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The Origins of the Elected Prosecutor

ABSTRACT. The United States is the only country in the world where voters elect prosecutors. But the American prosecutor did not start as an elected official. After the Revolutionary War, most states gave their governors, judges, or legislators the power to appoint prosecutors. Starting with Mississippi in 1832, however, states adopted new constitutions, statutes, or amendments that made prosecutors elected officials. By 1861, nearly three-quarters of the states in the Union elected their prosecutors.

This Note is the first detailed study of when, how, and why American state and local prosecutors became elected officials. It shows that fairness and efficiency concerns were largely absent from the debates over whether to make prosecutors elected. Instead, supporters of elected prosecutors were responding to governors and legislators who used the appointment system for political patronage. As prosecutors gained discretionary power over criminal prosecutions, mid-nineteenth-century political reformers believed it was crucial to remove prosecutors from partisan politics. Many also hoped elected prosecutors would be more accountable to the voters and the local communities they served. Not long after prosecutors became elected, however, prosecutors quickly became involved in and co-opted by partisan politics.

AUTHOR. Yale Law School, J.D. 2011; Dartmouth College, A.B. 2006. In this Note I modernize antiquarian spellings and correct obvious errors without disclosure. I am indebted to Professor John Langbein for his guidance and extensive comments. Professor Jed Shugerman and Professor Nicholas Parrillo both provided helpful suggestions and advice. I am also grateful to Dan Feith and the other staff of *The Yale Law Journal* for their skillful editing.

EDITOR'S NOTE. All state constitutions cited herein appear in the multivolume work, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (Francis Norton Thorpe ed., 1909).

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INTRODUCTION

The United States is the only country in the world where citizens elect prosecutors.[1] Local public prosecutors—whether called district attorneys, state's attorneys, prosecuting attorneys, or county attorneys—originated in colonial America without counterpart in eighteenth-century England.[2] American prosecutors began as appointed government officers, and they have remained so in the federal government. Between 1832 and 1860, however, nearly three-quarters of the states in the Union decided to give voters the right to elect public prosecutors.[3]

The change in the method of selecting prosecutors occurred during the same era—and in many instances, at the same state constitutional conventions—in which American government became more democratic.[4] Between 1820 and 1860, states across the country adopted new constitutions to enlarge voting franchises, reapportion legislatures, and make many more government offices, including governors and judges, elected.[5] This Note

1. *See* Michael Tonry, *Determinants of Penal Policies*, 36 CRIME & JUST. 1, 35 (2007) ("Only in the United States are judges and prosecutors elected . . . ."); *see also* Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 512 (1975) ("In most American states, public prosecutors are locally elected officials with surprisingly great and virtually uncontrolled authority. . . . [H]ierarchical subordination is negligible by continental [European] standards."); Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 568 (1984) ("[T]he American prosecutor enjoys an independence and discretionary privileges unmatched in the world." (internal quotation marks omitted)). The Swiss cantons of Geneva, Basel-City, and Tessin elect judges who have a prosecutorial function, but they are not public prosecutors in the common-law sense of the office. *See* COUNCIL OF EUR., THE TRAINING OF JUDGES AND PUBLIC PROSECUTORS IN EUROPE 148 (1995).

2. *See, e.g.*, LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 29-30 (1993) ("The public prosecutor . . . appeared quite early on this side of the Atlantic."); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261, 267 (1979) ("[I]n America . . . the public prosecutor has a longer history than in the mother jurisdiction . . . .").

3. *See infra* Appendix. Today, only four states—Connecticut, Delaware, New Jersey, and Rhode Island—do not elect district attorneys. Joan E. Jacoby, *The American Prosecutor: From Appointive to Elective Status*, PROSECUTOR, Sept.-Oct. 1997, at 25, 28 & n.12. No state admitted to the Union since the 1850s has chosen to appoint its district attorneys. *See id.*

4. *See, e.g.*, David M. Kennedy, *Editor's Introduction* to DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at xiv (2007).

