The Ideal of Judicial Independence: Complications and Challenges

Edward A. Purcell Jr.

Follow this and additional works at: https://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation

Available at: https://digitalcommons.law.utulsa.edu/tlr/vol47/iss1/14

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.
THE IDEAL OF JUDICIAL INDEPENDENCE:
COMPLICATIONS AND CHALLENGES

Edward A. Purcell, Jr.*


The ideal of "judicial independence" commands glowing and nearly unanimous approval, but any serious consideration of its meaning and operation quickly uncovers a range of problems and ambiguities.¹ Three important new books examine the history and operation of "independent" judiciaries in the United States. Together they explore some of the external challenges and internal complexities that render the ideal so problematic. All three address the inherent tension between "government under law" and "government by the people," and all three stake out significant and controversial positions on pressing contemporary issues.

I. THE IDEAL UPHeld: ORIGINAL SOURCES AND CONTEMPORARY CHALLENGE

In A Distinct Judicial Power² Scott Douglas Gerber announces two related goals. One is "to tell [the] story [of Article III] by chronicling how the original 13 states and their colonial antecedents treated their respective judiciaries"; the other is "to identify the origins of Article III" and the "independent" federal judiciary.³ Those seemingly...
overlapping goals prove discordant, however, and the book breaks into two quite different and somewhat ill fitting parts.

**A. Antecedents: The Role of the Colonial and Early State Judiciaries**

The much larger part of the book, accounting for well over three quarters of its text, reviews the various charters, statutes, practices, royal instructions, constitutions, and organizational structures that marked the judicial systems of the original thirteen colonies from their foundings through Independence, the Constitution, and a bit beyond. It highlights sporadic and diverse efforts in the various colonies and states to alter their court systems and sometimes to increase the independence of their judges, and it stresses the embryonic development in several states of ideas of judicial review, which it identifies as "the ultimate expression of judicial independence." As Gerber rightly claims, *A Distinct Judicial Power* "brings together for the first time a wealth of information" on the colonial and early state judiciaries in the years "between 1606 and 1787." The result is a valuable summary of the development of local judicial institutions that provides a welcome resource for students of the colonial and Revolutionary eras. Unfortunately, those developments throw little new light on the origins of Article III. Indeed, they seem to show that experience with the colonial and early state judiciaries played, at most, an oblique and peripheral role in generating the "independent" federal judiciary.

In part, the book's goal of explaining the origins of Article III falls victim to its method of "chronicling" early judicial developments rather than analyzing them in their full historical contexts. Its relatively formalistic approach seldom allows it to probe the complex social forces that shaped the internal politics of the colonies, drove their changing relationships with Great Britain and with one another, and molded evolving ideas and practices about their courts. Such a method offers only limited opportunities to identify whatever actual "influence" the colonial and early state judiciaries may have had on the origins of Article III.

More important, the book actually casts doubt on the claim that those judiciaries were important to the origins of Article III. First, its ultimate finding is minimal. There were, it concludes, "hints of judicial independence in almost all of the colonies." The "hints," however, were often faint, and the most important ones did not come in the experiences of the original states."  

---

4. This part (chapters 3-15) fills approximately 280 of the book's 361 pages of text.
5. Id. at 115, 333. For an examination of early judicial review cases in the states, both before and after 1787, see William Michael Treanor, *Judicial Review before Marbury*, 58 STAN. L. REV. 455 (2005).
6. GERBER, supra note 2, at xv.
7. The book seems to acknowledge this characteristic. "My legal and political science orientation likewise explains my emphasis on texts, where constitutional ideas are memorialized, rather than solely on the surrounding contexts." Id. at xxi.
8. Id. at 325.
9. E.g., "None of the colonial charters and implementing laws of what was to become the Commonwealth of Massachusetts treated the judicial power as independent in any fashion from the executive or legislative powers of government," id. at 90; "none of Virginia's colonial charters said a word about the judicial power, let alone about the importance of an independent judiciary," id. at 55; the compensation clause of the Maryland Declaration of Rights of 1776 "appeared to work against the independence of the judiciary," while its "removal by address provision cut: against the independence of the Maryland judiciary." Id. at 141 (emphasis in
extended colonial period but rather, and unsurprisingly, in the intense decade after 1776 when ideas about law and politics were in ferment and governmental institutions were being newly, and often radically, restructured. Second, the book shows that the colonial and early state judiciaries varied substantially from one another and thus presented no consensus model for the founders to emulate. Third, it suggests that their principal "influence" may not have been in developing positive models to be followed, but in establishing undesirable models to be avoided. The book declares at one point, that the "framers' political theory led them to reject the preexisting colonial and state practices."\(^{11}\)

That "rejection" claim and the reference to the "framers' political theory" point to the most fundamental reason why the book's focus on the colonial and early state judiciaries fits awkwardly with its goal of identifying the "origins of Article III." It turns out that Gerber's real thesis is not, in fact, that the founders shaped Article III on the basis of pre-existing judicial models or their more general experience with the colonial and early state judiciaries. It is, rather, that they shaped it on the basis of other and quite different considerations: their unsatisfactory experience with a courtless national government under the Articles of Confederation\(^{12}\) and, far more important, the inspiration of political theories involving separation of powers.\(^{13}\) Indeed, the book makes the ideas of John Adams the single most important force shaping the content of Article III. In his 1776 pamphlet, Thoughts on Government, Gerber declares, Adams produced "the final step in the political theory of an independent judiciary eventually embodied in Article III."\(^{14}\) His pamphlet was "a clarion call for separation of powers" that explained "in no uncertain terms how significant an independent judiciary" was "to any form of government dedicated to the preservation of liberty."\(^{15}\) Adams advocated both tenure in office during good behavior and compensation that could not be diminished. With a
single exception—excluding the executive from the judicial impeachment process—Article III “contained principles identical to Adams’s proposal.” The Philadelphia Convention, Gerber concludes, “wrote Adams’s theory of judicial independence into Article III.”

Thus, in spite of the book’s ostensible focus and the great bulk of its content, its principal argument is that the origins of Article III lay not in the pre-1787 judiciaries but in the minds of a long line of political theorists whose ideas culminated in 1776 with the thinking of John Adams. Moreover, it is quite clear that the earlier theorists in that long line did not draw any significant ideas from their experiences with the colonial and early state judiciaries.

One need not question the importance of Adams’s ideas, moreover, to find Gerber’s claim about their influence in need of qualification. His discussion ignores the fact that Adams based his idea of separation of powers on the principle of balanced government and that he stressed most centrally the importance not of establishing an independent judiciary but of weakening and dividing the powerful and dangerous legislative branch and of substantially strengthening the executive in a variety of ways, including giving it a veto over legislation. It also ignores the fact that Adams’s idea of separation of powers reflected not just the idea of dividing legislative, executive, and judicial powers—hardly an unknown idea by 1776—but also the ancient and quite different idea of balancing government between society’s three social orders—monarch, nobles, and commons. It ignores, further, the fact that Adams stressed the fundamental importance not only of judicial independence but also of the people’s rights to trial by jury and to elect a house of commons as essential requirements for protecting their liberties. Thus, the book oversimplifies Adams’s views and overemphasizes his focus on the judiciary. Finally, of course, it ignores a great many other historical complexities, including the fact that by 1787 there were quite a number of influential people advocating the establishment of an independent judiciary and supporting the drafting and


17. GERBER, supra note 2, at 334.

18. Gerber calls Adams “the American founding’s most sophisticated political theorist.” Id. at 24. He has long been an admirer of Adams. See, e.g., GERBER, supra note 10, 38-39, 87-89, 218 n.111. He is hardly alone. E.g., C. BRADLEY THOMPSON, JOHN ADAMS AND THE SPIRIT OF LIBERTY 87, 107, 190-191 (1998); DAVID MCCULLOUGH, JOHN ADAMS (2001).

