who made the Revolution and wrote the 1776 constitution, Woodward found that life tenure "is not necessary to a just independence of judges, in a republic." He argued that limited tenure was needed "to make judges in some degree ac-
countable to the people,”183 but he also seemed ready for the fuller measure of accountability elections would bring:

The love of popular applause is one of the strongest and noblest instincts of our nature, and if judicial independence can have a stay more firm and sure than all others, it is this. My amendment lays hold of this feeling of the human heart, and makes it stand surety for the good behaviour of the judge. For when his commission expires, and its renewal depends on the public voice, he will feel its value, and learn, by an independent, faithful and upright performance of his duties, to merit its approbation.184

A compromise was proposed, establishing fifteen year terms for justices of the supreme court, ten years for president judges of the common pleas court, and five for associate judges of the common pleas court.185 The compromise was adopted in Committee of the Whole by a vote of 60 to 48, with Woodward and other advocates of more dramatic change voting nay.186 In principle if not necessarily in fact, life tenure for judges—“the plague-spot in the Constitution”187—was gone.

In its final form, the 1838 constitution provided for gubernatorial appointments of judges, subject to the consent of the Senate, with the compromise terms of tenure.188 The mechanisms of removal—impeachment or discretionary removal by the governor on the address of two-thirds of each branch of the legislature “for any reasonable cause” insufficient for impeachment—were carried over from the 1790 constitution without substantive change.189 In what might be considered at least a significant symbolic depa-

183. Id. at 329.
184. Id. at 344.
185. Branning, supra note 73, at 25.
186. 5 Proceedings and Debates, supra note 160, at 136-38. Earlier Woodward had said he was “indifferent about the period of the tenure,” since what was important at this point was the “principle of the amendment.” 4 id. at 344-45. On the specific compromise, however, there were those who viewed fifteen years as the equivalent of life tenure. 5 id. at 137-38.
187. 4 id. at 344 (remarks of Delegate Woodward).
189. Article IV of the Pennsylvania Constitution of 1838 provided in pertinent part:
Section 1. The house of representatives shall have the sole power of impeachment.
Section 2. All impeachments shall be tried by the senate; when sitting for that purpose, the senators shall be upon oath or affirmation. No person shall be convicted without the concurrence of two-thirds of the members present.
Section 3. The governor and all other civil officers under this commonwealth shall be liable to impeachment for any misdemeanor in office; but judgment, in such cases, shall not extend further than to removal from office and disqualification to hold any office of honor, trust, or profit under this commonwealth; the party, whether convicted or acquitted, shall, nevertheless, be liable to indictment, trial, judgment, and punishment, according to law.
Pa. Const. of 1838, art. IV; compare with Article IV of the Pennsylvania Constitution of 1790 which provided in pertinent part:
Section 1. The house of representatives shall have the sole power of impeaching.
tute from the uniform appointment system of 1790, the 1838 constitution provided for popular election of justices of the peace.190

4. Duane's Legacy Claimed

As the critics of the 1838 compromise had noted, the difference between life tenure and fifteen-year terms for judges of the supreme court was, in practical terms, de minimis.191 The bitterness of the differences between the protagonists had resulted in near-stalemate. Twelve years later, when the voters finally adopted major change, the relative lack of controversy accompanying the change made it seem almost anti-climactic.

Section 2. All impeachments shall be tried by the senate. When sitting for that purpose, the senators shall be upon oath of affirmation. No person shall be convicted without the concurrence of two-thirds of the members present.

Section 3. The governor, and all other civil officers under this commonwealth, shall be liable to impeachment for any misdemeanor in office. But judgment, in such cases, shall not extend further than to removal from office, and disqualification to hold any office of honor, trust, or profit under this commonwealth. The party, whether convicted or acquitted, shall nevertheless be liable to indictment, trial, judgment, and punishment according to law.

PA. Const. of 1790, art. IV.

Article V, § 2 of the Pennsylvania Constitution of 1838 provided in pertinent part:
The judges of the supreme court shall hold their offices for the term of fifteen years, if they shall so long behave themselves well. The president judges of the several courts of common pleas, and of such other courts of record as are or shall be established by law, and all other judges, required to be learned in the law, shall hold their offices for the term of ten years, if they shall so long behave themselves well. The associate judges of the courts of common pleas shall hold their offices for the term of five years, if they shall so long behave themselves well. But for any reasonable cause, which shall not be sufficient ground of impeachment, the governor may remove any of them on the address of two-thirds of each branch of the legislature.

PA. Const. of 1838, art. V, § 2; compare with Article V, § 2 of the Pennsylvania Constitution of 1790, which provided in pertinent part:
The judges of the supreme court, and of the several courts of common pleas, shall hold their offices during good behavior. But for any reasonable cause, which shall not be sufficient ground of impeachment, the governor may remove any of them, on the address of two-thirds of each branch of the legislature.

PA. Const. of 1790, art. V, § 2.

Thus, the procedure for removal by impeachment for any misdemeanor in office continued to be less demanding than that for removal for less serious conduct.

190. Article VI, § 7 of the Pennsylvania Constitution of 1838 provided in pertinent part: "Justices of the peace or aldermen shall be elected in the several wards, boroughs, and townships, at the time of the election of constables, by the qualified voters thereof, in such number as shall be directed by law . . . ." PA. Const. of 1838, art. VI, § 7; compare with Article V, § 10 of the Pennsylvania Constitution of 1790 which provided in pertinent part: "The governor shall appoint a competent number of justices of the peace, in such convenient districts, in each county, as are or shall be directed by law . . . ." PA. Const. of 1838, art. V, § 10.

191. See supra note 186 for a discussion of the criticism of 15-year terms for supreme court justices.
In October 1850, the voters overwhelmingly adopted the constitutional amendment providing for an elected judiciary to Pennsylvania.\textsuperscript{192} Tenure remained unchanged, with fifteen year terms for justices of the supreme court, ten for president judges of common pleas, and five for associate judges.\textsuperscript{193} The impeachment article likewise remained unchanged, but the alternative removal process was amended to make removal by the governor mandatory, rather than discretionary, upon the address of two-thirds of each house of the legislature.\textsuperscript{194} The amendment effected change in a single sweep. It declared that the terms of all judges in office on the date voters ratified the amendment were to expire on the first Monday in December following the next

\textsuperscript{192} The amendment to Article V, § 2 of the Pennsylvania Constitution of 1838 provided in pertinent part:

The judges of the supreme court, of the several courts of common pleas, and of such other courts of record as are or shall be established by law, shall be elected by the qualified electors of the commonwealth in the manner following, to wit: The judges of the supreme court, by the qualified electors of the commonwealth at large; the president judges of the several courts of common pleas and of such other courts of record as are or shall be established by law, and all other judges required to be learned in the law, by the qualified electors of the respective districts over which they are to preside or act as judges; and the associate judges of the courts of common pleas, by the qualified electors of the counties respectively.

\textit{Pa. Const.} of 1838, art. V, § 2 (1850). In accordance with the amendment process established in article X of the 1838 constitution, two successive sessions of the General Assembly approved the proposed amendment in 1849 and 1850.

\textsuperscript{193} The amendment to Article V, § 2 of the Pennsylvania Constitution of 1838 provided in pertinent part:

The judges of the supreme court shall hold their offices for the term of fifteen years, if they shall so long behave themselves well, (subject to the allotment hereinafter provided for, subsequent to the first election); the president judges of the several courts of common pleas, and of such other courts of record as are or shall be established by law, and all other judges required to be learned in the law, shall hold their offices for the term of ten years, if they shall so long behave themselves well; the associate judges of the courts of common pleas shall hold their offices for the term of five years, if they shall so long behave themselves well . . . .

\textit{Pa. Const.} of 1838, art. V, § 2 (1850); \textit{compare with} the pre-amendment Article V, § 2 of the Pennsylvania Constitution of 1838 which provided in pertinent part:

The judges of the supreme court shall hold their offices for the term of fifteen years, if they shall so long behave themselves well. The president judges of the several courts of common pleas, and of such other courts of record as are or shall be established by law, and all other judges, required to be learned in the law, shall hold their offices for the term of ten years, if they shall so long behave themselves well. The associate judges of the courts of common pleas shall hold their offices for the term of five years, if they shall so long behave themselves well.


\textsuperscript{194} The amendment to Article V, § 2 of the Pennsylvania Constitution of 1838 provided in pertinent part: "[B]ut for any reasonable cause, which shall not be sufficient grounds of impeachment, the governor \textit{shall} remove any of [the judges] on the address of two-thirds of each branch of the legislature." \textit{Pa. Const.} of 1838, art. V, § 2 (1850) (emphasis added); \textit{compare with} the pre-amendment Article V, § 2 of the Pennsylvania Constitution of 1838 which provided in pertinent part: "But for any reasonable cause, which shall not be sufficient ground for impeachment, the governor \textit{may} remove any of [the judges] on the address of two-thirds of each branch of the legislature." \textit{Pa. Const.} of 1838, art. V, § 2 (emphasis added).
general election.\textsuperscript{195} Voters were to elect all new judges at that next general election, and their terms would commence on the day their predecessors' terms expired.\textsuperscript{196}

The official record of the 1850 amendment is very limited, considering the breadth of the amendment's sweep. George Woodward, the leading proponent of limited tenure in the 1837 convention,\textsuperscript{197} the leader of an effort to return to an appointive system in the 1872-73 convention,\textsuperscript{198} and a justice and chief justice of the supreme court under the 1850 system,\textsuperscript{199} complained that the amendment "was never called for by the people, [and] was not debated or considered as so grave a matter should have been . . . ."\textsuperscript{200}

It is true that the official Journals record little debate on the issue of electing judges,\textsuperscript{201} possibly because the issue had grown less controversial by the middle of the century or because the issue's outcome seemed certain. The vote in the Senate proposing the amendment in 1850 was 29 to 3; and the vote in the House was 87 to 3.\textsuperscript{202} In 1849, minor opposition was registered on procedural matters and on the assertion that the people had not demanded the amendment.\textsuperscript{203}

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196. \textit{Id.} The terms of the first elected justices of the supreme court were staggered at three-year intervals, by lot. \textit{Id.} The chief justice was always to be the justice whose commission expired first. \textit{Id.}
While both the nature of the change and the swiftness of its execution were striking, there was not a complete turnover of judicial personnel. For example, John Bannister Gibson, the last chief justice under the appointive system and an opponent of the elective system, was nominated by the Democrats and immediately returned to the court by election, though not as chief justice. Justice Richard Coulter returned to the high court in the same manner. \textit{Eastman, supra} note 106, at 445.
197. See \textit{supra} text accompanying notes 179-84 for a discussion of Woodward's arguments in favor of limited tenure of judges.
198. See 3 \textit{Debates of the Convention to Amend the Constitution of Pennsylvania} 732-38, 742-45 (Harrisburg, Pa., Benjamin Singerly, State Printer 1873) [hereinafter \textit{Debates}] (recording Woodward proposing and arguing his amendment requiring judges to be appointed rather than elected).
199. \textit{Branning, supra} note 73, at 61.
200. 3 \textit{Debates}, supra note 198, at 744. This is an obvious exaggeration. Mr. Woodward also failed to remember any expression of interest in an elected judiciary during the 1837 convention. See \textit{id.} (recording Woodward stating he did not remember anyone proposing election of judges during Convention of 1837).
201. A search of Journal index references yielded little by way of recorded debate. Part of the reason for this is that some debate simply was not recorded in the Journals, although it was reported elsewhere. See, e.g., \textit{infra} notes 204-08, 210-12 (noting several newspaper-reported accounts of debate). Kermit Hall provides a citation for what would appear to be the record of an extended debate in the House in 1850. Hall, \textit{supra} note 58, at 342 n.20. The Journal pages cited, however, do not address the amendment. \textit{Journal of the House of Representatives of the Commonwealth of Pennsylvania}, 1850 12, 17-21, 100-21 (1850).
203. See 1 \textit{Journal of the House of Representatives of the Commonwealth of Pennsylvania}, 1849 at 930-31 (Apr. 2, 1849) (opposing amendment because it (1) had not been
Despite the apparent calm in the legislature, there was robust debate in the popular press and extensive coverage of remarks made in the Assembly but not recorded in the Journals. Even in the press, however, there was a sense that the issue was not seriously in doubt. When “Snyder” offered the Philadelphia Evening Bulletin a series of articles “embracing the arguments in [the amendment’s] favor,” the editors questioned “whether the game [was] worth the candle” since they saw “the decision of this question as a foregone conclusion.”

“The efforts of all the Courts in the Commonwealth, combined with the few antiquated and aristocratic lawyers who are opposed to the measure, cannot arrest it.”

Nevertheless, several critical themes emerged. One theme was the competence of the electorate to select able judges. Representative Scofield addressed this issue, framing it with a critique of decisional coherence under the appointive system of judicial selection:

The Supreme Court has been the prolific theme of eulogy from the beginning of the debate. It is always more agreeable to praise than condemn, and it would be particularly grateful to my feelings to speak of that illustrious tribunal in the stereotyped phrases of commendation. But sir, I have some regard for truth. I believe, and I am compelled to say, that the people will elect a far better court. They will elect a court that can decide twice alike on the same question at least. Is that done now? . . . Their duty is to declare the law, not to make it. Stare decisis, ought to be the guiding maxim of a court. It used to be translated—“stand by the decisions;” but has now become to be translated stare at the decisions! I have no doubt the people will be able to select judges that can follow their own track.