5. *See, e.g.*, LAURA J. SCALIA, AMERICA'S JEFFERSONIAN EXPERIMENT: REMAKING STATE CONSTITUTIONS, 1820-1850, at 6-9 (1999) (describing how the "meaning of America's

examines the transition from appointing to electing local public prosecutors and the reasons for that change.[6] Supporters of elected prosecutors argued that popular election would give citizens greater control over government, eliminate patronage appointments, and increase the responsiveness of prosecutors to the communities they served.[7] These goals were not limited to prosecutors—reformers hoped that popular elections for as many public offices as possible would place government in the hands of the electorate and out of the control of political professionals.[8] The Mississippi constitutional convention of 1832, for instance, decided to elect not only judges and district attorneys,[9] but, at the statewide level, the treasurer, attorney general, secretary of state, and auditor of public accounts; in counties, sheriffs, coroners, surveyors, treasurers, boards of police, and rangers; and, in the judicial branch, clerks of inferior courts, justices of the peace, and constables.[10] One disgruntled delegate at the 1850 Kentucky constitutional convention mused, "[W]e have provided for the popular election of every public officer save the dog catcher, and if the dogs could vote, we should have that as well."[11]

commitment to popular sovereignty" was frequently the "primary issue on the agenda" in the post-Founding period).

6. This Note begins to fill the void of legal scholarship on elected prosecutors by focusing on printed records from state constitutional conventions, statutes, and contemporary newspaper accounts of political debates. Future scholarship might add additional depth to our understanding of the elected prosecutor by reviewing non-printed sources such as manuscripts or other archival resources of state constitutional conventions.

7. *See infra* Part IV.

8. *See* HARRY L. WATSON, LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA 50 (1st rev. ed. 2006) ("[V]oters should have more control over branches of government that had once been shielded from the pressure of public opinion. State leaders who expanded the right to vote in the 1810s and 1820s also moved to increase the number of elective offices in state government . . . ."); G. Alan Tarr, *State Constitutional Politics: An Historical Perspective*, *in* CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 3, 8 (G. Alan Tarr ed., 1996) ("[T]he number of offices subject to popular election and control were multiplied. . . . [B]y 1861 twenty-four of the thirty-four states selected judges by election rather than by appointment.").

9. MISS. CONST. of 1832, art. IV, §§ 2, 11. *See generally infra* Section I.B (discussing Mississippi's 1832 reforms).

10. MISS. CONST. of 1832, art. IV, §§ 19-20, 23, 25; art. V, §§ 14, 19-20; *see also, e.g.*, ARK. CONST. of 1836, amends. V-VII (1848) (providing for the popular election of circuit judges, prosecuting attorneys, and county judges).

11. Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 HISTORIAN 337, 340-41 (1983) (quoting THE OLD GUARD 22 (Thomas F. Marshall & J.H. Holeman eds., Frankfort, Ky., 1850)); *see also* LEE HARGRAVE, THE LOUISIANA STATE CONSTITUTION: A REFERENCE GUIDE 7 (1991) (quoting Bernard Marigny, a delegate opposed to elected prosecutors at the 1845 Louisiana constitutional convention,

Amid the era's democratic impulses, supporters of elected prosecutors gave little consideration to the effect that elections would have on the criminal justice system.[12] Later commentators have observed that elections subject prosecutors to "untoward political influences,"[13] lead prosecutors to concentrate on high-profile investigations to win favorable media coverage,[14] and have the potential to corrupt prosecutors with campaign contributions.[15] Some have even suggested that elections cause prosecutors to seek higher conviction rates.[16]

These concerns were not salient to nineteenth-century supporters of popularly elected prosecutors. Debates about popular control of government, the protection of individual rights, expansion of the voting franchise, and, in some states, issues related to slavery dominated the state constitutional conventions of the mid-nineteenth century.[17] But delegates at these

complaining, "We have an election for almost everything, from a sheriff down to an inspector of pork!"). Marigny is also notable for introducing the game of craps to the United States. After a trip abroad, Marigny taught a new French table game called "hazard" to his Creole friends. When Anglophones saw the Frenchmen playing the game, they called it "Johnny Crapaud's game," using the French word for "toad" to refer to the stereotype of the French as frog eaters. The game's nickname was later shortened to "craps." TYLER BRIDGES, BAD BET ON THE BAYOU: THE RISE OF GAMBLING IN LOUISIANA AND THE FALL OF GOVERNOR EDWIN EDWARDS 7-8 (2001).

12. *Compare* DEBATES AND PROCEEDINGS IN THE NEW-YORK STATE CONVENTION, FOR THE REVISION OF THE CONSTITUTION 549-73 (Albany, S. Croswell & R. Sutton 1846) [hereinafter CROSWELL & SUTTON, N.Y. DEBATES] (detailing lengthy debate on how to structure judicial elections), *with id.* at 769-71 (describing only a brief debate before deciding, without a roll call vote, to elect prosecutors).