19. The seven pre-Adams theorists that Gerber discusses are all non-Americans, five of whom died long before the colonies were founded: Aristotle, Polybius, Marsilius de Padua, Sir John Fortescue, Gasparo Contarini, King Charles I, and Montesquieu. GERBER, supra note 2, at 3-23.


21. E.g., “’Every plan of government talked of at the time of the Virginia convention of 1776’ provided for the separation of powers.” GERBER, supra note 2, at 55 (quoting A. E. Dick Howard, “For the Common Benefit”: Constitutional History in Virginia As A Casebook for the Modern Constitution-Maker, 54 VA. L. REV. 816, 881 (1968)).


23. THOMPSON, supra note 18, at 84-85.
ratification of Article III.24

Pressing his point, Gerber also argues that Adams's influence extended far beyond Article III and proved "influential in a number of state constitutional conventions."25 Sometimes quickly and sometimes belatedly, he maintains, the original thirteen states shifted their judiciaries toward the "federal model."26 While Adams's ideas did have an impact in several states,27 they also failed in the long run to command assent in most states. Gerber, however, does not pursue nineteenth-century developments when the overwhelming majority of states moved away from Adams's "federal model" and adopted popular election of judges, limited judicial terms, and easier methods of removal.28

B. Intellectual Origins and Contemporary Threat

The other, and more important, part of A Distinct Judicial Power consists of four chapters that sandwich its long middle section on the colonial and early state judiciaries. Two initial chapters provide, respectively, a "history of ideas" about separation of powers and judicial independence and a summary of the debates that surrounded the adoption of Article III. Two concluding chapters elaborate the book's argument that an independent judiciary is necessary for both judicial review and the protection of individual rights. The last of these, formally labeled an "Appendix," identifies the book's underlying contemporary purpose—to discredit recent theories of "popular constitutionalism."

The two introductory chapters establish Gerber's intellectual framework. The first provides an abstract and timeless capsule summary of the "contributions" to separation-
of-powers ideas made by eight thinkers, beginning with Aristotle and flowering fully with Adams.29 The “political theory of an independent judiciary,” Gerber there announces, “is the culmination of the work of eight political theorists writing over the span of 22 centuries, with each building on the contributions of the others.”30 The second chapter identifies the elements of Article III that establish an independent judiciary: tenure during good behavior, compensation that cannot be diminished, and clear separation from the other branches of government. Those elements show that “the framers strongly believed that the judiciary should be independent.”31

The two final chapters carry the book’s ultimate normative theses. The “Conclusion” argues that the founders understood that judicial independence was essential to protect individual rights, that judicial review flowed from and required judicial independence, and that the “genesis” of judicial review lay in “horizontal” separation-of-powers ideas rather than “vertical” ideas of hierarchy.32 The first two arguments seem both relatively standard and exceptionally abstract,33 and Gerber acknowledges that the evidence supporting the third—which justifies judicial review of actions taken by coordinate federal branches—is “not unambiguous.”34 He claims, however, that his timeless “history of ideas” about separation of powers demonstrates its accuracy.35 Thus, the “Conclusion” joins his first two chapters in seeking to establish an “originalist” foundation for the “independence” of the federal judiciary and for its obligation to protect individual rights and its authority for a comprehensive practice of judicial review.

The last chapter, labeled an “Appendix,” carries the book’s bluntest message: “that popular constitutionalism is wrong.”36 Singling out the work of Mark Tushnet, Cass Sunstein, and Larry Kramer,37 it argues that those scholars misread history and misunderstand both the nature of the Constitution and the significance of Article III. Their failures are rooted in the fact that they are “Leftist scholars” who share an “unshakeable dedication to the Left’s political agenda.”38 Indeed, as if to make its point as evocative as possible, the book equates the arguments of the three with “a kind of

29. See GERBER, supra note 2, at 3-23. Historians dispute the extent to which Adams was influenced by various earlier political theorists. For a sophisticated analysis of Adams’s intellectual influences see THOMPSON, supra note 18, at ch. 7-10.
30. GERBER, supra note 2, at 325.
31. Id. at 37.
32. Id. at 333.
33. Shugerman, for example, agrees that judicial independence arose from ideas of separation of powers and that it seemed necessary for a muscular and consistent practice of judicial review.” SHUGERMAN, supra note 16, at 24, 47, 94, 139-40.
34. GERBER, supra note 2, at 332.
35. As Gerber phrases it, “an investigation into the origins of judicial review that takes seriously the history of ideas reveals that the genesis of the doctrine [of judicial review] is more accurately traced to the ‘horizontal’ idea of separation of powers.” GERBER, supra note 2, at 333. Such a “history of ideas” seems entirely inadequate given the sophisticated and massive literature on the origins of judicial review. For a recent contribution, with an introductory commentary on much of the earlier literature, see, e.g., PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008).
36. GERBER, supra note 2, at 345.
38. GERBER, supra note 2, at 352, 358.
judicial Brezhnev Doctrine."

Several of Gerber’s comments are sound. He is right that Tushnet, Sunstein, and Kramer hold certain political and constitutional views in common. He is also right in maintaining that at least some varieties of “popular constitutionalism” seem misguided and inconsistent with the Constitution’s nature and structure. If some of its advocates failed to recognize that truth or gave it insufficient weight, the sources, tactics, funding, rhetoric, and organization of certain contemporary and ostensibly “popular” groups may well lead them to reconsider their views. Finally, Gerber is right in maintaining that “popular constitutionalism” is an example of “partisan constitutional theorizing.”

Reacting to the contemporary Court, many scholars have pursued a range of critical efforts designed to challenge its rulings, and those efforts surely include varieties of “popular constitutionalism.”

On two points, however, his comments are flawed. First, while Tushnet, Kramer, and Sunstein might, in contemporary terms, fairly be labeled “liberal,” “progressive,” or “left of center,” it is quite a different matter to brand them as “Leftists” with a unifying capital “L” and to charge them with an “unshakeable dedication” to some apparently dangerous and predetermined “political agenda” of “the Left[].” It is also quite a different matter to do so while identifying them as pushing, or at least fellow-traveling with, their own “Brezhnev Doctrine.”

Second, Gerber is mistaken in limiting his “partisan” charge as he does. His reference to “partisan constitutional theorizing” comes in a sentence that reads in full as follows: “Popular Constitutionalism is simply the latest reincarnation of partisan constitutionalism, implementing versions of “popular constitutionalism,” see David E. Pozen, Judicial Elections as Popular Constitutionalism, 110 COLUM. L. REV. 2047 (2010).