Contrasting the “rabble” and the governor, Representative Scofield then explained why the institutional constraints on the latter made the electorate more competent to select able judges:

Sir, I belong to the rabble—bound to them by the ties of blood and early and continued association, and profess to have some knowledge of that class of the people; and I tell the gentlemen, that when this resolution passes, we will elect judges who, not only, can mingle with all classes of the people and submit to their jests and their criticisms; who, not only, can enter a barroom with morals unstained and a church with a conscience undisturbed, but will, each of them, when he takes his seat upon the bench, be every inch a judge.—The

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discussed in House of Representatives, (2) contained many propositions, (3) failed to decide whether president judges should be resident of their districts at time of their election, and (4) had not been demanded by the people, as evidenced by the paucity of petitions). The last criticism reflects the vitality of popular petitions as the beginning point of legislative action well into the nineteenth century.

204. The Amendment to the Constitution, PHIL. EVENING BULL., Sept. 26, 1850, at 2.
205. Id.
206. Speech of Mr. Scofield, Upon Mr. Porter’s Amendment to the Proposed Amendment to the Constitution Delivered in the House of Representatives Feb. 15, 1850, KEY STONE, Feb. 26, 1850, at 1.
executive has not the power to select such judges. He is compelled by the usages of his party to reward his partisans; those who, from serving him with greater zeal than they did their country, have lost the confidence of the people and can get nothing from them. He must pension his wounded soldiers—the lame ducks of his party must be gathered in.\textsuperscript{207}

The proponents of an elected judiciary consistently acknowledged the fundamental importance of judicial independence. Representative Comyngham linked independence with accountability:

I know the necessity of an independent judiciary; but I should desire an independence for good and not for evil. True independence rests upon the feeling of a proper accountability, both for moral and judicial action; and in my judgment . . . the reappointing power should be placed, where the feeling of direct accountability points, with the people and not with any of their delegated officers. Under the old constitution the remedy for a defective judiciary was by impeachment, or by address of the legislature to the Executive, asking for the removal of an incompetent judge, but though there were judges, who were not always faithful and efficient, yet the remedy was seldom attempted, and when attempted was more rarely successful. Now under this limited tenure every judge must feel the necessity of answering at regular periods for his conduct, and the power should be placed, as we ask it, with the people, of answering to those who must know him, and who, therefore, are not so likely to be led astray by falsehood and deception.\textsuperscript{208}

Representative Smyser also addressed judicial independence, cutting to the heart of the debate by relating independence to separation of powers. Recalling the authority of departed Federalists,\textsuperscript{209} he explained how separation is fundamental to liberty:

The judiciary is the strong and effective shield of the personal rights of the subject or citizen, against executive tyranny and legislative encroachment. It should be kept separate from and independent of both. Liberty has every thing to fear from the union of the judiciary with either, and the effect of a disguised dependence is as dangerous as an ostensible union. Montesquieu in his “Spirit of Laws,” says “There is no true liberty if the judiciary power be not separated from the legislative and executive powers.” The same view will be found reiterated in the Federalist, that text book of the American Constitution:—“Though individual oppression may now and then proceed from the courts of justice, the general liberty of the people

\textsuperscript{207} Id.

\textsuperscript{208} W.E. Drake, Speech of Mr. Comyngham, Upon Mr. Porter's Amendment to the Proposed Amendment to the Constitution—Delivered February 6, 1850, \textit{Key Stone}, Feb. 22, 1850, at 1.

\textsuperscript{209} If Representative Smyser saw any irony in borrowing Federalist argument to support democratic election of judges, he did not acknowledge it on this occasion.
can never be endangered from that quarter, so long as the judiciary remains truly distinct from both the Legislature and Executive.”

Representative Smyser then introduced the popular sovereign into the equation:

What, in this country then do we mean by an independent judiciary? Do we mean utter irresponsibility any where? This amendment proposes to make it, as far as it is prudent and wise, independent of the Executive and Legislature. Would [we want it] to be independent of the people likewise? Then there would remain responsibility nowhere.

Sir, if this amendment proposed to link the judges to the Executive or Legislature, then there might be reason to tremble for their independence. But when it is only proposed that they shall be chosen by the people, whose interest it is their special duty to protect and guard, it seems to me that there is nothing to fear, but every thing to hope.

But we are told that if the judges are elected by the people, they will in turn pander to their prejudices and passions for the promotion of their own interests. Sir, I have already in part, anticipated the reply I intended to give in this connection, to this argument. I resume it.

I am not one of those demagogues who assert or believe in the infallibility of the people. . . .

But, sir, whilst they often err, they never err intentionally. The great heart of the people is always right; they are honest and soon retrace their steps when convicted of error. And herein lies the important distinction between them and the Executive or legislative departments. The latter may be corrupted or improperly influenced, and wilful error never or very rarely retraces its steps; whilst the former are more swift to repair than to do wrong. Give them time and they will always come right.

Shortly before the ratification election, The Pennsylvanian succinctly addressed the issues of separation of powers and popular sovereignty:

If the proposed amendment of the Constitution be not sound and safe, then is Democracy a lie and an absurdity, and the "government of the many by the few" the only true and feasible system of society. There can be no escape from this conclusion; for either the people may be fully entrusted with political power, or they are not at all capable of self-government. The departments of government are the Executive, Judicial and Legislative.—If the people elect the Executive and Legislative, why should they not elect the Judiciary? Why destroy the distinctiveness and independence of the Judicial Department, vesting the appointment of Judges, as is now the case, in the Executive and Legislative Departments? For the sake of con-

210. W.E. Drake, Remarks of Mr. Smyser of Adams County, in the House of Representatives, on Thursday, the 14th of March, 1850, on the Bill To Amend the Constitution by Providing for the Election of Judges by the People, PA. TELEGRAPH, Mar. 23, 1850, at 2.

211. Id.
sistency, if for no other reason, the Judges should derive their power directly from the people, as the Executive and Legislative Departments of the Government.\textsuperscript{212}

C. Judicial Power and the Reclamation of the People’s Assembly: The 1874 Constitution

Pennsylvania enjoyed intense economic growth in the period following the Civil War.\textsuperscript{213} That growth, the attendant explosion in the number of corporate charters, and the expansion of corporate power generally caused the General Assembly to slip to levels of non-feasance, misfeasance, and malfeasance unparalleled in the state’s history.\textsuperscript{214} The volume of requests for special legislation on behalf of specific corporations, individuals, and geographically local interests became so great that “laws were sent to the governor for signature without ever having passed either house of the assembly.”\textsuperscript{215}

Popular concern over the operation of the government resulted in the calling of the Constitutional Convention of 1872-73.\textsuperscript{216} Not surprisingly, the major focus of this convention, the fourth in the state’s history and the last to exercise plenary control over the document it was to propose,\textsuperscript{217} was the General Assembly and legislative power. Nonetheless, the convention also paid significant attention to the judiciary.

There was especially spirited debate over retention of the system of electing judges. The Committee on the Judiciary proposed a compromise,

\textsuperscript{212} A Friend to the Amendment, Election of Judges by the People, PENNSYLVANIAN, OCT. 7, 1850, at 1.


\textsuperscript{214} As one commentator has described it: During the years immediately following the Civil War until about 1875 Pennsylvania was governed worse than at any other time. A political ring was in almost complete control and special and local legislation was passed in their interests. In 1872, for example, the legislature passed 1113 bills, of which it is estimated that only 43 were general laws.

Selsam, supra note 98, at 180 (citations omitted); see also Branning, supra note 73, at 55-56 (discussing concerns raised regarding the proliferation of local and special laws).

\textsuperscript{215} Porter, supra note 213, at 306. At least one delegate made specific reference to this practice of legislative “hocus-pocus” during the convention debates. 2 Debates, supra note 198, at 764 (Mr. Cochran).


\textsuperscript{216} Branning, supra note 73, at 55.

\textsuperscript{217} For a description of constitution-making in Pennsylvania, see Witte, supra note 14, at 426-68. Although the Assembly attempted to limit the authority of the 1872-1873 convention to examine specific subjects, the Assembly action appeared at odds with the decision of the electorate to call the convention, and the convention itself disregarded the instructions, at least in part. Id. at 453-58. Most recently, the 1967-1968 convention stayed within the stricter bounds prescribed by the legislature with the approval of the electorate. Id. at 463 & n.323.
returning to an appointive system for the justices of the supreme court, with
the appointments subject to Senate approval, while continuing the election of
lower court judges.\footnote{218} In retrospect, it seems clear that this proposal had no
chance of acceptance. A leading proponent candidly acknowledged the am-
biguity of the issue:

I believe that the instances and the arguments which have been ad-
duced on both sides of the question, have been, in some degree,
exaggerated. I do not think that the judicial system of Pennsylvania
would be very seriously affected by either mode, whether by ap-
pointment or election. . . . Under both systems there have been
judges of eminent ability who have administered the law with great
good judgment and learning, and under both systems there have
been very bad and inefficient judges . . . \footnote{219}

Other protagonists were not so moderate. George Woodward, who had
led the charge for popular accountability in 1837, and who subsequently was
elected to the supreme court, argued at length for returning to an entirely
appointive system.\footnote{220} Advocates of the elective system were equally uncom-
promising, and they commanded far more votes than Judge Woodward.\footnote{221} A
critical obstacle for the compromise proposal lay in the nature of the evi-
dence used by the opponents of the elective system. While the judiciary com-
mittee proposal would have made judicial positions on the supreme court
appointive, opponents of the elective system identified specific abuses which
tended to be identified with trial courts in Philadelphia and New York
City.\footnote{222}

In the end, the Constitution of 1874\footnote{223} expanded the supreme court to
seven members, each elected for a single, twenty-one-year term.\footnote{224} It estab-
lished a system of limited voting—a means of spreading political power be-
yond simple majorities—when multiple vacancies existed on the supreme
court in the same election.\footnote{225} Judges of other courts of record were elected
for ten-year terms and were not prohibited from seeking reelection.\footnote{226}

\footnotesize{\begin{itemize}
\item \footnote{218}{Branning, supra note 73, at 81.}
\item \footnote{219}{4 Debates, supra note 198, at 28.}
\item \footnote{220}{3 Debates, supra note 198, at 732-38, 742-45.}
\item \footnote{221}{Branning, supra note 73, at 84. Likewise, a proposal for the governor to appoint judges, subject to subsequent approval in popular elections, was introduced but not debated on the floor. Id. at 84.}
\item \footnote{222}{See 3 Debates, supra note 198, at 754-61 (Mr. Temple arguing that judicial elections negatively affect judiciary through party politics); see also id. at 772-78 (Mr. Gowen stating party politics negatively affect judiciary if judges are not appointed); Branning, supra note 73, at 82-83 (stating opponents of elective system argued that politicians adversely affected judiciary by selecting judges in Philadelphia and New York City).}
\item \footnote{223}{The designation of the 1873 text as the "Constitution of 1874" and the current text as the "Constitution of 1968" has been made by statute. 1 Pa. Cons. Stat. § 906 (West Supp. 1975).}
\item \footnote{224}{Pa. Const. of 1874, art. V, § 2.}
\item \footnote{225}{Id. § 16. If two justices were to be chosen, each voter was permitted to vote only for one; if three were to be chosen, each voter could vote for not more than two. Id.}
\item \footnote{226}{Id. § 15.}
\end{itemize}}
Because the major focus of the 1872-73 convention was the dismal conditions in the General Assembly, discussion of judicial checks on legislative defalcations was inevitable. It is perhaps not surprising that the debate on that subject revealed more interest in the nature of the judicial power than did the debate over judicial selection. Measured by constitutional text produced, however, the debate over judicial power was ultimately unproductive.

The 1872-73 convention developed an impressive array of provisions designed to keep the legislature focused on the public interest. This work of the convention was a major extension of the reform initiated in 1864\textsuperscript{227} when the Assembly passed the “single-subject” rule\textsuperscript{228} and a prohibition on legislative grants of “powers or privileges” in subject areas within the purview of judicial authority.\textsuperscript{229} The additions to the 1874 constitution included substantive definitions of the permissible subjects of legislation and procedural rules intended to ensure that all legislation was the product of appropriate deliberation.\textsuperscript{230}

Having curbed the opportunities for legislative abuse on paper, the convention questioned whether these measures were sufficient. The Committee on Legislation, which had drafted the rules governing the Assembly, proposed to make the measures enforceable by any court of record which was asked to give effect to a legislative enactment.\textsuperscript{231} This proposal elicited

\begin{footnotes}
\item\textsuperscript{227} See supra notes 85-92 and accompanying text for a discussion of Pennsylvania’s effort to regulate legislative power in its 1776 constitution. The “radical” 1776 experiment was abandoned in 1790, however. See Selsam, supra note 72, at 259 (noting Constitution of 1790 undid many of the innovations of Constitution of 1776).