13. Harlan F. Stone, *Progress in Law Improvement in the United States*, 10 A.B.A. J. 633, 636 (1924); *see also* Allen Steinberg, *The "Lawman" in New York: William Travers Jerome and the Origins of the Modern District Attorney in Turn-of-the-Century New York*, 34 U. TOL. L. REV. 753, 755 (2003) ("The District Attorney's office was a dumping ground for [party] machine loyalists . . . .").

14. *See, e.g.*, NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON PROSECUTION 15 (1931) ("The 'responsibility to the people' contemplated by the system of frequent elections does not so much require that the work of the prosecutor be carried out efficiently as that it be carried out conspicuously.").

15. *See, e.g.*, Joseph E. Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 HASTINGS CONST. L.Q. 665, 680 n.55 (1997) ("[M]oney, in the form of campaign contributions, can influence elected prosecutors.").

16. *See* Eric Rasmusen, Manu Raghav & Mark Ramseyer, *Convictions Versus Conviction Rates: The Prosecutor's Choice*, 11 AM. L. & ECON. REV. 47, 71 tbl.2 (2009).

17. *See, e.g.*, SCALIA, *supra* note 5, at 7-8 (noting that debates over expanding the franchise, reapportioning state legislatures, and making various government officers elected comprised

conventions spent little time debating the merits of transforming prosecutors into elected politicians.[18] When delegates did discuss the question of which officers to make elective, they tended to concentrate on statewide executive offices and judgeships, not prosecutors. For instance, when a group of Massachusetts legislators called for a new constitutional convention in 1852, they engaged in "careful consideration" of whether "more important judicial offices" like judges should be elected, but mentioned prosecuting attorneys as one of many local offices that, in order to be "more conformable to the spirit of the age . . . [s]hould be elected by the people."[19] On the rare occasions when prosecutors did come up in debate, both supporters and opponents of elections discussed prosecutors in terms similar to other government positions.[20] Yet the decision to elect prosecutors was all the more important because of the increased discretion that prosecutors gained over the charging and prosecution of crime during the middle of the nineteenth century.[21]

"more than half the transcribed notes" from state constitutional conventions in the first half of the nineteenth century).

18. *See, e.g.*, J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER 1849, at 233-34 (Washington, John T. Towers 1850) [hereinafter CAL. DEBATES] (approving the election of prosecutors with minimal recorded debate); PROCEEDINGS AND DEBATES OF THE CONVENTION OF LOUISIANA. WHICH ASSEMBLED AT THE CITY OF NEW ORLEANS JANUARY 14, 1844, at 770 (New Orleans, Besancon, Ferguson & Co. 1845) [hereinafter LA. DEBATES] (recording no debate before vote on amendment to elect prosecutors); 1 CHARLES KETTLEBOROUGH, CONSTITUTION MAKING IN INDIANA: A SOURCE BOOK OF CONSTITUTIONAL DOCUMENTS WITH HISTORICAL INTRODUCTION AND CRITICAL NOTES 342 n.50 (1916) (noting that the 1851 Indiana constitutional convention adopted the Committee on Organization of Courts of Justice's proposal for the election of prosecuting attorneys without amendment or vote); *see also The Convention*, JEFFERSONIAN REPUBLICAN (New Orleans), Apr. 25, 1845, at 2 (accusing the Louisiana convention of "stifl[ing] discussion upon the illiberal provisions which they are incorporating in the new Constitution" by voting down proposals to elect judicial officers "without permitting a word of debate").

19. REPORT OF THE JOINT SPECIAL COMMITTEE OF THE LEGISLATURE OF 1852, IN FAVOR OF A CONVENTION TO REVISE THE CONSTITUTION OF MASSACHUSETTS 6-7 (Boston, Damrell & Moore 1852); *see also* 2 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 805 (Boston, White & Potter 1853) [hereinafter MASS. DEBATES] (statement of Del. Rufus Choate) (calling the sheriff's office one "which the freedom and violence of popular elections do not greatly harm"). Choate went on to describe the sheriff's responsibilities as "certain specific duties to do for a compensation, and if these are well done, it does not much signify what a minority or what anybody thinks of him." *Id.*

20. *See, e.g.*, CAL. DEBATES, *supra* note 18, at 234 (statement of Del. John McDougal) (discussing the district attorney as one of numerous "officers" of the court to make elected).