39. Id. at 356. The book explains the “Brezhnev Doctrine” as the Soviet Union’s justification for its invasion of Czechoslovakia in 1968: “what we have, we keep.” Id. at 356 & n.84. Gerber notes that Tushnet “is a Marxist.” Id. at 347 n.15.


41. GERBER, supra note 2, at 347. Others, myself included, have made that point. See, e.g., EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 159 (2007).

42. GERBER, supra note 2, at 358. The capitalized term appears at different places and in different forms. See, e.g., id. at 348, 352, and 357. Gerber is particularly critical on the issue of “affirmative action,” which he terms “the sacred cow of the Left.” Id. at 356.

43. It is worth noting that the three targeted scholars differ from one another in many ways and that they also differ from other contemporary scholars who could also be classified as “popular constitutionalists” — whether or not Gerber would term them “Leftists” — and who also differ from one another. E.g., 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006); Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution, 87 VA. L. REV. 1045 (2001); Saikrishna B. Prakash, America’s Aristocracy, 109 YALE L.J. 541 (1999).
constitutional theorizing that dates from [James Bradley] Thayer's famous essay.\textsuperscript{44} Whatever else—unwise, misconceived, or dangerous—"popular constitutionalism" might be, it is not "simply" so. That is, "popular constitutionalism," like every other example of serious "constitutional theorizing" in America, is a social, political, cultural, and intellectual phenomenon that is complex, evolving, strategic, and multi-valued.\textsuperscript{45} More important, "popular constitutionalism" is not the "latest reincarnation" of a new phenomenon that "dates from Thayer's famous essay," which was published in 1893. It is not uniquely the product of "modern" forces, nor is it the simple result of "sociological jurisprudence" or "legal realism."\textsuperscript{46} Rather, it is one more in a continuous if shifting line of such "reincarnations" whose origins lie with the nation's origins and whose appearance characterizes the politico-intellectual dynamic of American constitutionalism. Contemporary "popular constitutionalism" is, in fact, merely one part of a recent phase in the same contested and value-laden practice of constitutional argumentation that engaged the colonists and Revolutionaries, the Constitution's supporters and opponents, the Federalists and Jeffersonians, and all those who subsequently joined the nation's ongoing constitutional debate.\textsuperscript{47} If Gerber's full sentence is intended either to simplify "popular constitutionalism" into some historically aberrant and unrooted error\textsuperscript{48} or to quarantine it from earlier and purportedly non-political "constitutional theorizing"—whether that of John Adams or any other constitutional theorist, including those who claim to be 'originalists'—it is itself badly misguided. Some ideas and some arguments are surely better than others, but all are rooted in specific historical contexts, usually inspired by particularly pressing problems, and shaped by the values, purposes, and assumptions of those who articulate them.\textsuperscript{49}

As a general matter, \textit{A Distinct Judicial Power} seems unlikely to satisfy or persuade most historians. Its approach is too formalistic and abstract,\textsuperscript{50} and its "history of ideas" bears little resemblance to the sophisticated analyses of scholars who write in the intellectual history tradition associated with Arthur O. Lovejoy.\textsuperscript{51} In fact, the book is

\textsuperscript{44.} GERBER, \textit{supra} note 2, at 347.

\textsuperscript{45.} Alexander Bickel, for example, surely a sophisticated constitutional theorist, embraced a form of "popular constitutionalism." See, e.g., ALEXANDER M. BICKEL, \textit{THE SUPREME COURT AND THE IDEA OF PROGRESS} 90 (1970).

\textsuperscript{46.} Gerber has previously suggested that those forces spurred the emergence of "theories of constitutional interpretation" in the late nineteenth century. GERBER, \textit{supra} note 10, at 1-2.

\textsuperscript{47.} See, e.g., ALISON L. LACROIX, \textit{THEIDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM} (2010); PURCELL, \textit{supra} note 41.

\textsuperscript{48.} Consider for example the complexities discussed in \textit{People's Courts}, in particular its argument that the move in the states to judicial elections was an effort to implement the separation of powers and to protect judicial independence. SHUGERMAN, \textit{supra} note 16, at ch. 3.

\textsuperscript{49.} Lee's book, \textit{Judicial Restraint in America}, discussed in Part III below, nicely illustrates this general proposition in the area of relatively technical constitutional doctrine.

\textsuperscript{50.} Gerber's approach contrasts sharply with the incisive historical analyses developed, for example, in DANIEL J. HULSEBOSCH, \textit{CONSTITUING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830} (2005), and MARY SARAH BILDER, \textit{THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE} (2004).

\textsuperscript{51.} See, e.g., John Patrick Diggins, \textit{Arthur O. Lovejoy and the Challenge of Intellectual History}, 67 J. Hist. Ideas 181 (2006). Gerber's discussion, for example, fails to consider the complex impact that separation of powers ideas had on the concept of judicial authority and the power of judges to void governmental acts. Compare Gerber's \textit{A Distinct Judicial Power}, with HAMBURGER, \textit{supra} note 35, at ch. 17 (suggesting that Madisonian ideas of "checks and balances" limited older conceptions of judicial authority and exposed judges
more appropriately viewed not as history, but as contemporary legal argument, an elaborately detailed and apparently teleological chronicle with a skeletal normative claim and a clear contemporary target.

As his "history of ideas" treats separation of powers as an abstraction, Gerber's discussion of judicial independence, judicial review, and the protection of individual rights does the same, and on that level his claims seem bland if hardly indisputable. Indeed, he might even agree that an acceptance of those ideas on such a general level is compatible with most brands of contemporary "constitutional theorizing." He notes, for example, that Lawrence H. Tribe, "a political liberal," wrote a scathing rejection of Kramer's "popular constitutionalism."

According full honor to lofty abstractions, however, the truly serious and perplexing questions remain. What, exactly, does "judicial independence" mean, especially in the context of today's intensely politicized judicial appointment process? When, and under what conditions, should the power of judicial review be exercised? Which individual rights should receive judicial protection, and how much protection, and under what conditions, and with what limitations? Critics of the contemporary Court, including "popular constitutionalists," believe in the protection of individual rights as much as Gerber does, but they also recognize a new and ominous threat. The contemporary Court has been inhospitable and sometimes acutely hostile to many of those rights. Over the past several decades it has regularly limited or denied the rights of ordinary Americans against both government and business, and increasingly it has invented ever more sweeping and "activist" ways to deprive ordinary Americans of the opportunity to gain access to an "independent" federal court in their efforts to protect those rights. The contemporary Court's substantive and

52. "I argue that judicial independence is not a useful, analytic concept. It does not promote either our understanding of how courts function or the design of desirable judicial institutions." Lewis A. Kornhauser, Is Judicial Independence a Useful Concept?, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 45, 45 (Stephen B. Burbank & Barry Friedman eds., 2002).

53. "Both liberal and conservative thinkers conclude that the 'rule of law' depends upon impartiality, equal and consistent treatment, the protection of general fundamental principles protected from arbitrary power—i.e., judicial independence." SHUGERMAN, supra note 16, at 13.