\item\textsuperscript{228} Pa. Const. of 1838, art. XI, § 8 (1864). Section 8 provided: “No bill shall be passed by the legislature containing more than one subject, which shall be expressed in the title, except appropriation bills.” Id.

\item\textsuperscript{229} Id. § 9 (1864). Section 9 provided: “No bill shall be passed by the legislature granting any powers or privileges, in any case, where the authority to grant such powers or privileges has been or may hereafter be conferred upon the courts of this commonwealth.” Id. The problem of legislation favoring specific individuals in areas regulated by general law had first been addressed in the 1838 constitution, which prohibited legislative annulments of any marriage for which a judicial decree of divorce was available. Pa. Const. of 1838, art. I, § 14. Although the expressly detailed prohibitions of section 7 may appear to have made the general language redundant, the general prohibition of section 9 was carried into the 1874 constitution, Pa. Const. of 1874, art. III, § 7. The general language was omitted from the 1968 constitution. See Pa. Const. art. III, § 32 (omitting general prohibition on legislative powers where such powers had been granted to judiciary).

\item\textsuperscript{230} See Williams, supra note 66, at 91-92 (discussing adoption of procedural limitations on state legislative processes in response to perceived legislative abuses). The substantive and procedural limitations were set out in great detail. See Pa. Const. of 1874, art. III (stating substantive and procedural limitations on the legislature).

\item\textsuperscript{231} 2 Debates, supra note 198, at 758. The proposed § 35 provided:
Any Bill passed in disregard of the provisions and directions prescribed shall be void and of no effect; and when the validity of any law passed by the Legislature is questioned in any court of record, it shall be competent for such court to inspect the Journals of either House, and if it does not appear thereon that all the forms of legislation, in both Houses, as hereinbefore prescribed, have been observed in the passage of such law, the same shall be adjudged by such court to be void.

Id.
\end{footnotes}
problems that the convention struggled valiantly, yet unsuccessfully, to resolve.232

The debate on this subject identified two principal, competing constitutional values. First, if no means of enforcing the constitutional limits were provided, the convention's rules would be "as efficacious as the [Papal] [B]ull against the comet."233 Second, however, if the courts were given general authority to inquire into the validity of legislative acts, statutory law would lose its reliability, and rights devolved from statutes would never be secure.234 As the convention discussed these values at length, the delegates offered numerous alternative methods of oversight. The proposed methods of oversight relied variously on the governor, the secretary of state, the attorney general, and the supreme court.235 The convention ultimately rejected the committee proposal and all substitute proposals.236

Several delegates referred to the enrolled bill doctrine237 which immunizes legislative acts from scrutiny for defects that are not facially evident in the text as it is certified by the appropriate legislative authorities.238 While these references suggest that some members of the convention believed this rule of deference would apply in the absence of constitutional language to the contrary, the debate as a whole does not mandate that conclusion. Since the enrolled bill doctrine is a judicially crafted rule of deference, one could argue plausibly that the convention simply left the matter of enforceability of its work to future judicial debate.

D. Judicial Coups: The 1968 Constitution

With the exception of a brief experiment with nonpartisan elections between 1913 and 1921,239 the judicial selection system established in 1874 re-

232. See id. at 758-97 (convention rejecting proposal after lengthy debate).

233. Id. at 761. Mr. Palmer was likely referring to Halley's Comet, which had appeared in 1835. 13 Encyclopedia Americana 724 (1994).

234. 2 Debates, supra note 198, at 759, 762, 765-69, 771, 773-76, 780, 792-95.

235. See id. at 758-97 (recording delegates debating various ways to oversee potential abuses of legislature).

236. See id. (convention failing to come to agreement on proposal despite several attempts). Part of the difficulty the delegates encountered lay in the fact that very different varieties of problematic legislation were considered together. One area of concern was simple corruption. For example, a felonious clerk might alter the official record, making "law" of text never approved by the Assembly. Id. at 759. The major reforms, however, consisted of substantive and procedural limitations on the exercise of legislative power in ways that had no necessary connection to venality.

237. Id. at 759-72, 774-76, 778, 784-85, 787-88, 791.

238. See Williams, supra note 66, at 106-12 for a discussion of the "enrolled bill doctrine" and its close relatives.

239. See Montgomery & Conner, supra note 17, at 8 (discussing nonpartisan election history); see also Madonna, supra note 20, at 2-3 (discussing history of nonpartisan elections between 1913 and 1921).
mained in effect for nearly one hundred years. During most of its existence, there was discussion about the "need" for reform, but there was no constitutional change until 1968. The 1968 convention proposed numerous changes in the judiciary. The most visible changes that affected judicial selection were the move to uniform, ten-year terms of office and "up-or-down" retention elections for all judges of courts of record. Potentially more important, a provision was made for a separate referendum, to be held in 1969, on "merit selection." The 1968 amendments were adopted, but merit selection was rejected the following year.

Judicial selection processes aside, the 1968 constitution did effect important reform. Perhaps the most significant reform was the move to "a unified judicial system." Before the unitary system principle was adopted and implemented,

the court system in Pennsylvania . . . was archaic, not to say chaotic. At the appellate level, the supreme and superior courts were administratively totally independent of each other. At the county trial court level, each district was a judicial fiefdom with its own jealously guarded prerogatives. Within those districts existed a "bewildering patchwork of courts with overlapping jurisdiction, unsupervised operations, and, often, ill-trained personnel."

Two other changes adopted in 1968 held special significance for judicial selection, independence, and accountability—in ways perhaps unintended and unforeseen by most delegates. The first change was the constitutional requirement that all judicial elections, including retention elections, be held during municipal elections. The second change significantly enlarged the authority of the supreme court to exercise supervisory and administrative au-

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240. Neither the 1850 amendment nor the 1874 constitution mandated partisan elections. Other than the early twentieth-century interlude, however, this has been the Pennsylvania practice.

241. See Montgomery & Conner, supra note 17, at 8-11 for a summary of reform efforts in Pennsylvania from 1913 to 1990. For a summary of post-1850 debate, particularly since the 1950s, see Madonna, supra note 20, at 2-4. Several major "reform" proposals have been debated during the twentieth century. See e.g., 1959 REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION (Hon. Robert E. Woodside, Chairman, developing the "Pennsylvania Plan," a merit selection system that was recommended but not adopted). These continued after the voters' 1969 rejection of merit selection. See e.g., THE COMMITTEE OF SEVENTY, JUDICIAL SELECTION GOVERNANCE STUDY (1983) (discussing decline of Pennsylvania judiciary and reform proposals) [hereinafter COMMITTEE OF SEVENTY]; REPORT OF THE GOVERNOR'S JUDICIAL REFORM COMMISSION (1988) (The Beck Commission Report evaluating Pennsylvania's judiciary).

243. Id. § 13(d).
244. This referendum was incorporated in the 1968 constitution, adopted April 23, 1968. PA. CONST. art. V, § 13(â). As such, the failed 1969 referendum remains a part of the current constitution.
245. Id. art. V, § 1.
246. Pomeroy, supra note 17, at 616 (citing S. SCHULMAN, TOWARDS JUDICIAL REFORM IN PENNSYLVANIA (1962)).
247. PA. CONST. art. V, §§ 13(a), 13(b), 15(b).
authority over all the courts and the justices of the peace,\textsuperscript{248} and to prescribe rules of practice and procedure and of conduct of the courts and judicial personnel.\textsuperscript{249} The impact of these changes will be examined in Part V below, but I will first turn to a comparison of the theory of an elected judiciary with its contemporary practice.

IV. THE PRACTICE OF JUDICIAL POWER UNDER THE 1968 CONSTITUTION: CRACKS IN THE KEystone OF POPULAR SOVEREIGNTY

A. Judging the People’s Judges: The Measure of Theory

The arguments made some 150 years ago in support of an elective judiciary offer an intriguing measure of the vitality of William Duane’s legacy in the later years of the twentieth century. Reported in detail above, those arguments may be summarized in three critical themes. Two are at least arguably amenable to some form of “objective” analysis, and they provide the starting point for the analysis that follows.

One theme that has recurred throughout the history of the debate is the competence of the electorate to select capable judges.\textsuperscript{250} It requires no modesty to recognize that this theme is not appropriate for analysis here. “The qualifications and qualities essential to a ‘good’ judge are vague and uncertain; needless to say, choosing the ‘best qualified’ individuals to sit on the judiciary is a problematic endeavor.”\textsuperscript{251} Furthermore, critics of the Pennsylvania Supreme Court are quick to insist that the “laughing stock” of today was a respected model yesterday.\textsuperscript{252} Indeed, modesty has been a keynote of this issue from its inception. Protagonists on both sides acknowledge that elective and appointive systems alike have produced “judges of eminent ability who have administered the law with great good judgment and learning, and under both systems there have been very bad and inefficient judges.”\textsuperscript{253}

The two other themes are more promising.

Judicial independence is a second common theme, and one that proponents of an elected judiciary have consistently linked to accountability. Independence means, on the one hand, that “[t]he judiciary is the strong and

\textsuperscript{248} \textit{Id.} § 10(a).
\textsuperscript{249} \textit{Id.} § 10(c).
\textsuperscript{250} By this theory, the people are at least as capable of choosing judges wisely as are politicians. Furthermore, by means of popular election and either term limits or retention elections, the people serve as an independent, sovereign check on their judges. Periodic review creates a renewable contract of employment. However, the relatively long terms of judicial office encourage voters to take the long view and to see the totality of an incumbent’s service.
\textsuperscript{251} \textit{Dubois, supra} note 25, at 17. Dubois also notes a Missouri study that found “very few differences in the background characteristics of ‘superior’ and ‘inferior’ judges in terms of age, birthplace, education, political experience, or prior judicial experience. \textit{Id.} (citing \textit{Watson \& Downing, supra} note 25).
\textsuperscript{252} \textit{See} Madonna, \textit{supra} note 20, at 6, 7 (citing Testimony of Professor Bruce Ledewitz before the Pennsylvania State Senate Judiciary Committee, Mar. 2, 1993, and \textit{Committee of Seventy, supra} note 241, at 60).
\textsuperscript{253} \textit{4 Debates, supra} note 198, at 28.
effective shield of the personal rights of the subject or citizen, against executive tyranny and legislative encroachment."\textsuperscript{254} On the other hand, independence does not imply the "utter irresponsibility" that would result from detaching the judiciary from the people as well, for then "there would remain responsibility nowhere."\textsuperscript{255}

The third theme, and the one that has been at the core of the debate from William Duane's opening arguments to the present, is the place of the popular sovereign in the scheme of separation of powers. This is a theme of symmetry: "either the people may be \textit{fully} entrusted with political power, or they are not at all capable of self-government. . . . For the sake of consistency, if for no other reason, the Judges should derive their power \textit{directly} from the people, as the Executive and Legislative Departments of the Government."\textsuperscript{256} As a practical matter, the theme of popular sovereignty poses two questions. First, has the political power in fact been entrusted to the people? Second, if the judges derive their power directly from the people, does the authority of the popular sovereign operate as a check on the exercise of judicial power?

Two grand themes, then—judicial independence and accountability, and the role of the popular sovereign—not only have driven the larger part of the discourse over popular election of judges but, when placed in the context of specific areas of judicial activity, offer an opportunity to evaluate the current health of the Pennsylvania system. The evaluation reveals that the Pennsylvania Supreme Court today has not kept faith with William Duane.

\textbf{B. Judicial Independence and Accountability}

An attempt to evaluate the independence and accountability of any court is a tall order. The task I set for myself here is achievable only because I will first limit the parameters of the inquiry and then will rely heavily on excellent analyses already prepared by others.

The value of judicial independence as a means of erecting a "strong and effective shield of . . . personal rights . . . against executive tyranny and legislative encroachment"\textsuperscript{257} already has been identified. We still must specify, however, the rights that will count. Although it may seem obvious that individual rights are the most important in this context, I have chosen to focus on institutional issues, and specifically on the court's guardianship of the constitutional allocation of powers. I am particularly interested in the court's record regarding the powers of the legislature and those of the supreme court.

\textsuperscript{254} Drake, \textit{supra} note 210, at 2 (remarks of Mr. Smyser).

\textsuperscript{255} \textit{Id}. Professor Geyh focuses on separation of powers in the context of three branches of government, and faults "a state constitutional vision of a judiciary separate to the point of being isolated, a vision not shared by the federal constitution." Geyh, \textit{supra} note 17, at 1051. If the parameters of theory are defined by the traditional branches of government, Professor Geyh's observation is not only accurate, but critical. In the context of a theory that recognizes an active popular sovereign, however, the judiciary is not isolated.

\textsuperscript{256} \textit{Pennsylvanian}, Oct. 7, 1850, at 1.

\textsuperscript{257} Drake, \textit{supra} note 210, at 2 (remarks of Mr. Smyser).
itself. I limit the analysis in this fashion both because inherent difficulties exist in making an "objective" assessment of the judicial record on individual rights and because the issue of institutional guardianship is so directly related to the second value at stake, accountability.