21. *See, e.g.*, Steinberg, *supra* note 1, at 580.

Previous scholarship has traced the transition of American state court judges, but not prosecutors, from appointed to elected status in the late 1840s and early 1850s.[22] Some writers have described the move to elect judges as an attempt to weaken judicial power by making judges, like other elected officials, responsive to the popular will.[23] An elected judiciary was, according to this account, "part of a coherent program . . . to hobble the power of the executive, the legislature, [and] the courts."[24] Under another view, the move to elect judges was motivated by a desire to strip the opposing political party of influence over government and patronage opportunities.[25] Recently, Jed Shugerman has linked the shift to an elected judiciary to the economic panics of the 1830s, which arose from debts incurred in building transportation infrastructure.[26] According to Shugerman, the movement to elect judges was intended to strengthen the ability of the judiciary to review—and strike down—the fiscally reckless actions of state legislatures. Conventions in the 1840s and 1850s produced state constitutions that severely limited the ability of state governments to incur debt and charter corporations to build infrastructure, and elected judges were necessary to enforce the new limits on government power.[27]

22. Historians have given only cursory treatment to the shift of the district attorney from an appointed to an elected office. *See, e.g.*, JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 23-25 (1980); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 450-51 (2001) (devoting two paragraphs to prosecutors becoming elected officials); Jacoby, *supra* note 3, at 25, 27-29; Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1328 (2002).

23. *See, e.g.*, 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); *see also* D.B. EATON, SHOULD JUDGES BE ELECTED?, OR, THE EXPERIMENT OF AN ELECTIVE JUDICIARY IN NEW-YORK 71 (New York, John W. Amerman 1873) (describing the election of judges as "almost . . . a political revolution" against the judiciary); JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 87 (1950) ("It is one of the paradoxes of our legal growth that [the] most basic assertion of the people's control of the courts came at the threshold of the greatest period of judicial power in our history.").

24. Nelson, *supra* note 23, at 207 (internal quotation marks omitted).

25. *See, e.g.*, STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND AMERICAN HISTORY: CASES AND MATERIALS 428-41 (1980).

26. *See* Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1067 (2010) ("The catalysts in the rise of judicial elections were reckless overspending on internal improvements and then the Panics of 1837 and 1839.").

27. JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 104-05 (2012).

The change of prosecutors from appointed to elected status occurred at many of the same constitutional conventions that adopted elections for judges, so delegates to those conventions may have shared similar motivations for making both offices elected.[28] Nevertheless, efforts to explain the rise of judicial elections do not give a fully satisfactory account of why the same regime was applied to the office of district attorney. Although many state constitutions classified district attorneys as functionaries of the judicial branch,[29] prosecutors had no role in the review of statutes. Even if prosecutors were capable of checking legislative overreaches by declining to enforce criminal statutes, they could not affect state spending. It is therefore difficult for Shugerman's theory of elected judges reining in legislative overspending to explain elected prosecutors.

The idea that electing district attorneys was a means of gaining partisan advantage is also unpersuasive. If the motivation for electing prosecutors was to assure control of government for one party, Democratic and Whig leaders would have sought to make prosecutors elected when their party was politically dominant. Instead, many states began electing district attorneys when neither party would be assured of winning the next election.[30] Contrary to

28. *See, e.g.*, Shugerman, *supra* note 26, at 1132-33 (noting that opposition to gubernatorial patronage contributed to judicial elections).

29. *See, e.g.*, CAL. CONST. of 1849, art. VI, § 7 (establishing the prosecuting attorney in the constitutional article entitled "Judicial Department"); IND. CONST. of 1851, art. VII, § 11 ("Judicial"); LA. CONST. of 1845, tit. IV, art. 74 ("Judiciary Department"); WIS. CONST. of 1848, art. VII, § 23 ("Judiciary").