55. Gerber would presumably attempt to answer those questions by recourse to the Founders "original" natural rights philosophy which, he has argued, provides the correct basis for construing the Constitution. GERBER, supra note 10, at 15, 58, 89-90, 197-200. Most constitutional questions can be properly answered, he maintains, if one has an accurate understanding of that "original" natural rights philosophy. See SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 163-87 (1999). Indeed, Gerber suggests that the natural rights philosophy is "objective" and that it should be a requirement for membership on Supreme Court. The devices available for checking the Court — constitutional amendments, impeachment, judicial restraint, and the appointments process — "if properly used, can help ensure that the Court interprets the Constitution in accordance with the natural-rights philosophy of the Declaration of Independence, rather than in light of the moral and political convictions of particular justices." GERBER, supra note 10, at 161. Ironically, Gerber maintains that Justice Clarence Thomas, who claims allegiance to those natural law principles, has failed to apply them properly. Justice Thomas, Gerber concluded in an earlier study, is "merely an especially fascinating example of the realist maxim that judges read their policy preferences into the law they are interpreting." GERBER, supra, at 198.

procedural restrictions are, in fact, far more dangerous to both individual rights and the rule of law than are any recent and reactive theories of "popular constitutionalism."

II. THE IDEAL EXPLORED: POLITICS, REFORM, AND THE PROBLEM OF JUDICIAL SELECTION

Jed H. Shugerman's provocative and insightful book, *The People's Courts*, reflects many of the same general values that inform Gerber's book. It emphasizes the fundamental importance of judicial independence, locates its roots in ideas of separation of powers, and affirms the belief that judicial selections are best made on the basis of "merit." It agrees, moreover, with a fundamental point that Gerber has previously acknowledged, that the central challenge plaguing judicial selection processes is their unavoidably "political" nature.

Beyond those shared general views, however, the books have little in common. Shugerman concentrates not on the colonial period but on the period from the Constitution to the present, and he traces the states' well-known path not toward but away from the federal model. While Gerber presents judicial independence as an abstract normative principle and accepts the idea of judicial merit as a relatively objective standard, Shugerman examines the former as an ever-changing institutional challenge and the latter as a largely immeasurable criterion. Indeed, for Shugerman, ideas of both judicial independence and judicial merit have varied significantly over time in both meaning and significance.

Examining efforts to institutionalize the ideal of judicial independence, *The People's Courts* argues that the states have struggled through five distinct stages. The "premodern," or colonial, judiciary featured dependent judges who were often elected officials exercising mixed judicial, legislative, and executive powers. During the eighteenth century an "aristocratic" model developed, embracing ideas of judicial independence, separation of powers, and tenure in office during good behavior. The 1840s and 1850s brought "judicial democracy," the increased use of judicial elections to protect the independence of the courts from the corrupting use of appointment powers by governors and legislatures. The 1930s saw the emergence of "judicial meritocracy," efforts to check the sway of corrupting party influence over judicial elections by making nominations and appointments dependent on some type of professional "merit" screening. Finally, the late twentieth century witnessed the advent of "judicial plutocracy," a system in which judicial selections, largely based on popular elections, were increasingly "shaped by direct cash transactions between lawyers, clients, and the

57. SHUGERMAN, supra note 16.
58. GERBER, supra note 10, at 157-61 (discussing appointments to the federal judiciary).
59. "Almost ninety percent of state judges face some kind of popular election. Thirty-eight states put all of their judges up before the voters." SHUGERMAN, supra note 16, at 6.
60. GERBER, supra note 10, at 157-61.
61. For example, "Academic studies are mixed or inconclusive about whether merit selects more experienced candidates or produces better judges, in part because it is hard to quantify judicial quality." SHUGERMAN, supra note 16, at 415. See id. at 14-15.
62. For example, in the early twentieth century, "the label 'merit' had been used to distinguish good government from party patronage and to contrast American equality of opportunity from socialism. By the 1970s it was also used to critique racial affirmative action." Id. at 389.
judges who hear their cases."63 This last and contemporary phase, Shugerman declares, has become an "increasingly contentious practice."64

Concentrating on the last three stages, The People’s Courts provides detailed analyses of developments in dozens of states and seeks to identify when, where, and why the successive forces of reform coalesced and ultimately won the day. In doing so, it illuminates the complexity of American legal politics, the ever-changing nature of its focal issues, and the imperfect nature of all judicial selection procedures.

The shift toward “judicial democracy” in the mid-nineteenth century revealed the irony and unpredictability of judicial reform. Impetus for change grew out of acute pressures generated by the long depression of the late 1830s and 1840s and an intense public anger over the irresponsibility and corruption of state legislatures in incurring huge and wasteful public debts.65 The spread of judicial elections institutionalized the era’s anti-legislative animus and gave judges a new democratic legitimacy. The result, however, was not “popular” rule but a new anti-majoritarian judicial orientation that brought more frequent invalidations of legislative enactments.66 Popular elections thus helped inspire “anti-popular” attitudes in state judiciaries and contributed to the rise of substantive due process ideas long before those ideas reached the United States Supreme Court.67

Even more broadly, Shugerman argues that “the 1840s and 1850s were a turning point in favor of judicial review and judicial power, driven by the first generation of elected judges.”68 Prior to this period, the courts articulated theories of judicial review, but they were nonetheless politically weak and their decisions remained tentative and qualified. The “specific context of these [early judicial review] cases illustrates how fragile these courts were, and how a court decision might trumpet formal legal power precisely because the court knew it lacked political power.”69 Although the Marshall Court and some state courts erected “a foundation for more power later,” they did not exercise that power widely, commonly, or vigorously.70 “American judges built the doctrine of judicial review into a more robust and regular power only once those [later] reformers decided to harness it as part of judicial democracy in the 1840s-1850s.”71

63. Id. at 20.
64. Id. at 20.
65. For a useful review of the historical debate over the rise of elective judiciaries in the states, see Caleb Nelson, A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America, 37 AM. J. LEGAL HIST. 190 (1993) (concluding that elective judiciaries arose from a general suspicion and distrust not merely of legislative power but of all governmental power).
66. Once “judges actually became elected, they wrote as skeptics of democracy and increasingly turned to countermajoritarian theories.” SHUGERMAN, supra note 16, at 207-08.
67. Shugerman’s argument implicates a number of historical debates involving not only the spread of elective judiciaries in the mid-nineteenth century states but also the rise of substantive due process. For a recent review and discussion of the latter issue, see Matthew J. Lindsay, Response, In Search of “Laissez-Faire Constitutionalism,” 123 HARV. L. REV. F. 55 (2010).
68. SHUGERMAN, supra note 16, at 48.
69. Id. at 50. See, id. at 78-83, 92-93.
70. Republicans viewed the pronouncements of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), as “empty threats that would not be enforced in other venues,” and thought that the more important case at the time, Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803), demonstrated “that the Supreme Court had capitulated to the Republicans on the judiciary.” SHUGERMAN, supra note 16, at 79.
71. SHUGERMAN, supra note 16, at 93.
The social and institutional results of "judicial democracy," however, were hardly simple. Popular elections also led state court judges to react with a new sympathy to some of the dangers brought by late nineteenth-century industrialism. Many responded forcefully, for example, to the public outcry over the social causes and consequences of the Johnstown Flood of 1889 and imposed new responsibilities on business by adopting theories of strict tort liability for hazardous activities.72 Thus, judicial elections empowered judges vis a vis legislatures, and the judicial reaction to the Johnstown flood "offers a hint that longer terms might make elected judges more responsive to recent events" rather than less. Indeed, Shugerman notes, several states "lengthened terms [in office] explicitly to give judges more freedom from special interests and from political corruption."73