Professors Bruce Ledewitz and Charles Gardner Geyh recently have examined in some detail the Pennsylvania Supreme Court's institutional guarди-

258. While we may refer to core individual rights with such terms as "fundamental" and "inalienable," a measure of rights often will depend on the eye of the beholder. Whether a "state action" component should be incorporated into a state constitutional guarantee of free speech, for example, may depend on the perspective from which one begins the inquiry, the property owner's or the pamphleteer's. See generally Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331 (Pa. 1986) (holding state constitution does not confer positive rights to individuals to solicit signatures for political purposes in privately owned shopping mall); Ledewitz, supra note 17, at 450-54 (discussing state action doctrine). Even if we agree on the definition of a body of individual rights, to what standard is a particular court's record of guardianship to be compared? The record of the U.S. Supreme Court? When?


In earlier research on this subject, I concluded that the history of constitution-making in Pennsylvania evidences a strong tradition of citizen respect for individual rights. See generally Witte, supra note 14. In contrast with several other states, public reaction to judicial expansion of individual rights in Pennsylvania generally has been moderate. See, e.g., John T. Wold & John H. Carter, The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability, 70 JUDICATURE 348, 348-55 (1987) (discussing 1986 campaign to unseat members of California Supreme Court in response to judicial decisions regarding individual rights). This may suggest that the Pennsylvania Supreme Court is reasonably in tune with the generally pro-rights tradition of the citizens of the state.
anship of the constitutional allocation of powers. Professor Ledewitz observes:

The justices exercise their most important and independent authority in the area of institutional relations among the branches of Pennsylvania's government. In this field, where their powers are greatest, the justices constantly overstep reasonable boundaries . . . . Of course, critics always say that courts are too activist. The Pennsylvania situation is unique, however, because the justices are not acting to protect powerless minorities or fundamental rights, but instead, are maintaining and expanding their own influence and prerogatives.260

Professor Geyh focuses on the powers of the supreme court in the areas of regulating practice and procedure, judicial administration, and judicial discipline. Contrasting the systems of "intermingled separation of powers" provided by the United States Constitution and many state constitutions,261 Professor Geyh finds that the "power grab"262 by the Pennsylvania Supreme Court, effectively ousting the legislature from the lawmaking arena in "all matters relating to judicial operations,"263 is one manifestation of the problem of a "judiciary separate to the point of being isolated."264

Accepting the general contours of the critiques offered by Professors Ledewitz and Geyh, I will use one, exceptionally important Pennsylvania Supreme Court decision to illustrate how the court's guardianship of the constitutional allocation of powers has abandoned all pretense of judicial logic and restraint. Consumer Party v. Commonwealth265 is a particularly rich case for this illustration because it sweeps through a broad array of institutional powers and limitations, both judicial and legislative.

Consumer Party involved a challenge to the Public Official Compensation Law of 1983.266 The compensation law was, in many respects, a routine and necessary measure of government housekeeping. It established salaries and expenses for important government officials, including the highest officers of the executive branch, members of the legislature, justices of the supreme court and all other judges.267

While compensation of public officials is part of the housekeeping of government, in Pennsylvania it also is addressed in the constitution. One constitutional provision of particular significance for the 1983 law addresses compensation of members of the General Assembly:

259. Ledewitz, supra note 17; Geyh, supra note 17. See also Scherer, supra note 17; Mulcahey, supra note 17.
260. Ledewitz, supra note 17, at 409.
261. Geyh, supra note 17, at 1054.
262. Id. at 1061.
263. Id.
264. Id. at 1051.
266. Id. at 325.
267. Id. at 326.
The members of the General Assembly shall receive such salary and mileage... as shall be fixed by law, and no other compensation whatever.... No member of either House shall during the term for which he may have been elected, receive any increase of salary, or mileage, under any law passed during such term.\textsuperscript{268}

Despite its elegant simplicity, this language proved to be quite accommodating.

Several provisions of the compensation law appeared to conflict with the constitutional constraints. Section 4 of the law raised the salaries of most members of the Assembly from $25,000 to $35,000 per year.\textsuperscript{269} It postponed that raise, however, for members of the Senate who had been elected in 1982.\textsuperscript{270} presumably on the theory that since they were in the middle of four-year terms,\textsuperscript{271} Article II, § 8 of the Pennsylvania Constitution demanded forbearance. Rather than forbearance, however, the compensation law awarded the mid-term senators—and only the mid-term senators—an "expense allowance of $10,000 per annum" in addition to their $25,000 salaries and the other expense allowances provided to the members of the Assembly generally.\textsuperscript{272} The arithmetic of this plan is as plain as the constitutional language that had been thought to prohibit it.

The mid-term pay raise for half the Senate was not the only substantive point of contention. Section 5 of the law granted all members a $5000 per year "unvouchered expense allowance," in addition to other expense allowances.\textsuperscript{273} Officers of each chamber were granted further "unvouchered expense allowance[s]" in amounts ranging from $1500 for lower party leaders to $6360 for appropriations chairmen.\textsuperscript{274} The "unvouchered expense allowance[s]" of Section 5 were to begin December 1, 1983,\textsuperscript{275} meaning that all members of the Assembly would receive additional money under the Compensation Act during the legislative term in which they passed it.

If the substantive problems with the 1983 compensation law appeared to be severe, they paled in comparison to the procedural ones. The limitations on legislative authority that were thought important in the nineteenth century\textsuperscript{276} were carried forward into the 1968 constitution, but were honored only in the breach in 1983. The impressive list of procedural limitations provided by the 1968 constitution includes requirements, dating to 1873, that no bill may be so altered on passage through the Assembly "as to change its original purpose,"\textsuperscript{277} that all bills shall be referred to a committee,\textsuperscript{278} and

\textsuperscript{268} Pa. Const. art. II, § 8.
\textsuperscript{269} Consumer Party, 507 A.2d at 326 n.3
\textsuperscript{270} Id.
\textsuperscript{271} Senators are elected for terms of four years. Pa. Const. art. II, § 3.
\textsuperscript{272} Consumer Party, 507 A.2d at 326 n.3.
\textsuperscript{273} Id. at 326 n.4.
\textsuperscript{274} Id.
\textsuperscript{275} Id.
\textsuperscript{276} See supra notes 227-38 and accompanying text for a more detailed discussion of these limitations.
\textsuperscript{277} Pa. Const. art. III, § 1.
that each bill "shall be considered on three different days in each House." Although an argument can be made that the compensation law complied with any one of these limitations, acceptance of that argument negates the suggestion that both of the other limitations were satisfied.

The compensation law became a bill on September 28, 1983, when a conference committee of the House and Senate, which had assembled to reconcile differences between the two chambers on legislation affecting local government, focused instead on compensation of state government officials. The conferees provided pay raises for all state officials who might have an opportunity to review the legislation, and their bill was adopted by both chambers of the Assembly the same day. Thus, the Public Official Compensation Law of 1983 was introduced, considered, and passed by both chambers in less than twenty-four hours, without the benefit of consideration by any committee other than a conference committee that had been appointed to consider an entirely different matter.

In short, as routine housekeeping measures go, the compensation law was a messy affair. It also was a run on the public fisc that if attempted by persons lacking a cloak of apparent legal authority likely would have led to prison. More important for our purposes, the law was an ideal foil for an institution intended to be a "strong and effective shield . . . against executive tyranny and legislative encroachment." In order to address the merits of legislative defalcations, the Pennsylvania Supreme Court first had to overcome two daunting obstacles to its assertion of authority. The court tackled both, suggesting that it took its function as guardian of the rights and interests of the people seriously. The first obstacle was standing. For a number of years, the court had followed a liberal rule of taxpayer standing "to enjoin the wrongful or unlawful expenditure of public funds," even though the plaintiff had suffered no injury other than as a taxpayer. This liberal rule was overruled in 1979 in Application of Beister. However, Beister did not end the matter because the Consumer Party court focused on the "narrow exception" to its new rule against taxpayer standing, if "judicial review otherwise would not occur" but seemed appropriate. Although this "narrow exception" clearly has the capacity to swallow the rule, it is at least consistent with the notion of an in-

278. Id. § 2.
279. Id. § 4.
281. Id. at 326. The Act was signed by Governor Thornburgh two days later. Id.
282. Drake, supra note 210, at 2 (remarks of Mr. Smyser).
284. 409 A.2d 848 (Pa. 1979). The Beister court held that to meet the requirement of standing, a plaintiff must allege and prove an interest in the outcome of the suit which surpasses "the common interest of all citizens in procuring obedience to the law." Id. at 851 (quoting William Penn Parking Garage, Inc. v. City of Pittsburgh, 346 A.2d 269, 281 (Pa. 1975)). To surpass the common interest, the plaintiff's "interest is required to be, at least, substantial, direct, and immediate." Id. at 851.
dependent judiciary checking the defalcations of other members of the
government.286

Having disposed of the inconvenience of its recent standing precedent,
the court had to confront the yet more formidable obstacle known as the
"enrolled bill doctrine." As previously noted, the 1872-73 convention grappled
with the problem of enforcing its limitations on legislative power, but did not resolve it.287 Soon thereafter, the supreme court weighed in and declared that the rules governing legislative practice are mandatory and binding on the members of the Assembly. In addition, the court stated that "any intentional disregard is a breach of duty and a violation of their oaths."288 Nonetheless, "when a law has been passed and certified in due form, it is no part of the duty of the judiciary to go beyond the law as duly certified to inquire into the observance of form in its passage. . . . The presumption in favor of regularity is essential to the peace and order of the state."289

The enrolled bill doctrine is readily susceptible to criticism.290 To rely exclusively on the legislature to enforce the limitations on its own power may undermine the value of those limitations. On the other hand, the rule has a distinguished pedigree,291 and it at least theoretically makes the legislature accountable to the people for the manner in which it exercises its delegated power. Thus, to accept the rule is to defer to the legislature. To reject the rule is to demand compliance with the constitutional text by shifting power to the judiciary.

In Consumer Party, the Pennsylvania Supreme Court took a path that purported to respect the rule of law and the constitutional text, while still according a measure of deference to the rule of the Assembly. This required the court to reject its prior caselaw, but arguably established a neat and defensible middle ground. While a general rule of deference was still recognized, "where the facts are agreed upon and the question presented is whether or not a violation of a mandatory constitutional provision has oc-

286. Professor Ledewitz criticizes the court's expansion of its power that follows from the standing aspect of Consumer Party and its prodigy. Ledewitz, supra note 17, at 426. This is certainly a fair criticism, since an expansive view of standing leads directly to an expansive exercise of judicial power. Some organ of the government, though, is going to exercise power in any event, and the real question is which one. If the court eschews judicial review because of a narrow standing rule, the legislature (or executive, as the case may be) will exercise its power to preserve the illegal conduct.

287. See supra text accompanying notes 231-38 for a discussion of the 1872-1873 convention's debate regarding enforcement of limitations on legislative power.

288. Kilgore v. Magee, 85 Pa. 401, 412 (1877) (addressing challenge to act allegedly passed in contravention of several limitations on legislative power provided by 1874 Constitution).

289. Id.

290. See, e.g., Williams, supra note 66, at 114 (criticizing enrolled bill doctrine).

curred, it is not only appropriate to provide judicial intervention, and if warranted a judicial remedy, we are mandated to do no less."292

Consumer Party had the potential to become a model of judicial statecraft. Instead, however, the court put itself in the worst of all possible worlds. Having discarded precedent and prudence to assert broad power of judicial oversight, it placed its stamp of approval on all of the Assembly's defalcations. On the procedural side, with a logic seemingly borrowed from Sesame Street, the court reasoned—without quite saying—that while the substance of the original Senate Bill 270 had changed quite dramatically, its number had not.293 Specifically, the court noted that there had been "no change in the bill's purpose after it left the [Conference] Committee and that object was clearly stated in the new title."294

Regarding the real claim, that what came out of the conference committee was so totally different from what had gone in that it could not possibly be said to comply with Article III, the court reasoned that since the conference process "is by its nature designed to reach a consensus,"295 material change by the committee was to be expected.296 The purpose of the procedural restriction is to put the Assembly and interested persons on notice, and that was accomplished because anyone who read the bill produced by the committee would understand what it was meant to do.297

As for the substantive claims, the court found it could look at the "plain meaning" of the words in the statute.298 The constitution prohibited only increases in "salary" or "mileage." An "unvouched expense allowance" is neither of these and is, therefore, allowed.299 The court's construction of these terms invites difficulty with other terms, since the constitution also commands that legislators receive "no other compensation whatever,"300 but the court made no mention of this problem.301 Thus, it seems, the Assembly may give its members whatever money the members want, as long as the Assembly avoids the constitutional language of money.


293. To paraphrase Sesame Street's classic statement of sponsorship: "This law has been brought to you by the number 270."

294. Consumer Party, 507 A.2d at 334. The court failed to mention that there was no opportunity to change any part of the bill after it emerged from conference. The vote in each house could only be up or down, and likewise the review of the governor.

295. Id. at 334 (citing 1 Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 11-08 (Sands 4th ed. 1985) (quoting F. Horack, LEGISLATION 220 (1940))).