30. *See, e.g.*, DONALD J. RATCLIFFE, THE POLITICS OF LONG DIVISION: THE BIRTH OF THE SECOND PARTY SYSTEM IN OHIO, 1818-1828, at 133-34 (2000) (explaining how the 1828 election created a "balanced party system" in Ohio for the next twenty-five years); Shugerman, *supra* note 26, at 1082 (citing Philip L. Merkel, Party and Constitution Making: An Examination of Selected Roll Calls from the New York Constitutional Convention of 1846, at 2-6, 30 (May 2, 1983) (unpublished graduate seminar paper, University of Virginia) (on file with Harvard Law School) (describing the New York convention as split between Whigs and the "Barnburner" and "Hunker" factions of the Democratic Party, with the Barnburners holding a plurality)); *cf.* Winbourne Magruder Drake, *The Mississippi Constitutional Convention of 1832*, 23 J.S. HIST. 354, 367 (1957) (describing how "liberal-conservative lines" and sectional factions were "blurred" on the question of popular election of judges at the 1832 Mississippi convention). Elections were relatively competitive between Democrats and Whigs, the two leading political parties, throughout the period prosecutors became elected officials. For example, the four presidential elections between 1836 and 1848 elected two Democrats and two Whigs, and more than half of the states (fourteen of twenty-six) gave their votes to both Democratic and Whig candidates in presidential elections during that same period. *See Electoral Votes for President and Vice President 1837-1853*, NAT'L ARCHIVES & RECORDS ADMIN., http://www.archives.gov/federal-register/electoral-college/votes/1837_1853.html (last visited Dec. 3, 2011).

explanations in terms of partisan advantage, supporters of elected district attorneys intended to *reduce* the ability of legislatures and governors to appoint political allies as prosecutors.[31] Reformers hoped popular election of district attorneys would deprive governors of a patronage opportunity. Moreover, they hoped that district attorneys elected by the voters of each county would be more responsive to the criminal justice priorities of local communities than prosecutors selected by a governor or legislature located in the state capital.

Part I of this Note details the mechanisms for selecting public prosecutors in the early Republic, and the role prosecutors played in their local communities. Part I also discusses the decisions of two states, Mississippi in 1832 and Ohio in 1833, to adopt elected prosecutors more than a decade before any other jurisdiction. Part II discusses government patronage during this time period and popular dissatisfaction with abuses of the appointment power. Part III examines similarities and differences between the decisions to elect prosecutors and judges, as well as how popular election was a mechanism to keep district attorneys accountable to their local communities. Part IV discusses how, after becoming elected, prosecutors quickly became involved in, and later co-opted by, partisan politics.

I. THE APPOINTED PROSECUTOR AND THE FIRST STEPS TOWARD ELECTED STATUS

Prosecutors, like many other American state- and county-government officials, were appointed officers in the early nineteenth century. But in the 1820s and 1830s, two structural trends set the stage for elected prosecutors. First, voters became dissatisfied with the appointment process. Governors gained new powers, giving one man unchecked appointment authority in many states, while in states where the legislature selected prosecutors, political parties commandeered the appointment process to reward their allies and punish their enemies. At the same time, prosecutors began to assume a larger role in the criminal justice system and gained discretionary powers over prosecutions. Voters did not trust a broken appointments process to select an increasingly important office, so popular election was a natural alternative. In

31. *Cf.* Kermit L. Hall, *The "Route to Hell" Retraced: The Impact of Popular Election on the Southern Appellate Judiciary, 1832-1920*, *in* AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 229, 230 (David J. Bodenhamer & James W. Ely, Jr. eds., 1984) ("In the state constitutional conventions of the mid-nineteenth century, lawyer-delegates expected to professionalize the bench by bringing popular will to bear on the influence exercised by party leaders over judicial patronage.").

Mississippi and Ohio, the first states to elect prosecutors, both of these trends were reflected in the political debates of the 1830s.

A. Appointed Prosecutors

District attorneys were appointed officials under state constitutions adopted in the wake of the Revolutionary War. Who appointed the district attorney varied from state to state: in Kentucky and New York, for example, it was the judge of the county court;[32] in Alabama, Georgia, North Carolina, and Tennessee, it was the state legislature;[33] in Massachusetts and New Hampshire, it was the governor, assisted by his council of advisors;[34] in Michigan, the governor with the advice and consent of the state senate.[35]

Governors were initially relatively powerless in many states,[36] but they gained significant authority over the next few decades.[37] In New York, for example, the state's 1821 constitutional convention abolished the Council of Revision and Council of Appointment, two institutions designed, in the words

32. KY. CONST. of 1799, art. III, § 23 ("Attorneys for the commonwealth, for the several counties, shall be appointed by the respective courts having jurisdiction therein."); N.Y. CONST. of 1821, art. IV, § 9 ("The clerks of courts . . . shall be appointed by the courts of which they respectively are clerks; and district attorneys by the county courts.").