Similarly, mid-twentieth-century campaigns for merit-selection plans revealed the varying social and political conditions that made reform possible. Business generally supported such efforts while labor opposed them, and reform was achievable only when and where "the climate was just right."74 In rural states business was too weak to push through merit plans, and in heavily industrialized states labor was too strong for business to overcome. Thus, Shugerman concludes, it was in "rural-but-industrializing states," where business had grown strong but labor had not yet caught up, that a window of opportunity opened. Reform could not be achieved, however, unless other underlying conditions—apparent crime waves, racial tensions, corruption scandals, regional sympathies, or Cold War politics—created acute public concerns and anxieties and, even then, only if an organized and astute political leadership was able to provide direction and effectively link those concerns and anxieties to the cause of merit selection.75

From his historical survey Shugerman draws several conclusions. The most traditional and heartening is that Americans have long recognized the fundamental importance of judicial independence and that they pressed their successive reform campaigns for the precise purpose of securing that ideal in practice. Judicial independence "has been surprisingly resilient and popular throughout American history."76 His other conclusions, however, deeply complicate the significance of the first. One is that in all stages of reform "economic interests drove the design and redesign of judicial selection."77 Another is that the concept of judicial "independence" itself is "so contextual and malleable that a well-financed campaign can usually put itself in the corner of judicial independence against one vilified interest or another, right or left."78 A third is that judicial independence is at risk in any and every selection process.

72. Id. at 259-65.
73. Id. at 265.
74. Id. at 301.
75. Id. at 301, 391; see, e.g., id. at 302-23 (California); id. at 325-42 (Missouri).
76. Id. at 11. The "core" meaning of judicial independence, Shugerman writes, "refers to a judge's insulation from the political and personal consequences of his or her legal decisions." Id. at 13.
77. Id. at 391. "At each stage of reform, economic interests were able to win over enough public support in the name of judicial independence." Id. at 424.
78. Id. at 418-19. The same is true, of course, about underlying separation-of-powers ideas which have repeatedly been used to undergird conflicting and contradictory views on many issues, including judicial selection and tenure. See, e.g., Purcell, supra note 41, at 38-47.
There is "no escape from politics, but only different forms of political influence."\(^{79}\) Reforms "succeeded in insulating the courts from one set of evils, but they often exposed courts to new political forces—sometimes unwittingly, sometimes wittingly."\(^{80}\) Thus, the fundamental issue is never about securing judicial "independence" in some pure form, but rather about designing specific selection procedures to best insulate judges from whatever outside pressures seem most dangerous and corrupting at any given time.

Shugerman's last and most pressing conclusion comes in his final two chapters. Like Gerber's "Appendix," these chapters reveal his book's animating prescriptive purpose and announce what the author regards as the paramount contemporary threat to judicial independence. For Shugerman, it is "judicial plutocracy," not "popular constitutionalism," that must be fought and defeated.

"Judicial plutocracy," Shugerman argues, is both different from, and far more dangerous than, its various predecessors.\(^{81}\) The preceding "aristocratic," "democratic," and "merit-plan" models sought not to weaken judicial independence but to strengthen it against outside forces that were seen as particularly corrupting and oppressive. "Each set of reforms reflected a new perspective on the American institution of the separation of powers."\(^{82}\) In contrast, the "plutocratic" model seeks to limit judicial independence and capture state courts for partisan ends. Thus, unlike its predecessors, "judicial plutocracy" presents a potentially lethal threat to judicial independence.

Although Shugerman points to the contributions of trial lawyers and other groups commonly associated with the Democratic Party,\(^{83}\) he identifies business interests and the Republican Party as the primary practitioners and beneficiaries of "judicial plutocracy."\(^{84}\) Recent judicial elections "are simply part of a larger pattern: business interests find ways of playing by the existing rules of judicial selection to win, and when they stop winning, they campaign to change the rules."\(^{85}\) Their goal is not to ensure judicial independence but to establish a friendly and fostering bench. "After spending their capital (political and financial) on campaigns for merit reforms," Shugerman maintains, "businesses returned to trying to win judicial elections outright, and they did so by capitalizing on socially conservative issues and by pouring money into key races."\(^{86}\) Across the nation, judicial elections in the 1990s cost $60 million in direct campaign contributions, while in the following decade that amount shot up to $200 million.\(^{87}\) In 2004 spending on Alabama Supreme Court elections stood at $7.5 million; in 2006 it jumped to $13 million. In the process, judicial elections were transformed

---

\(^{79}\) Id. at 20.
\(^{80}\) Id. at 423.
\(^{81}\) Id. at 20.
\(^{82}\) Id. at 280.
\(^{83}\) Id. at 406.
\(^{84}\) Id. at 403.
\(^{85}\) Id. at 403.
\(^{86}\) Id. at 412.
\(^{87}\) Id. at 411.
“from local to national” contests that were focused on “national hot-button issues” and directed by “national political operatives." During the past twenty-five years such campaigns have shifted the supreme courts of California, Texas, and Alabama from Democratic to Republican hands, and more recently they have begun invading ever more judicial elections at all levels and all across the country.

Seeking workable remedies to counter the challenge, Shugerman begins with lessons from his history. The “key to judicial independence is not front-end selection, but rather, back-end retention and job security,” what he calls “general” judicial independence. Particularly valuable then — especially when combined with “merit selection” systems — are longer terms of office and “retention” elections in which voters can choose only between retaining or dismissing sitting judges. The “stark pattern” he sees in the costliest judicial campaigns confirms that conclusion. “All of the million-dollar races between 2000 and 2009” were “contested” elections. “None of the retention elections came close to that level of spending, and in particular, the merit-plan retention elections had almost no money at all.” Merit-retention systems offer strong job security for a variety of reasons, including the advantages of incumbency. Perhaps most important, they reduce “the incentives for a judge's opponents to invest in her defeat because those opponents do not choose the replacement.”

Still, Shugerman cautions, merit retention elections provide no guarantee. All merit plans are subject to both manipulation and political pressure, and “there are signs that aggressive hot-button campaigning and interest group spending are coming to merit retention elections.” Thus, the situation is grave. “America is now at a crossroads between a flawed-but-promising judicial meritocracy and a flawed-and worsening judicial plutocracy.”