296. Id.

297. Id. at 335.

298. Id. at 336.

299. Id.

300. PA. CONST. art. II, § 8.

301. The court began its discussion of Article II, § 8, by insisting that "the issue is not properly before the Court." Consumer Party, 507 A.2d at 336. It nonetheless addressed the merits, but without reference to the "no other compensation whatever" difficulty. Id. at 336-38.
C. Judicial Power and Popular Sovereignty

If Consumer Party were an aberration, one might be inclined to let it go with a smile. After all, we do know some things about money and politics. But Consumer Party is not an aberration; it is a reflection of the Pennsylvania Supreme Court's standard operating procedure of arrogating power to itself, for use if and how the court might see fit.\textsuperscript{302} I will turn now to an examination of how that practice has infected the court's review of the processes of constitutional change.

If there is a single area in which a court that is accountable to the people might be expected to show restraint, it is when the popular sovereign exercises its fundamental right to alter or amend the structure or powers of its government. However, the Pennsylvania Supreme Court's approach in this area has mirrored its stance in Consumer Party: discard precedent and claim the power of review.\textsuperscript{303} This is the most direct measure of the success of "democratic reform" of an elected judiciary, and it demonstrates contemporary failure. The court has significantly curtailed the people's "inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper,"\textsuperscript{304} at least by peaceful means.

Although the constitutional text clearly recognizes the people as the ultimate authority in the amendment process, contemporary judicial practice has placed the vitality of the text in doubt. A form of the constitutional rule of popular sovereignty was once recognized in Pennsylvania, enunciated in decisions concerning the original and sole means of amending the constitution—the convention process. The court's most recent pronouncements on the convention process, however, suggest that a different rule may apply in Pennsylvania today.\textsuperscript{305}

The former judicial respect for popular sovereignty is illustrated in events relating to the creation of the Constitution of 1874. That constitution has been referred to as "partially revolutionary."\textsuperscript{306} The Act of the legislature calling the convention that framed it expressly withheld the authority to propose amendments that would alter any of the language in the Declaration of Rights or that would establish courts with exclusive equity jurisdiction.\textsuperscript{307} The Act also provided that one-third of the membership of the convention could require the body to submit any part of its final proposals to the electo-

\textsuperscript{302} Professors Ledewitz, supra note 17, Geyh, supra note 17, and other commentators offer numerous examples beyond those I detail here. See supra notes 259-64 and accompanying text for a summary of their findings.

\textsuperscript{303} See supra notes 283-92 and accompanying text.

\textsuperscript{304} Pa. Const. art. 1, § 2.

\textsuperscript{305} The discussion that follows, through the text at footnote 345, infra, is taken in large part from my earlier work on the processes of constitutional change in Pennsylvania, Witte, supra note 14, at 454-61.

\textsuperscript{306} Thomas R. White, Commentaries on the Constitution of Pennsylvania 37 (1907).

rate as a separate issue.\textsuperscript{308} The Act authorized the convention to establish the time and manner of submitting proposals,\textsuperscript{309} but it provided for the ratification election to be conducted "as the general elections of this commonwealth are now by law conducted."\textsuperscript{310}

In several respects, the convention disregarded the legislature's attempts to limit its authority. Two cases that addressed the convention's actions reached the state supreme court. The first, \textit{Wells v. Bain},\textsuperscript{311} was decided before the election to ratify the proposed new constitution. The second, \textit{Woods's Appeal},\textsuperscript{312} was decided after ratification. Together, these decisions represent a studied effort to grapple with the relationship between popular sovereignty and the constitutional amendment process.

\textit{Wells} addressed two of the convention's actions: its attempt to remove oversight of the ratification election in Philadelphia from the control of the regular election officials in that city,\textsuperscript{313} and its refusal to submit the proposed judiciary article to a separate vote, despite the contention that the requisite one-third of its members had so demanded. To determine the validity of these actions, the court examined the convention's power.

First, the right of the people, recited in the Declaration of Rights, to "alter, reform, or abolish their government"\textsuperscript{314} as they saw fit was \textit{not} at issue. That was because "the people," in this instance, meant "the whole—those who constitute the entire state, male and female citizens, infants and adults," not a "mere majority of those persons who are qualified as electors."\textsuperscript{315} A related right of the people, to assemble and petition for redress of grievances, \textit{was} implicated, but invocation of \textit{that} right relies on the "instrumental process" of law, effected through the people's chosen representatives.\textsuperscript{316} The primordial right of revolution remains when "unfaithful"

\begin{itemize}
\item \textsuperscript{308} \textit{Id.}
\item \textsuperscript{309} \textit{Id.} \textsection 5.
\item \textsuperscript{310} \textit{Id.} \textsection 6, at 55-56.
\item \textsuperscript{311} 75 Pa. 39, 55 (1874) (holding that change in election practices was invalid due to direct conflict with Act of Apr. 11, 1872, but that matters of procedure within scope of act were not subject to judicial review).
\item \textsuperscript{312} 75 Pa. 59, 74-75 (1874) (holding that people's adoption of new constitution subsequent to dismissal of case at trial ended any possibility of judicial review).
\item \textsuperscript{313} The convention's interest in relieving the Philadelphia election officials of supervisory authority over the ratification election was hardly surprising. Election fraud was one of the critical substantive concerns of the convention, second only to legislative corruption. \textit{Branning, supra} note 73, at 87.
\item \textsuperscript{314} \textit{Pa. Const.} of 1838, art. IX, \textsection 2.
\item \textsuperscript{315} \textit{Wells}, 75 Pa. at 46. This dictum carries extraordinary implications in its suggestion of the participation of women and children, rich and poor, in the ultimate political life of the community to a degree never before or since recognized in the Commonwealth.
\item \textsuperscript{316} \textit{Id.} at 47. When electors possessing "the qualifications sanctioned by the people in order to represent them" choose the representatives, they act with authority conferred on them by the people as a whole. \textit{Id.} The court does not explain how women, children, and other disenfranchised members of "the people" confer this power on the electorate.
representatives fail to respond, or when "the government becomes tyrannical."\textsuperscript{317}

Because the convention was not a "revolutionary body," it was bound by the legislative enactment that had created it. The electorate had authorized but had not mandated the legislature to call the convention. When the electorate subsequently selected its delegates, it did so under the terms of the call issued by the legislature. Lacking, therefore, a delegation of plenary power to act for the people, the convention was limited to the powers fixed by the legislature's terms, which were expressed in the law. In the court's view, that law not only failed to grant the convention the authority to displace the election officials of Philadelphia, but negated it, leaving the convention's ordinance on the subject "illegal and void."\textsuperscript{318}

The refusal to submit the judiciary article to a separate vote, however, stood "on a very different footing," because "[t]he convention was clothed with express power to act upon the question of submitting the amendments in whole or in part."\textsuperscript{319} That being so,

it must be presumed that the decision of the body as a whole was rightly made, and either that the request was not made by a full one-third of all the members, or, if made by one-third, it was not in a regular or orderly way. It would be a violent presumption to suppose that the body would willfully disregard their own oaths as well as a full and orderly request.\textsuperscript{320}

Most importantly, even if the convention committed such a wrong, "no appeal is given to the judiciary, and the error can be corrected only by the people themselves, by rejecting the work of the convention."\textsuperscript{321}

Thus, the issues for the Wells court became straightforward questions of power. If the convention attempted to act beyond its authority, as it did in the first instance, then it was the duty of the court to restrain it. But when the convention had acted within the scope of its power, its decisions, at least on "[m]ere errors of procedure," were final, and subject to correction only by the electorate.\textsuperscript{322}

After Wells had focused on the power of the convention, the court in Woods's Appeal\textsuperscript{323} focused on the power of the people. Woods's Appeal challenged the entire convention process, the method of selecting delegates, and several specific acts of the convention, including the proposed amendments to the Declaration of Rights. The lower court dismissed the case, and the appeal was not heard by the supreme court until after the ratification election had been held.

\textsuperscript{317} Id. at 47-48.

\textsuperscript{318} Id. at 47-55.

\textsuperscript{319} Id. at 55.

\textsuperscript{320} Id. at 55-56.

\textsuperscript{321} Id. at 56.

\textsuperscript{322} Id.

\textsuperscript{323} 75 Pa. 59, 74-75 (1874) (concerning power of people to adopt new constitution).
Woods's Appeal consumes over fifteen pages of the Pennsylvania Reports, but its holding comprises precisely one sentence: "The change made by the people in their political institutions, by the adoption of the proposed Constitution since [the decree of dismissal entered by the lower court], forbids an inquiry into the merits of this case." 324 Most of the other ink is devoted to a lengthy transcription of the trial judge's opinion and the supreme court's extensive dicta refuting that opinion.

The trial court had reviewed the broad recognition of the convention as an institution in the United States, and held that it was a legitimate mechanism for the exercise of the "right [of] the people to change their constitutions, except where especially prohibited in a constitution itself." 325 The opinion then elaborated a theory of popular sovereignty under which the people could allow the convention to exercise its power wholly unrestrained by the legislature. Only the people themselves could limit the convention:

A convention to amend the constitution, without there is an express limitation as to the extent of their power, passed upon by the people in determining the question of amendment, has inherently, by the very nature of the case under the great principle peculiarly American, and quasi revolutionary in its character . . . , absolute power, so far as may be necessary to carry out the purpose for which they were called into existence, by the popular will. 326

The supreme court affirmed the lower court's decree, but felt constrained to decry the "unsound and dangerous" doctrine thought to sustain the decree. 327 The court explained that the right to alter, amend, or abolish government belongs to the people alone, rather than to a convention of their agents. Whatever authority the convention possesses is delegated authority, and the delegation is effected by law, "the highest form of a people's will in a state of peaceful government." 328 Until the frame of government is changed, the power to make law resides in the legislature. Therefore, unless prohibited by the existing constitution, the legislature, on behalf of the people, may regulate the convention, and the convention must obey. 329

Throughout its opinion, the supreme court expressed concern that a convention, acting on its proclaimed sovereignty, might usurp the people's power by refusing to submit its work to a ratification election. 330 Nothing of the sort, of course, was attempted or suggested in 1873, and it is difficult to read an assertion of such a power into the trial court's opinion. 331

324. Id. at 68-69.
325. Id. at 65.
326. Id. at 67.
327. Id. at 69.
328. Id. at 71-72.
329. Id. at 72.
330. Id. at 72-73.
331. The trial court's assertion of "absolute power" in the convention is immediately qualified by language limiting it to necessity, in the context of carrying out the will of the people. Id. at 67.
In its concluding sentence, however, the court more generally rejected any right of a convention, limited by law, to “infuse present life and vigor into its work before its adoption by the people.” The 1872-73 convention had attempted to “infuse present life and vigor” into its ordinance displacing the election officials in Philadelphia and already had been rebuffed on that point by the Wells court. To equate that act with a coup d’état, however, is a stretch.

It is important, nevertheless, to differentiate the dicta of Woods’s Appeal from its holding. While the dicta would establish a regime of legislative dominance of the convention process, the holding recognized the ultimate right of the people to ratify the convention’s work, even if the convention defied a legislative attempt to restrain it. This judicial respect for the “judgment of the electorate” gives practical application to the doctrine of popular sovereignty, closing the window for judicial review of the amendment process at the moment the revision is ratified by the electorate.

The Pennsylvania Supreme Court’s most recent pronouncements on the subject, however, appear to repudiate its jurisprudence of deference to the judgment of the people. Stander v. Kelley was a challenge to Article V of the constitution of 1968. Article V was framed by a convention that, following the teaching of Woods’s Appeal, had been strictly limited by the General Assembly. The electorate ratified the new constitution on April 23, 1968 before Stander was decided, and justiciability was a critical issue.