Beyond merit retention elections, Shugerman proposes other innovative reforms to check “judicial plutocracy.” He suggests requiring 60% majorities for dismissals, ensuring greater bipartisan balance and broader public participation in screening commissions, and focusing judicial elections on overturning specific decisions rather than on dismissing judges. He also recommends regulating and limiting the role of money in judicial elections. Here, Shugerman readily acknowledges that the Supreme

88. Id. at 393.
89. Id. at 394-414.
90. Id. at 21. General independence “simply means a judge is more insulated from direct political pressure from any source,” and it requires job security provisions such as long terms and protection of jurisdiction, salary, and institutional resources. “Relative” independence refers to “methods of judicial selection” which make judges “more independent from one set of powers, but more accountable to another.” Id. at 13-14. Merit plans, for example, “replaced one kind of insider politics with another (bar associations and professional expertise), and it was designed to reduce the public spectacle of judges campaigning.” Id. at 422-23.
91. Id. at 415. Judges who have made unusually unpopular decisions have lost retention elections. Id. at 417 (three Iowa supreme court judges lost retention elections after ruling in favor of a state constitutional right to gay marriage).
92. SHUGERMAN, supra note 16, at 414.
93. Id. at 415.
94. Id. at 417. Judges who have made unusually unpopular decisions have lost retention elections. Id. at 417 (three Iowa supreme court judges lost retention elections after ruling in favor of a state constitutional right to gay marriage).
95. Id. at 21.
Court has sorely exacerbated the problem of maintaining an independent judiciary, but he proposes a new constitutional basis for taming the power of money and political organization. Relying on *Caperton v. Massey*, he suggests that due process ideas could be used to protect judicial independence by requiring full campaign disclosures in judicial elections and mandating that judges recuse themselves in cases involving their campaign donors.

Shugerman is right that *Caperton* offers possibilities, and his proposal is a worthy one, indeed hardly more than the barest common sense in contemporary circumstances. Unfortunately, its potential in theory has doubtful promise in practice. In the first instance, making *Caperton* an effective remedy would require a broad interpretation of its principle that allowed it to reach well beyond the bald and exceptional facts the case presented. Further, currently allowable campaign finance techniques would likely allow easy circumvention of even a moderately broadened *Caperton*. Perhaps most important, making its principle effective would require a bench determined on enforcement, and the combination of the current Court's reigning ideology and the self-interest of elective state judiciaries makes such a precondition seem an unlikely possibility.

*The People's Courts* is both timely and astute. Exploring the tensions between the ideal of an independent judiciary and the practice of popular government, it shows that compromises between the two are unavoidable and that effective reform must seek to meet ever-changing threats. Like advocates of "popular constitutionalism," Shugerman affirms the right of the people to influence the selection of their judges and to determine the content of their laws; like critics of "popular constitutionalism," he warns equally that judicial elections can severely threaten the independence of the judiciary. Most pointedly, he insists that under contemporary conditions voters may be too easily misled, confused, distracted, or simply overwhelmed by the massive and seemingly ever-expanding power of money, organization, and partisan political expertise.

Unfortunately, Shugerman's warning is not only well justified, but also far more widely applicable than he indicates. The challenge of "judicial plutocracy" presents an especially acute danger today because it is merely one component of a sweeping and interrelated set of challenges that currently threaten the nation's noblest ideals and values. It is but one manifestation of the globalization of capital, the spread of an untrammeled market ideology, the acceptance of national policies that foster a growing economic inequality, and a political system increasingly shaped by the financial support and consequently effective policy demands of an internationalized, corporate managerial-investor-political donor segment. What is at stake is not judicial independence alone but also responsive popular government, equality under the law, and basic American ideas of social and economic justice for all.

---


99. A growing literature confirms Shugerman's concerns and shows their relevance to other and far wider
Indeed, by identifying the contemporary United States Supreme Court as an institution creating major obstacles to the maintenance of an independent judiciary, Shugerman highlights what might seem a paradox. Judicial independence can become its own worst enemy. However, since the contemporary Court has also used its power to restrict the rights of ordinary Americans and to limit their access to the independent federal courts, its obstacle creation should hardly come as a surprise. Perhaps it is not even a paradox. The cases restricting individual rights and court access and the cases expanding the power of corporations over the nation’s elections do, after all, serve essentially the same basic social policy. That stark fact spotlights the contemporary relevance of the third book under review.

III. THE IDEAL EXPLORED FURTHER: VALUES, DOCTRINES, AND THE PROBLEM OF JUDICIAL DISCRETION

Like Gerber and Shugerman, Evan Tsen Lee readily accepts the ideal of an independent judiciary, but his focus and approach in Judicial Restraint in America differs markedly from theirs. Unlike Gerber, who links the virtue of an independent federal judiciary to the goal of constitutional “originalism,” Lee has little faith in “originalist” jurisprudence. Rather, he accepts the fact that doctrines evolve and adapt, and his book demonstrates that the Court’s current standing and judicial restraint jurisprudence has scant foundation in “originalist” sources. Unlike Shugerman, who examines external factors that limit judicial independence, Lee probes the internal operations of judicial independence in practice in the decisions of the United States Supreme Court. Highlighting the Court’s unavoidable connections with society, he shows the complex ways in which broad social changes and personal value commitments led individual justices to remold the law and give its rules and principles new meanings and applications. An “independent judiciary,” he thus cautions, is a complex institution, for it also means a judiciary that enjoys discretion and, within broad limits, lacks accountability.

Lee’s incisive and carefully reasoned book traces the evolution of ideas about judicial restraint, especially the doctrine of “standing,” from Marbury v. Madison to the present. From John Marshall’s time to the 1920s, it argues, the federal courts denied remedies to plaintiffs who could not show an “injury” to a vested “legal right.” The “injury” requirement was no preliminary threshold matter but rather an integral part of a claim’s common-law merits. While Marshall and later nineteenth and early twentieth-


100. EVAN TSEN LEE, JUDICIAL RESTRAINT IN AMERICA: HOW THE AGELESS WISDOM OF THE FEDERAL COURTS WAS INVENTED (2011). In the interest of full disclosure, I read Lee’s book in manuscript and authored a laudatory “blurb” for the book’s jacket.


102. E.g., Lee, supra note 100, at 18 (discussing Justice Marshall); id. at 32 (discussing Brewer and Peckham).
century judges (Lee focuses on Justices David A. Brewer, Rufus Peckham, and George Sutherland) altered and expanded the category of "legal rights" in order to protect private property, they nonetheless remained true to Marshall's common-law view of both "injury" and "legal right."\(^{103}\)

Major changes in those requirements began in the 1920s. Sutherland himself was something of a transition figure, suggesting obliquely in *Frothingham v. Mellon*\(^{104}\) that the "legal right" requirement was a limit on the Court's power of judicial review and hence that it implicated separation of powers principles.\(^{105}\) The inspiration for that suggestion, however, was likely the doctrine's true innovator, Justice Louis D. Brandeis. Writing for the Court the previous year, Brandeis had declared that the "case or controversy" language of Article III mandated the injury requirement.\(^{106}\) "No previous decision," Lee explains, "had attributed a plaintiff's ineligibility to go forward to Article III."\(^{107}\) The injury requirement thus became the foundation of a new "standing" doctrine, one that not only created a bar that was preliminary to and separate from the merits of a claim but also one that purportedly imposed on the federal judiciary an explicitly constitutional limitation.\(^{108}\)

More changes soon followed. Between the 1940s and 1970s the "legal injury" requirement gradually gave way to a less technical "injury in fact" standard, a change that liberal justices saw as a method of reducing the standing bar. Then, beginning in the 1970s, the Court reversed course as more conservative justices added two new limitations to the "injury in fact" requirement: plaintiffs had to show that their injury was "fairly traceable" to the actions of defendants and that it was likely to be "redressed" by judicial remedy. The first limitation essentially duplicated—and, as a threshold matter, thereby heightened—causal showings commonly necessary on the merits, and the second created barriers against public interest suits that sought to check or compel government actions. Together, the expanded standing requirements enabled courts to dismiss more actions at earlier stages and often without discovery. On a parallel track, new statutes authorizing suit by parties "aggrieved" by federal regulatory actions raised the issue of the extent to which Congress could confer standing on claimants. The Court swung back and forth in its decisions as different justices sought to accommodate or restrict various kinds of regulatory challenges, but under the growing influence of its conservative members in the late twentieth century it gradually came to insist that Article III imposed limits on congressional as well as judicial power. Although the doctrine remained imprecise and ambiguous, it ensured that "the courts would have the final say on

103. LEE, supra note 100, at 32-35 (discussing Justices Brewer and Peckham); id. at 77 (discussing Justice Sutherland).
105. LEE, supra note 100, at 39.
107. LEE, supra note 100, at 40. "[T]he doctrine of Article III standing," Lee declares, simply "did not exist until the 1920s." Id. at 190.
108. Brandeis's success in using Article III to constitutionalize "standing" doctrine may have encouraged him to try to use it again as a bar to prevent the federal courts from issuing declaratory judgments and, further, to block congressional efforts to authorize the federal courts to grant such relief. See EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 124-32 (2000).
standing in agency cases." Subsequent adaptations and modifications confirmed both the pliability of "standing" doctrine and its practical power to limit Congress and allow the Court to regulate the content and flow of federal litigation.

Lee aptly places his history of standing within a broader history of ideas about "judicial restraint," showing that standing was just one of many "avoidance" doctrines the Court developed after the 1920s. Here, too, Brandeis was key. The Justice who constitutionalized standing also urged a variety of other theories that would constrain the federal judiciary—statutory presumptions, limits on judicial competence, dangers of premature or unnecessary decisions, and prudential reasons for deferring to the expertise of Congress, the states, and administrative agencies. Following Brandeis's lead, Justice Felix Frankfurter added new emphases of his own. He expanded standing into a more overtly discretionary doctrine, broadened the reach of many of Brandeis's avoidance techniques, and transformed federalism into an independent rationale for confining the power of the federal judiciary. "For Frankfurter," Lee declares, "judicial restraint became an article of faith." Over the succeeding decades the Court came to praise the generalized wisdom of "judicial restraint" and frequently, if erratically, employed a variety of amorphous and often overtly discretionary grounds for limiting or rejecting a range of diverse types of cases.

Lee argues that the doctrinal transformation that began in the 1920s was rooted in two causes: an intellectual and cultural shift from "Protestant idealism to secular and scientific pragmatism" and a political reaction against the "conservative" federal courts that drove progressives to seek ways to limit their power. Thus, Brandeis's path-breaking efforts to create doctrines of judicial avoidance were inspired by his jurisprudential pragmatism and driven by practical political and social considerations. In his hands, standing became "a tool to protect the ability of the executive and legislative branches to deal with modern social and economic problems." Succeeding judicial generations learned Brandeis's instrumentalist lesson and began to act with a keen eye on the practical effect that their avoidance doctrines would likely have on selected values and policies. The Warren Court "sought to dissociate standing from separation of powers" in order to encourage "public law litigation," while the Burger Court relied on "a free-floating principle of separation of powers" to tighten standing requirements and "short-circuit" otherwise cognizable suits. "Liberal" Justice William Brennan and

109. Lee, supra note 100, at 138; accord id. at 87, 90.
111. "Equity went from the handmaiden of vested rights to the handmaiden of federalism, from a God-given remedy for God-given rights to an instrument for the technical accommodation of state and federal interests." Lee, supra note 100, at 117.
112. Id. at 81.
113. Exemplifying the spread of such discretionary Frankfurterian ideas, for example, the Court explained in 1996, "[f]ederal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism." Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 723 (1996) (citation omitted).
115. Id. at 69.
116. Id. at 135, 132.
117. Id. at 154.
"conservative" Justice Antonin Scalia worked similarly and purposely to mold avoidance doctrines to advance their favored, if contradictory, social and political policies.

Lee's story of the intellectual and cultural shift in the early twentieth century draws on an extensive historical literature, but it nonetheless requires qualification. On the "Protestant idealism" side, he equates "Langdellian[ism]" and the "Lochner Court" with a "pious obstinacy toward instrumental thinking" and a belief that "answers" to all legal questions were "accessible through principles already within the system." Further, he contrasts those shared attitudes with the empirical and consequentialist approach of pragmatists like Brandeis and Frankfurter. Both the equation and the contrast are problematic. Whatever committed "Langdellians" might have believed, the "Lochner Court" operated on its own distinct ideological and policy-based grounds. Its "principles" and "logic" were shot through with implicit value judgments, socially biased meanings, and, above all, substantive assumptions about desired social consequences. It was every bit as practical and consequentialist as were the later pragmatists. Indeed, if the "Lochner Court" was guided by "principles" and "logic," those later pragmatists were guided equally by their own distinctive "principles" and "logic." What changed in the early twentieth century, then, was not just general cultural and intellectual assumptions but, more immediately, the nature of the society's—and especially the Court's—prevailing values and goals, practical assessments about the means necessary to achieve desired ends, and the language, judicial style, and publicly acknowledged self-awareness of those who made the decisions and provided their legal justification.

Like both Gerber and Shugerman, Lee is equally determined to address contemporary issues. As Gerber added his "Appendix" and Shugerman his last two chapters, Lee includes a jurisprudential "Postscript" that warns against the dangers of broad, discretionary theories of judicial restraint. There, he traces the use of democratic ideas to restrict the judiciary from the "Frankfurterian" writings of Alexander Bickel and the "legal process" school of the 1960s to the broader arguments of contemporary "popular constitutionalists" who draw Gerber's fire. The former group maintained that a

118. Id. at 47-50.
119. There is evidence that so-called "Langdellians"—presumably certain academic systematizers in the late nineteenth and early twentieth centuries—had relatively little in common with the values of the "Lochner Court." See id. at 49; see, e.g., Thomas C. Grey, Langdell's Orthodoxy, 45 U. Pitt. L. Rev. 1 (1983). On the variety of academic thinking during the period, see William P. LaPiana, LOGIC & EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994); Stephen A. Siegel, John Chipman Gray and the Moral Basis of Classical Legal Thought, 86 Iowa L. Rev. 1513 (2001).
120. Marshall used an obviously collusive suit in Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), to provide constitutional protections for property rights, while Brewer "was unconcerned with notions of federalism or technical limits on jurisdiction" and happy to advance "a breathtakingly broad interpretation of equity jurisprudence" to serve the same cause. Lee, supra note 100, at 12-18, 21, 24. See generally Edward A. Purcell, Jr., Ex parte Young and the Transformation of the Federal Courts, 1890-1917, 40 U. Tol. L. Rev. 931 (2009); Edward A. Purcell, Jr., The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and "Federal Courts," 81 N.C. L. Rev. 1927 (2003).
121. Lee argues that we must recognize the nature and extent of the Court's discretion in construing Article III, and that justices must check themselves constantly with an acute self-consciousness about their actual motives and goals in shaping their doctrinal formulations. Quoting Justice Oliver Wendell Holmes, Jr., he warns that failure to consider the influence of such personal factors "is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious." Lee, supra note 101, at 53 (internal quotation marks and citation omitted).
122. Lee, supra note 100, at 196.
“restrained” judiciary served democratic values by leaving most matters to be decided by the elective branches of government, while later “popular constitutionalists” expanded that theme by arguing more comprehensively that “the people” were supreme and consequently that they, not the Court, properly held final authority over all constitutional questions.