Affirming the lower court’s decree which dismissed the challenge, the supreme court was unable to agree upon an opinion explaining its decision. However, four justices expressly addressed justiciability, including the single

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332. Id. at 75.
333. Although drawn in the language of the rights of the people, the supreme court’s dicta actually addressed the division of authority between the legislature and a convention, and established a regime of legislative supremacy over the convention process. The court’s argument that this tilt does not “restrain the people,” but gives effect to their right, “by the instrumentality of the law, to limit their delegates,” id. at 71, lacks force. The limitations that the legislature placed on the 1872-1873 convention were established only after the electorate overwhelmingly had approved the calling of the convention, and abuses of legislative power had been the principal impetus for the call. Compare Act of June 2, 1871, No. 262, 1871 Pa. Laws 282 (providing for referendum on whether to call convention) with Act of Apr. 11, 1872, No. 44, 1872 Pa. Laws 53 (calling the convention). One might argue that the convention delegates evidenced more interest in ensuring the rights of the people when the delegates exceeded their legal limits, as interpreted by the court, than the legislature did when it created them.
334. Woods’s Appeal, 75 Pa. at 75.
337. Act of Mar. 15, 1967, No. 2, 1967 Pa. Laws 2. For example, Act 2 strictly limited the subject areas open to convention consideration and, within those areas, prohibited the making of certain specified proposals. It gave the convention three calendar months within which to complete its work. Id. at 6-8.
338. Stander, 250 A.2d at 475.
339. The Pennsylvania Supreme Court earlier had affirmed the trial court’s denial of a preliminary injunction striking the ratification question from the ballot on grounds that there was no clear abuse of discretion, or palpable legal error. Stander v. Kelley, 246 A.2d 649 (Pa. 1968).
dissenting justice, and all agreed that ratification by the electorate did not close the window for judicial review. 340 Furthermore, although the three members of the court who joined in a concurring opinion were silent on that issue, their focus on the merits implies that they agreed with the rest of the court on justiciability. 341

Speaking for a three-member plurality, Chief Justice Bell briefly reviewed the precedent, including Woods's Appeal, and dismissed it:

Assuming these cases are apposite, if they hold as the Commonwealth contends, the foolishness of such a holding in the present era is obvious. If there is a palpable violation or violations of the existing Constitution, the Commonwealth contends that that question or issue is justiciable if decided by the Courts one week or one day prior to the election, but is not justiciable one day after the people have voted to approve or adopt the Amendment, no matter how clearly the provisions of the existing Constitution may have been violated. Furthermore, under the theory of the Commonwealth, a trial Court or an appellate Court could unintentionally or intentionally enable a palpable violation or violations of the Constitution of Pennsylvania, or of the Constitution of the United States, to become Constitutional and nonjusticiable, if, . . . for any reason whatsoever it failed to render a decision before the question was approved by the vote of the people. 342

Relying on United States Supreme Court decisions holding that amendments to state constitutions are subject to review for compliance with the federal Constitution, despite their ratification, the Chief Justice concluded that “[i]t is a traditional and inherent power of the Courts to decide all questions of Constitutionality,” and that ratification of an amendment does not render constitutional claims of its invalidity nonjusticiable. 343

To the extent that the Chief Justice's view of the matter is limited to judicial review under federal constitutional norms, it is perfectly unexceptional and, indeed, reflects the mandate of the Supremacy Clause. 344 To the extent that it purports to require judicial review of a new constitution, ratified by the people, under the norms of the former state constitution, the decision is a remarkably thoughtless rejection of nearly two centuries of constitutional practice in the Commonwealth.

The plurality view of the matter is plainly intended to embrace review under state norms as well as federal ones, because many if not most of the specific claims made regarding Article V were based on the 1874 constitution. All claims were found to be without merit, and the plurality's analysis of justiciability is therefore only the dicta of three justices. It is dangerous,

340. Stander, 250 A.2d at 476-78; id. at 485 (Cohen, J., dissenting).
341. Id. at 485-87 (Roberts, J., concurring).
342. Id. at 477 (plurality opinion) (citation omitted).
343. Id. at 478.
344. U.S. Const. art. VI, § 2.
however, because all members of the Stander court appear to have agreed that ratification created no bar to their reaching the merits. 345

Stander announced that the Pennsylvania Supreme Court has abandoned its doctrine of deference to the judgment of the popular sovereign in the constitutional amendment process. Thus, foreshadowing Consumer Party, Stander demonstrated the migratory character of the contemporary court’s approach to a jurisprudence of judicial review. Just as Consumer Party rejected precedent in order to claim judicial powers previously eschewed, 346 Stander laid claim to a power of judicial review that the court had disavowed almost a century earlier, 347 at a time when the crusade for an elected judiciary was still recent history. In both instances, of course, the court simply claimed a new power of judicial review, but did not use it to nullify the statute or the constitutional amendment under challenge.

The “banking” of judicial power is a familiar scene in American constitutional history. Chief Justice Marshall’s assertion of authority over President Jefferson’s Secretary of State 348 is an honored exemplar. The contemporary examples from Pennsylvania, however, command no such respect. The Pennsylvania Supreme Court’s decision in Consumer Party left its members, as well as those of the General Assembly and many in the executive branch, financially more comfortable then they would have been with a different decision. 349 Stander gratuitously denied the final authority of the

345. The opinion of the Chief Justice went so far as to invite new litigation on the constitutionality of individual provisions of Article V. Stander, 250 A.2d at 483.

346. See supra notes 283-92 and accompanying text for a discussion of the court’s expansion of taxpayer standing and its abrogation of the enrolled bill doctrine.


349. The Compensation Act challenged in Consumer Party included pay raises for the judiciary as well as for the legislature and the executive branch. While Consumer Party is a particularly colorful case, it certainly is not the only example of the court’s use of its power to increase judicial compensation. In Goodheart v. Casey, 555 A.2d 1210 (Pa.), aff’d on reh’g, 565 A.2d 757 (Pa. 1989), and Klein v. Employees’ Retirement Sys., 555 A.2d 1216 (Pa. 1989), the court invalidated several provisions of a 1974 revision of the state retirement system as it affected judges. In Goodheart, a plurality reasoned that since the legislature in 1959 had determined that one retirement system was appropriate as part of an “adequate compensation” package for judges, the legislature in 1974 could not determine that a less generous system for new judges was also part of an adequate package. Goodheart, 555 A.2d at 1216.

In Klein, a different plurality reasoned that related revisions violated state constitutional requirements of a unified judicial system, Pa. Const. art. V, § 1, and equal protection. Whatever may be said of the contention that a legislative effort to repair a state retirement system somehow disunites the judicial system, see Ledewitz, supra note 17, at 437-38, the equal protection claim is at least creative. One hurdle is that the Pennsylvania Constitution does not have an “equal protection” provision as such. Second, although there is other constitutional text that the court uses as a substitute for the national “equal protection” language, the court generally has applied that text in lockstep with the federal doctrine. See generally Marritz, supra note 258 (discussing equality provisions within Pennsylvania Constitution and state supreme court interpretations of these provisions); Williams, supra note 258 (same). But there is nothing lockstep about the Klein court’s careful review of the legislature’s retirement plan for the class of
popular sovereign in the constitutional amendment process, while upholding an amendment that increased both the court's power and its isolation from the electorate. The 1968 amendment itself now requires attention.

V. WHOSE JUDICIARY IS THIS?

If the critique of the Pennsylvania Supreme Court's doctrinal migrations in its guardianship of the constitutional allocations of powers to the General Assembly and, ultimately, to the people, has any validity, then something about the theory or practice of a popularly elected judiciary clearly is amiss in the Commonwealth. A court that exercises its authority to bank money and power in its own name may be "independent," but certainly is not "responsible."

This assessment does not mean, however, that the theory developed nearly two hundred years ago finally has been proved wanting, even though judges taking office after March 1, 1974. As a concurring justice observes, the newer judges are hardly a "suspect class." Klein, 555 A.2d at 1226.

In addition to claiming authority to tell the legislature how much money judges must be paid, the court also asserts the authority to instruct other branches of the government how much money must be provided to support the judicial system generally. See, e.g., County of Allegheny v. Commonwealth, 534 A.2d 760 (Pa. 1987) (finding that judiciary's power to control own funding is not intrusion upon legislature). Although this case may be criticized as well, see Ledewitz, supra note 17, at 426-29 (discussing Pennsylvania Supreme Court's lack of judicial restraint and general overstepping of institutional bounds on its own behalf), the Pennsylvania court certainly is not alone in its theory that there are judicially enforceable, constitutional standards for legislative funding of an adequate judicial system. See, e.g., Broomfield v. Maricopa County, 544 P.2d 1080, 1083 (Ariz. 1975) (compelling county board to hire deputy adult probation officer in accordance with judicial order); Smith v. Miller, 384 P.2d 738, 741 (Colo. 1963) (holding that county commissioners must approve salaries of court employees as fixed by judiciary); Rose v. Palm Beach County, 361 So. 2d 135, 139 (Fla. 1978) (holding that court has power to order county commission to compensate witness above statutory guidelines if reasonable in pursuit of justice); Knuepfer v. Fawell, 449 N.E.2d 1312, 1317 (III. 1983) (staying judicial order to evict private business tenant from county administration building for purpose of creating courtrooms because county board had already called for additional temporary courtrooms); State ex rel. Hillis v. Sullivan, 137 P. 392, 395 (Mont. 1913) (declaring that judiciary can appoint and compensate court officials only if county commissioners and sheriff fail to do so); In re Alamance County Court Facilities, 405 S.E.2d 125, 132 (N.C. 1991) (holding that judiciary has inherent power to direct county commissioners to provide adequate court facilities); In re Furnishings for Judge, 423 N.E.2d 86, 88 (Ohio 1981) (stating that judge has jurisdiction to enforce order against county commissioners to purchase furnishings and equipment for courtroom); In re Salary of Juvenile Director, 552 P.2d 163, 175 (Wash. 1976) (finding that judiciary had overstepped its power by ordering increase in salary of Director of Juvenile Services when there was no evidence of necessity for increase). For an insightful analysis of the "inherent" power of the judiciary to compel funding of its own operations, see Jeffrey Jackson, Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers, 52 Md. L. Rev. 217 (1993) (discussing judiciary's power to mandate adequate funding); see also Comment, State Court Assertion of Power To Determine and Demand Its Own Budget, 120 U. Pa. L. Rev. 1187 (1972) (discussing power of state court to fix and demand its budget independent of any legislative discretion). Compared to the judicial compensation cases, this larger argument at least has the advantage of being less obviously related to the personal financial interests of the judges making it.
the arguments raised against the theory then may be renewed today. It is possible to consider less radical accounts of the current state of affairs, and I believe that the 1968 amendments to Article V offer a fruitful source for this inquiry. In examining those amendments, it should be acknowledged that serious problems existed in the Pennsylvania judiciary of the era, requiring corrective measures.\(^{351}\) But as easy as it is to acknowledge the problems confronting mid-century reformers, the problems confronting end-century reformers are no less urgent. And if problems identified today have their genesis in the corrections made by a previous generation, our ability to examine them, and to try again, confirms the messy elegance of the constitutional system we have grown.

In terms of our specific inquiry, I suggest that the end-century reformers consider how the reforms of their mid-century predecessors affected two critical questions: first, do the people in fact select and retain their judges; second, if the judges are not accountable to the popular sovereign, have other checks on judicial power been minimized as well?

A. Who Elected These Judges?

Our theory is that judges are accountable to the people because they are elected by the people and are retained by the people. The theory seems to be reflected in the constitution, because Article V provides for both initial elections and retention elections of our judges.\(^{352}\) Several factors, however, work against the theory, and the first of these is the timing of judicial elections.

The scheduling of judicial elections—whether with general or municipal elections—has been an issue since the debate over popular elections began in earnest. The importance of the issue was captured by Representative Co- myngham in 1850:

Mr. Speaker, I do not agree with the gentlemen, who in opposing the details of the resolution, object to the time fixed for the periodical election of the judges, that is to say, the general or fall election.—Persons may differ in relation to whether it be proper or not thus to connect a judicial election with the period at which political feelings run the most violently in their several currents: but it must be remembered, that if politics are to operate as they do now, and will probably continue to do hereafter, the great objective is to fix the time of election at that period which will ensure the fullest exhibit of the public will, the greatest popular vote, and this we all know must be at the general election. Experience shows us that if you multiply the times of election the people will not so generally attend—and it is at small elections, where but few of the voters attend, that the influence of demagogues, and particular individuals is the most to be feared. Let it be as this resolution fixes the time, and

\(^{351}\) See generally Pomeroy, supra note 17. See supra notes 245-46 and accompanying text for discussion concerning the move to a unified judicial system.

we may be sure that the people of the county will attend in their numbers and their strength, to vote for their judges.\textsuperscript{353}

The argument for maximum participation carried the day in the 1850 amendment, and express provision was made for judicial elections to be held as part of the general election.\textsuperscript{354} At the time, general elections were held annually and members of the house of representatives served one-year terms.\textsuperscript{355} The 1874 constitution continued the basic system of holding judicial elections as part of the general election, except for justices of the peace.\textsuperscript{356} A 1909 amendment moved the state from annual to biennial general elections, in even-numbered years.\textsuperscript{357} More significantly, another 1909 amendment moved the election of local judges to the municipal election and permitted the election of statewide judges in \textit{either} general or municipal elections, "as circumstances may require."\textsuperscript{358}

\textsuperscript{353} Drake, supra note 210, at 1.

\textsuperscript{354} Pa. Const. of 1838, art. V, § 2 (amended 1850).

\textsuperscript{355} Id. art. I, § 2.

\textsuperscript{356} The timing of judicial elections was expressed less directly than it had been in 1850. Terms for judges appointed to fill vacancies would expire on the first Monday in January after the first general election held at least three months after the vacancy was created. Pa. Const. of 1874, art. V, § 25. Additionally, the definition of the municipal election, in terms of the officers to be elected, did not include judges. Id. art. VIII, § 3. Justices of the peace, however, were elected with local constables. Id. art. V, § 11. A 1909 amendment made it explicit that justices of the peace were elected in municipal elections. Id. art. V, § 11 (amended 1909).

Although the 1874 constitution moved the Commonwealth from a system of annual legislative sessions, Pa. Const. of 1838, art. I, § 2, to a biennial one, Pa. Const. of 1874, art. II, § 4, and gave representatives two-year terms, id. § 2, it carried forward the provision for annual general elections. Id. art. VIII, § 2.

\textsuperscript{357} Article VIII, § 2 of the Pennsylvania Constitution of 1874 provided in pertinent part: "The general election shall be held annually on the Tuesday next following the first Monday of November, but the General Assembly may be law fix a different day, two-thirds of all the members of each House consenting thereto." Pa. Const. of 1874, art. VIII, § 2; \textit{compare with} the 1909 amendment of § 2, which reads in pertinent part: "The general election shall be held biennially on the Tuesday next following the first Monday of November in each even-numbered year, but the General Assembly may be law fix a different day, two-thirds of all the members of each House consenting thereto: Provided, That such election shall always be held in an even-numbered year." Pa. Const. of 1874, art. VIII, § 2 (amended 1909); Pa. Const. art. VII, § 2.

\textsuperscript{358} Article VIII, § 3 of the Pennsylvania Constitution of 1874 provided in pertinent part: "All elections for city, ward, borough, and township officers, for regular terms of service, shall be held on the third Tuesday of February." Pa. Const. of 1874, art. VIII, § 3; \textit{compare with} the 1909 amendment of § 3, which reads in pertinent part:

All judges elected by the electors of the State at large may be elected at either a general or municipal election, as circumstances may require. All elections for judges of the courts for the several judicial districts, and for county, city, ward, borough, and township officers, for regular terms of service, shall be held on the municipal election day; namely, the Tuesday next following the first Monday of November in each odd-numbered year, but the General Assembly may by law fix a different day, two-thirds of all the members of each House consenting thereto: Provided, That such election shall always be held in an odd-numbered year.

Pa. Const. of 1874, art. VIII, § 3 (amended 1909). The "as circumstances may require" language presumably related to the date on which the vacancy was created. It effectively suggested,
The 1968 constitution moved all judicial elections to the municipal election and abolished the system of limited voting for supreme court justices. The 1968 constitution also provided for a referendum election, to be held in 1969, to decide whether to further amend the judicial selection system by adopting a form of merit selection. The 1969 referendum narrowly defeated the merit selection amendment. The Pennsylvania Supreme Court has expressed its opinion regarding the policy of electing judges only during municipal elections:

The strong policy reasons that gave rise to the constitutional mandate that judicial elections should be held in municipal elections applies statewide as well as to the judges of the “several judicial districts.” Pa. Const. art. VII, § 3. In general elections the citizens of this Commonwealth are called upon to elect either a President or a Governor. Because of the importance of selecting good judges, it was concluded that the election of judges in an election where either a President or Governor was being elected would detract from the public attention required for the filling of the judicial office. Even the detractors of the popular selection of judges must concede the wisdom of this policy as long as we retain elected judges. Although they may challenge the efficacy of electing judges, they cannot legitimately dispute that a presidential or gubernatorial race distracts the voters in their selection of judicial officers.

The court might have added that the move to electing judges during municipal elections exclusively is a step toward a non-elected judiciary because voter turnout for municipal elections tends to be substantially lower than that for general elections. Furthermore, the outcome of the judicial races may well be determined by factors wholly extraneous to the “merits” of the race. In effect, the “policy” of 1968 rejected the argument for maximum participation that had carried the 1850 debate.

however, that there were no practical differences between general and municipal elections. Whatever the validity of that suggestion in 1909, it is certainly false today.

359. Pa. Const. art. V, § 13(a). There is a measure of textual ambiguity on this point, since the 1968 constitution also carried forward the provision, adopted in 1909, that permitted election of statewide judges in either general or municipal elections. Id. art. VII, § 3. In 1982, this provision was held by the supreme court to permit the election of a justice of that court in the general election. Cavanaugh v. Davis, 440 A.2d 1380, 1382 (Pa. 1982) (distinguishing between state and local judges). In 1988, the court effectively overruled Cavanaugh, by limiting it to the “sui generis quality” of its facts. Sprague v. Casey, 550 A.2d 184, 194 (Pa. 1988).


361. Pa. Const. art. V, § 13(d). Article V of the 1968 constitution was presented to the voters as one of a series of five proposals prepared by a limited convention. All were approved by the electorate. A number of other amendments to the 1874 constitution had been proposed by the legislature and were adopted by the people in 1966 and 1967. Thus, the “Constitution of 1968” is a series of seriatim amendments to the Constitution of 1874. 1 Pa. Cons. Stat. § 906 (Purdon’s Supp. 1995); Robert E. Woodside, Pennsylvania Constitutional Law 579-82 (1985).


363. Sprague, 550 A.2d at 194.
A review of data maintained by the Pennsylvania Department of State, Bureau of Elections since 1968 demonstrates the magnitude of this outcome.\textsuperscript{364} When voter registration data are compared to voter participation data, the difference between a "general" election and a "municipal" election becomes strikingly plain. In the fourteen general elections held between 1968 and 1994, the voter participation rate\textsuperscript{365} ranged from a 1990 low of 53.9\% at the reelection of Governor Robert Casey to a 1968 high of 84.7\% in the presidential election that put Richard Nixon in the White House.\textsuperscript{366} The average voter participation rate in presidential elections was 80\%; in gubernatorial elections the average rate was 62\%.\textsuperscript{367}

Voter participation rates for statewide candidates or issues are substantially lower in municipal elections. Usually the only statewide offices on the ballot in municipal elections are justices of the Pennsylvania Supreme Court and judges of the superior court and the commonwealth court. A notable exception occurred in 1991, when the remaining two years of the U.S. Senate term of the late John Heinz was on the ballot. Not surprisingly, that race drew almost 64\% of all registered voters. Contested races for statewide judgeships, however, yield much lower figures, ranging from a low of 32.7\% in a superior court race in 1993 to a high of 52.8\% in a 1976 race for a judgeship on the same court.\textsuperscript{368} The average voter participation rates in elections for positions on the supreme court was 41.5 \%; on the superior court, 43\%; and on the commonwealth court, 38\%.\textsuperscript{369}

In short, roughly one-half the number of voters who participate in presidential elections participate in judicial elections; roughly two-thirds of the number who vote in gubernatorial elections vote in judicial elections.\textsuperscript{370} As

\textsuperscript{364} The Pennsylvania Department of State, Bureau of Elections, maintains reports of all votes cast in every election in the state. For statewide elections—and only statewide races are considered here—the reports give the official tallies by county and the statewide totals for each office, retention election, or other measure on the ballot. The Bureau also maintains records of voter registration, including statewide totals, for each election. Copies of the Bureau's reports for statewide elections from 1968 through 1994 are on file with the author.

\textsuperscript{365} Voter participation rates are reported here as the percentage of registered voters in any given year who vote in a particular statewide election held that year. See \textit{supra} note 364.

\textsuperscript{366} If this difference may be attributed in some part to the difference between elections which result in the retention of a popular governor in 1990 and the selection of a new president during the intense national discord of 1968, it is nonetheless consistent with the differences between voter turnout in national, general elections, compared to state, general elections, since 1968. The highest rate of voter turnout in general elections for governors during this period was 68\%, in 1970, while the lowest participation rate for voters in presidential elections was 77\%.

\textsuperscript{367} See \textit{supra} notes 364, 366.

\textsuperscript{368} Data are reported here for contested judgeship races when only a single seat on any one court was to be filled. Data are not reported for those occasions when two or more seats on the same court were filled, because each candidate is running against all other candidates, and voters are permitted to vote for as many candidates as there are open positions. Thus, the Bureau of Elections data show the total number of votes cast, but not the number of voters.

\textsuperscript{369} See \textit{supra} note 364.

\textsuperscript{370} These comparisons slightly overstate the relative rates of voter participation in judicial races, because voter registration figures typically are slightly smaller in municipal election years than in general election years. To complete the symmetry, voter registration typically is some-
for retention elections, which are uncontested in the sense that the single judge is listed for a "yes" or "no" vote, voter participation is lower still—usually well below 30%. Retention elections aside, the only statewide elections that typically generate lower voter participation rates than contested judicial races are ballot issues such as constitutional amendments and bond issues. Less than 23% of the state's registered voters, for example, participated in the 1971 election that ratified Pennsylvania's Equal Rights Amendment.

The low rates of voter participation in municipal elections is hardly surprising, and the falloff reported here for judicial elections in Pennsylvania has been observed in other states as well. Furthermore, the severe decrease in popular participation in the judicial selection process is only part of the problem with municipal elections, and not even the most important. The other part has to do with what makes an elective system work.

The Pennsylvania Supreme Court's explanation of the policy driving the 1968 switch—that it would permit voters to concentrate on judicial elections without the distraction of presidential or gubernatorial races—is absurd. Very few people would dispute the assertion that voters, generally, know virtually nothing about specific candidates for judicial office. And it is even doubtful that members of the Pennsylvania supreme court really believe that moving judicial elections to the relatively low-interest municipal elections actually increases voter concentration on judicial candidates.

what higher in general election years featuring a presidential election than in years in which a governor is chosen.

371. Although it is sometimes said that retention elections draw less interest than contested elections and almost always result in retention because voters are weighing a known entity against an unknown replacement, the data and theories analyzed here suggest a very different reason. As will be seen, the partisan label gives voters important information. Retention elections are non-partisan, meaning, ironically, that voters in fact have less information about the decision they are asked to make than is available in contested elections. The Pennsylvania experience here is consistent with patterns documented elsewhere. Dubois, supra note 25, at 18 (using Missouri example to illustrate pattern). Although a vigorous effort to disseminate information about inadequate judges would assist voters, those with the best information—members of the bench and bar—are under powerful institutional constraints that counsel silence.


374. See supra text accompanying note 362.

375. Dubois, supra note 25, at 62-63. Voter ignorance frequently is advanced as an argument for merit selection of judges. E.g., Madonna, supra note 20. As Dubois observes, however, the real point is how the level of voter ignorance regarding judicial candidates compares to voter ignorance regarding candidates for other high office. If voters also are ignorant regarding candidates for legislative office, for example, does that mean we should abolish elected legislatures? Dubois, supra note 25, at 62-63.
What makes a system of judicial elections work is the very thing many of its critics decry, partisan politics. If no distorting institutional factors are at work, partisan politics "cures" the problem of voter ignorance. Even if the voter knows nothing about the candidate other than the party label, that information is still quite useful. As one leading commentator explains,

if judicial campaigns are typical of other subpresidential contests, the candidates for state supreme court judge are not likely to attract much attention and, consequently, the level of specific voter awareness and knowledge about the qualifications and policy positions of judicial hopefuls is not likely to be very high. Voters may thus have to rely upon less-direct indicators and cues to guide them in their choice between competing judicial candidates. Where a party label is available, voters are most likely to call upon it to help them cast their ballots. If the results of previous research are considered, such voting behavior is not irrational from the standpoint of the individual voter since party labels identify, in a general way, the kinds of policies voters can expect from individual judges on the bench wearing each label. . . . [T]here is a demonstrable relationship between partisan affiliation and judicial policy-making. In scholarly studies of the relationship between social background characteristics and the patterns of individual judicial behavior, political party has emerged as the single most important factor which accounts for the differences in the decision-making tendencies of state supreme court justices.

The importance of party affiliation as a predictor of judicial decision-making applies to federal appellate judges, appointed for life, as well as to state appellate judges elected in partisan races. In the states, the relationship obtains regardless of the method of selection and retention, whether it be merit selection, partisan election, non-partisan election, merit retention, or a combination.