Lee offers a wise, measured, and essentially negative assessment of both earlier and later versions. First, he points out that “the people” have, in fact, controlled the meaning of the Constitution over the long sweep of the nation’s history and that the Court has generally, if unevenly, adapted its rules to accord with changing popular views.123 Contemporary “popular constitutionalism,” then, is essentially misguided, for the Court’s “supreme” authority is “limited to provisional control”124 that extends over the relatively short run only.125 When popular opposition to its decisions is “sufficiently intense and enduring, the Court will eventually relent.”126

Second, affirming the values of “institutional settlement” and the desirability of legal regularity and order, Lee argues that the Court is the institution best suited to interpret the Constitution consistently and predictably in the short run and, hence, that it is best suited to serve those fundamental social needs.127 Thus, the Court’s “supremacy” is necessary as a practical matter in the nation’s day-to-day affairs, though—as a practical matter—it is subject in the long run to the public’s approval or rejection.

Finally, considering the democratic rhetoric used to justify theories of both judicial restraint and popular constitutionalism, Lee invokes the lesson of the story he has told: “the actual development of the judicial restraint doctrines was the product of forces more varied and more complicated than a simple desire to protect democracy, or simple obedience to the principles of constitutional government.”128 Thus, he concludes, the standard assertion that “judicial restraint” serves democratic values is highly questionable. The practice of “restraint” should “not be given a free pass”129 but must, instead, be scrutinized in every individual context to determine what particular results it actually brings. “We must insist on real benefits in light of what we already know is the cost of the judicial restraint doctrines.”130 That cost, Lee makes clear, is that the courts may refuse to enforce the law and protect the rights of individuals. “For a person who is told his rights are without remedies, the promise of law is an empty one indeed.”131

123. See id. at 218 (citing BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009)).
124. Id.
125. See id.
126. Id.
127. On this point Lee cites and seems to accept the views of Larry Alexander and Frederick Schauer. Id. at 216; Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 HARV. L. REV. 1359 (1997); Larry Alexander & Frederick Schauer, Defending Judicial Supremacy: A Reply, 17 CONST. COMMENT. 455 (2000).
128. LEE, supra note 100, at 219.
129. Id.
130. Id. Compare id., with KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS 154-55 (2009) (arguing that direct democracy has limited efforts to expand individual rights in a number of areas, including affirmative action, bilingual education, marriage, and criminal law).
131. LEE, supra note 100, at 219; accord id. at 193. For a thoughtful examination of the Court’s many “restraint” doctrines co-authored by one of Gerber’s leading “popular constitutionalists,” see John A. Ferejohn & Larry D. Kramer, Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint, 77 N.Y.U.
Lee’s probing analysis underscores the ironies and confusions that resulted from the Court’s avoidance doctrines. Most obvious, the practical significance of the doctrines shifted as the political orientation of the federal judiciary swung between political poles and the likely social consequences of federal adjudication changed. Less obvious, but equally important, unintended ambiguities appeared in the shifting legal formulations that the Court gave to its avoidance doctrines, forcing the creation of ever more qualifications and restatements. Indeed, Lee maintains, by the beginning of the twenty-first century the Court’s standing doctrine had become essentially incoherent, showing that it was “not a rule of constitutional law” at all but merely a rough and flexible “policy norm.”

Thus, like Shugerman, Lee highlights the complicated and ambiguous nature of the ideal of judicial independence. The “independence” of Article III courts fails to guarantee consistency and stability in either the specific rules of law or the judiciary’s own orientation and sense of purpose. Further, it fails to insulate the courts from the influence of broad social and political changes or the personal attitudes and goals of individual judges, what Lee calls their “lens of substantive values.” Thus, while an independent judiciary remains a high ideal, Lee confirms—as did Shugerman from a different perspective—that such abstractions are of little analytical value in thinking seriously about the practical meaning and significance of that ideal.

IV. CONCLUSION: FROM PAST TO FUTURE

Lee and Gerber occupy much common ground. Both reject contemporary theories of “popular constitutionalism” and emphasize the fundamental role the courts should play in protecting individual rights. They nonetheless part company in identifying the danger presented. For Gerber, the danger is that “popular” forces may compromise or destroy the judiciary’s “independence” by overruling its decisions or overthrowing its authority. For Lee, the danger is that the Court may withhold its judgment and allow disfavored individual rights to suffer. Gerber worries that outsiders might come to pressure the Court and twist the law, while Lee worries that insiders have been doing exactly that all along.

Both worries accentuate the gravity and immediacy of the problem that Shugerman highlights. If, as Gerber fears, outside pressures of “popular constitutionalism” threaten the courts, the most immediate and potentially devastating contemporary danger to judicial independence is the rise of “judicial plutocracy.” And if, as Lee believes, “the

---

132. LEE, supra note 100, at 188, 193.
133. Id. at 205. Lee comments on JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). He doubts the ability of judges to prevent “blockage in the political process” without consulting their own values. Id.
lens of substantive values" is an inherent part of judging, then the forces of "judicial plutocracy" have a compelling incentive to pursue ever more aggressively and elaborately their campaigns to pack the bench with those offering a fostering lens.

Recognition of those facts should compel Americans to rethink quite carefully what the ideal of an "independent judiciary" actually means and how, in practice, it can most effectively be achieved. For Gerber, the answer lies in certain basic principles and an "original" natural rights philosophy. In their diverse ways, however, both Shugerman and Lee make it clear that problems involving "judicial independence" are complex and that abstract ideals are of little use in grappling with them. While the possibility of either forging agreement on principles of natural rights or altering the nature of the judicial process itself seem doubtful, the possibility of reforming judicial selection and retention procedures—including the increasingly dysfunctional process at the federal level — seems somewhat more practical. Surely Shugerman is right in pointing us toward the gravest current threat to our "independent" judiciaries.

Whether effective reforms can actually be achieved, of course, would seem to depend in large part on whether the many deleterious legal, political, and economic trends of the past half-century could be checked or reversed. That possibility may be doubted. Still, the enduring ideal of judicial independence and the highly prized values it promises—one point on which all three authors agree—should warrant our most strenuous efforts to reshape our law and institutions in ways that will honor the ideal in practice and secure, to the greatest extent possible, its promised benefits.

135. For a recent analysis and critique of "originalism" that reviews much of the literature, see Geoffrey Schotter, Diachronic Constitutionalism: A Remedy for the Court's Originalist Fixation, 60 CASE W. RES. L. REV. 1241 (2010).