However, it must be emphasized that the rationality of the partisan elective system depends on the absence of institutional distortions. Unfortunately, distortions abound in the Pennsylvania system as it is currently configured. Data regarding this state's high court indicate that political party
affiliation is a less powerful factor in policy differences here than elsewhere. 380 Two reasons for this have been advanced. First, but largely of historical interest, the twenty-one-year single term of Pennsylvania high court judges prior to 1968 served to diminish the significance of party ties after the election. 381 Second, and critical today, the intra-party factionalism that divides Philadelphia and Pittsburgh "has partially mitigated the strength of the party variable for judicial behavior . . . " 382

I would add two other considerations to the list, both dealing with municipal elections. First, to the extent that municipal elections tend to attract the greatest interest in larger cities, and to the extent those cities tend to be more heavily Democratic than rural areas, one might expect municipal elections to favor Democratic candidates. This appears to have happened. On the supreme court, the number of justices who are Democrats has increased steadily and consistently, from two in 1969, when nearly the entire court had been selected under the terms of the Constitution of 1874, 383 to six of seven in 1994, before the removal of Justice Larsen. 384 The commonwealth court reveals a similar pattern. It was created by the Constitution of 1968 385 and its first members were appointed in 1970. 386 The appointed judges included three Democrats and four Republicans. 387 That pattern changed steadily until 1994, when eight of the nine judges were Democrats. 388 Only the superior court fails to follow the pattern, having had four Democrats in a total of seven judges in 1969, and eight in a total of fifteen in 1994, 389 a difference that possibly is explained by the high number of judges initially appointed to that court. 390 Taking the statewide courts as a whole, of the fifteen judges elected between 1982 and 1991, thirteen have been Democrats. 391

381. Id. at 159.
382. Id. See also id. at 186-87. The east-west split certainly continues to be a factor in judicial party politics. See Patriot-News Voters Guide, THE PATRIOT-NEWS, May 8, 1995, at 4 (providing example of this split). The Democratic Party primary resulted in an endorsement to easterners, after a "raucous committee meeting that pitted [Philadelphia and Scranton against Pittsburgh]." Id.
384. Id. at 413, ex. 8.
386. Nase, supra note 383, at 399.
387. Id. at 414, ex. 10.
388. Id.
389. Id. at 414, ex. 9.
390. This is a hypothesis. I have not gone beyond the data reported by Mr. Nase. His data—useful as it is—does not lend itself readily to proving the hypothesis, but is consistent with it.
391. Nase, supra note 383, at 430. As a life-long Democrat, I will admit to having a strong personal preference for a system that produces judges reflecting Democratic values, whether those judges are elected or appointed. Since I also like to consider myself a reasonably fair-minded person, however, I am prepared to concede that a selection process ought not to be so systemically skewed as to consistently disfavor the candidates of a particular party—not even the
Second, if the intra-party factionalism dividing Philadelphia and Pittsburgh mitigates the effectiveness of the partisan process as a control mechanism generally, the timing of the election exacerbates its impact. In the primary election, the turnout in Allegheny County (Pittsburgh) versus that in Philadelphia will frequently determine the outcome of the Democratic Party's nominee. In nominations of candidates for the supreme court, Allegheny has been the consistent victor.\footnote{392} If the Democratic nominee is then favored in the fall election, because of a pro-Democrat skew in municipal elections generally, the result is to confirm the winner of the east versus west battle. Primary turnout, however, will rarely be affected by the judicial races themselves. It will depend instead on how hot some other, purely local, contest becomes.\footnote{393} Of course, spillover is a fact of life in all elections, including judicial elections in even the best systems:

In the situation most abhorred by critics, sitting judges are caught in the middle of partisan shifts sparked by political events connected with executive and legislative politics in which the officials of one party, including judges, are swept out of office and replaced by candidates affiliated with the other party. As one who was both a beneficiary and a victim of this process once observed, "I was elected in 1916 because Woodrow Wilson kept us out of war—I was defeated in 1920 because Woodrow Wilson hadn't kept us out of war."\footnote{394}

Pennsylvania's spillover is particularly troubling, however, because it nearly always is the product of a purely local matter in one or both of the largest cities.\footnote{395} It is one thing to be affected one year by a national or state Democratic sweep, and another year by a Republican one. It is quite another thing to have the outcome of statewide judicial elections consistently at the mercy of local party factions. Pennsylvania judges are not accountable to the people, but to local, and mostly Democratic, party functionaries.

\textit{B. Can Anyone Guard the Guardians?}

If the analysis above is at all persuasive, then it must be accepted that the Supreme Court of Pennsylvania is not, in any practical sense, accountable to the people. Finally and most importantly, though, as a rational and reflective person I am uncomfortable with a system whose outcome is determined by the vagaries of local party politics in Pittsburgh and Philadelphia. That system neither ensures that I will have good Democrats on the bench nor enables me to call it "fair." But that is the system we have.

\footnote{392}{Nase, supra note 383, at 419.}


\footnote{394}{DuBois, supra note 25, at 7 (citation omitted).}

\footnote{395}{As long as judicial elections are part of the municipal election, exceptions to the local politics domination of spillover will be extremely rare. The 1991 U.S. Senate race between Harris Wofford and Richard Thornburgh was one such exception.}
to the people. Lack of accountability to the people is not fatal, however, if other checks on the exercise of judicial power are available. That is, after all, the national system. In Pennsylvania, however, the high court’s approach to its supervisory and rulemaking powers has left it without a meaningful check.

Professors Ledewitz and Geyh have thoroughly documented the court’s inclination to view itself as the sole keeper of its keys. They also have offered solutions to the problem of an unchecked court. Professor Ledewitz recommends a constitutional amendment that would place the power of the supreme court under the express control of the General Assembly. Professor Geyh finds the “shared power” of the national model more appealing. Although both of these recommendations offer plausible correctives, they do not exhaust the possibilities.

One benefit of our federal system is its ability to experiment with different solutions to a problem perceived by many and the states’ different approaches to the question of checks and balances is no exception. The laboratories of the states have produced three models of separation of powers in the area of judicial rulemaking. Pennsylvania is but one of the laboratories, and before we draw conclusions regarding the success of the Commonwealth’s experiment, our proactive federalism suggests that we look to the experiences of our sister states.

In one model of separation, the court is highly deferential to the legislature, and accepts the legislature’s rule even when a judicial rule on the same issue at least arguably contradicts it. In the second model, the court defers to the legislature’s judgement unless there is a judicial rule that is both contrary to the legislative rule and is within a modest view of the judicial power

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396. As explained in note 23, supra, the accountability analysis here focuses on the supreme court.
398. Id. § 10(c).
399. Ledewitz, supra note 17; Geyh, supra note 17; see also Scherer, supra note 17; Mulcahey, supra note 17.
400. Ledewitz, supra note 17, at 459 (stating that many problems could be solved if article V, § 10 of the state constitution was repealed and replaced by provision allowing legislature to define supreme court’s powers and duties).
401. Geyh, supra note 17, at 1043, 1076.
402. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
403. See, e.g., Bartholomew v. Schweitzer, 587 A.2d 1014, 1017-18 (Conn. 1991) (reading statute so that it did not interfere with trial court's broad discretion); State v. Reed, 811 P.2d 1163, 1167-68 (Kan. 1991) (explaining that contradiction between statutes and court-enacted rules must be resolved by looking at specific facts and circumstances of each case with assumption that statute is constitutional); City of Fargo v. Ruether, 490 N.W.2d 481, 484 (N.D. 1992) (deferring to legislature where "statute governing admissibility of evidence is part of a legislative design that essentially authorizes and creates the item of disputed evidence"). A court following this model may stress the lack of complete separation of powers in the state's constitutional scheme.
to regulate practice and procedure. This model enjoys a high level of acceptance in the state laboratories. 404 The third model invalidates any legislative rule that touches on an issue constitutionally assigned to the court, even if there is no judicial rule. This is a form of "field preemption," and is the Pennsylvania model today. For Article V, section 10 purposes, the court has permitted itself to be accountable to no other institution. While other states occasionally exemplify this model as well, 405 and while Pennsylvania is not entirely off the scale, the Pennsylvania Supreme Court fairly may be said to be on the fringe. 406

The 1968 amendments that moved judicial elections to the municipal election and entrenched the rule-making and supervisory power of the supreme court in the constitution look like judicial coups because they increase judicial power and decrease accountability. There is no need, however, to question the motivation of the reformers who gave us the 1968

404. See, e.g., Ex parte Ward, 540 So. 2d 1350, 1351 (Ala. 1988) (recognizing that state legislature has power to enact statutes creating and defining substantive rights, and that rules developed by courts are limited in that respect); R.J.A. v. Foster, 603 So. 2d 1167, 1171 (Fla. 1992) (stating that court had power to uphold a procedural rule when dealing with time-frame prior to trial); People v. Williams, 577 N.E.2d 762, 764 (Ill. 1991) (holding section of statute unconstitutional for violating separation of powers clause of Illinois Constitution, ILL. CONST. art. II, § 1); State ex rel. Beacon Journal Publishing Co. v. Waters, 617 N.E.2d 1110, 1113-14 (Ohio 1993) (recognizing limits on criminal procedural rule, even as court held it constitutional); State ex rel. Silcott v. Spahr, 552 N.E.2d 926, 928 (Ohio 1990) (holding "that a valid procedural rule can be invalidated only by a resolution of disapproval . . . and that once in effect, rules governing practice and procedure cannot be later invalidated by a purported withholding of 'jurisdiction' to follow them"); Bennet v. Warner, 372 S.E.2d 920, 924-26 (W. Va. 1988) (directing trial court to follow jury selection statute); see also Mulcahey, supra note 17, at 549-52 (using Massachusetts judicial branch as example of this ideology).

405. See, e.g., In re J.E.S., 817 P.2d 508, 512 (Colo. 1991) (stating that "[t]he inherent and indispensable nature of the courts' right to punish contemptuous conduct necessarily shields this judicial power from the legislative control"); In re "Sunshine Law," 255 N.W.2d 635, 636 (Mich. 1977) (holding that Act applying to courts in their rulemaking capacity and decisionmaking duties over administrative orders was unconstitutional, because it "intruded into the most basic day-to-day exercise of the constitutionally derived judicial powers"); Goldberg v. Eighth Judicial District Court, 572 P.2d 521, 522-23 (Nev. 1977) (holding statute requiring open meeting of public bodies unconstitutional as applied to judiciary).

406. "Pennsylvania's supreme court seems to have greater power than any other state supreme court in the country." Mulcahey, supra note 17, at 552. Justice Pomeroy also has noted how the "dual role" opens the court to criticism. Pomeroy, supra note 17, at 633.

Paralleling the criticism of the level of authority the court claims under Article V, § 10, is the criticism of the procedures by which it has exercised that authority in isolation and in secrecy. See, e.g., Woods, supra note 361, at 429 (discussing some distressing conduct by Pennsylvania Supreme Court). In the press, the court's reputation for secretiveness and unaccountability has been referred to as "The Supreme Disgrace." Charles W. Grau, Judicial Rulemaking: Administration, Access and Accountability 49 (1978) (quoting The Supreme Disgrace: Does the Law Matter?, PHILA. INQUIRER, Apr. 23, 1978, at K6).

The court's tight-fisted approach to judicial administration has garnered similar criticism. For example, shortly after the 1968 amendments took effect, the supreme court created a Judicial Council of Pennsylvania to oversee much of the work of administering the judicial branch. Members of the court came, however, to dislike sharing this power, and the Council "was allowed to become moribund." Pomeroy, supra note 17, at 625.
amendments. Best intentions often yield unintended consequences. Kermit Hall has analyzed the effects of the national judicial reform movement that progressives and reformers in the legal community mounted between 1850 and 1920. His conclusion seems a reasonable description of where Pennsylvania finds itself today, and an invitation to exercise caution:

Popular partisan election had been more a potential than a real threat to the independence of state appellate judiciaries. The machinery sponsored by bar reformers and Progressive political leaders made the threat even less remote, but in doing so it damaged the inherently fragile nature of democratic accountability and the popular credibility of the appellate judiciary. Judicial elections became the tail on the electoral kite, democratic accountability declined, and the public lost its best means of regulating judicial policy making.407

VI. CONCLUSION

The Pennsylvania system of electing appellate court judges is not working as planned. It serves today neither the democratic nor the quality values that were said to justify its creation. The Pennsylvania Supreme Court is independent, in the sense that it is neither dominated by either of the other two branches of state government nor is it accountable to the popular sovereign. The court’s form of independence, however, is not especially healthy. Indeed, “out of control” may be a better description, since no internal institutional safeguards appear to be operative either.

There is a significant, very regrettable, irony here. Because its members are, as a matter of form, elected and retained by the people, the high court’s power is conferred by democratic means. The court exercises its power with the same seal of legitimacy as do the governor and General Assembly in the exercise of their powers. Possessing the highest form of legitimacy a democracy can confer, the Pennsylvania Supreme Court has no need to earn the faith of the people by persuading them of the propriety of its actions.

This puts the Pennsylvania court in sharp contrast with its federal cousin. The United States Supreme Court, lacking any significant claim to a democratic mandate, imposes constraints upon itself.408 At times, the Court or its members address the legitimacy issue expressly, as occurred in Planned Parenthood v. Casey.409 Claiming a higher form of democratic legitimacy,

407. Hall, supra note 373, at 369.
408. This is not to argue that the U.S. Supreme Court is always true to its constraints, or that its decisions possess some metapolitical correctness. It isn’t and they don’t; and these facts create institutional problems for the court. What is important, however, is that the U.S. Supreme Court at least acknowledges the need for restraint, a matter that does not burden the Pennsylvania court.
409. 112 S. Ct. 2791, 2804-06 (1992). Professor Morton J. Horwitz points out that the Supreme Court’s “legitimacy crisis” that was acknowledged in Planned Parenthood is very much of the Court’s own making. “Politically committed to dismantling decades of Warren Court doctrine, yet culturally bound to an originalist conception of constitutional change, the current Court’s jurisprudence has thus devolved into conceptualism and technicality.” Morton J. Hor-
the Pennsylvania court has no need for self-restraint. Of course, if the elective system worked, if the popular sovereign were an effective check on judicial power, such indirect approaches to legitimacy would be functionally irrelevant. But the system doesn’t work today. There was a time when it did work, and the question is how to get there again.

The argument that there is an inherent defect in judicial elections has not been proved. The elective system in place in Pennsylvania today, however, does not at all resemble the one established in 1850. In 1850 there were annual general elections and annual General Assemblies. Judges were elected in general elections, with state and national politics in the air.

The choices available to the Commonwealth seem clear: Return to a system of effective popular checks on the judiciary, with real debates and high turnout elections, or adopt an effective system of merit selection.