33. ALA. CONST. of 1819, art. V, § 18 ("There shall be . . . as many solicitors as the general assembly may deem necessary, to be elected by a joint vote thereof . . . ."); GA. CONST. of 1798, art. III, § 3 ("There shall be a State's attorney and solicitors appointed by the legislature, and commissioned by the governor, who shall hold their offices for the term of three years . . . ."); N.C. CONST. of 1776, pt. 2, art. XIII ("That the General Assembly shall, by joint ballot of both houses, appoint . . . [an] Attorney-General, who shall be commissioned by the Governor, and hold [his] office during good behavior."); TENN. CONST. of 1796, art. V, § 2 ("The general assembly shall, by joint ballot of both houses, appoint . . . an attorney or attorneys for the State . . . .").

34. MASS. CONST. of 1780, pt. II, ch. 2, § 1, art. IX ("All judicial officers . . . shall be nominated and appointed by the governor . . . ."); N.H. CONST. of 1792, pt. II, § 46 ("All judicial officers, the attorney-general, solicitors . . . shall be nominated and appointed by the governor and council . . . .").

35. MICH. CONST. of 1835, art. VII, § 3.

36. *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 133-34 (2005) (describing a "backdrop of weak state 'presidents' and occasionally stronger state 'governors'" behind the crafting of the Federal Constitution's Article II).

37. *See, e.g.*, LA. CONST. of 1812, art. III, § 9 (giving the governor the power to appoint, "with the advice and consent of the Senate, Judges, Sheriffs and all other Officers whose offices are established by this Constitution"). *Compare* VA. CONST. of 1776 (requiring the governor to stand for annual election by the legislature), *with* VA. CONST. of 1830, art. IV, § 1 (requiring the legislature to elect the governor to a three-year term).

of one historian, to "cheapen the executive office."[38] New York's new constitution gave the governor a veto over legislation[39] and the ability to appoint, with the senate's consent, state judges.[40] That same year, Massachusetts also gave its governor the power to veto legislation.[41] By the Civil War, thirty-three state governors had a veto power.[42]

The district attorney's shift to elected status also occurred as prosecutors became increasingly powerful figures in the criminal justice system.[43] At the start of the nineteenth century, district attorneys were judicial functionaries, who, like clerks of court, coroners, and recorders of deeds, had mainly nondiscretionary duties.[44] These duties included, among other things, carrying out criminal prosecutions on behalf of the state, representing the state in civil suits, and issuing subpoenas.[45] There is evidence, however, that over time, district attorneys began to "make administrative decisions which determined whether or not a case was prosecuted," gaining discretionary authority over prosecution priorities.[46] As prosecutors started to cooperate with newly organized police departments to screen criminal charges, district attorneys became more closely aligned with the executive branch.[47]

38. DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820'S, at 126 (Merrill D. Peterson ed., 1966).

39. N.Y. CONST. of 1821, art. I, § 12.

40. *Id.* art. IV, § 7.

41. MASS. CONST. of 1780, amend. I (1821); *see also* John A. Fairlie, *The Veto Power of the State Governor*, 11 AM. POL. SCI. REV. 473, 476-80 (1917) (describing governors' increased veto powers by the middle of the nineteenth century).

42. Frank W. Prescott, *The Executive Veto in American States*, 3 W. POL. Q. 98, 100 (1950).

43. *See, e.g.*, Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 LAW & SOC'Y REV. 273, 274 (1979) ("By the 1840s and 1850s in the larger cities . . . full-time prosecutorial staffs developed and often handled charging decisions, at least in serious cases.").

44. *See, e.g.*, People v. Whipple, 9 Cow. 707, 712 (N.Y. Sup. Ct. 1827) (finding that the competence of a witness could not "with propriety, be entrusted to the public prosecutor, or any other inferior ministerial officer of justice, because, strictly speaking, it is the exercise of a high *judicial* discretion"); *see also* CAL. DEBATES, *supra* note 18, at 233-34 (statement of Del. John McDougal) (including district attorneys in a list of "officers of the[] court"); THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW-YORK tit. IV, at 142 (Lawbook Exch., Ltd. 1998) (1850) (including district attorneys with sheriffs, county clerks, coroners, clerks of court, and court reporters as "ministerial" officers); JACOBY, *supra* note 22, at 23 (explaining that the prosecutor was, "in the eyes of the earliest Americans, clearly a minor actor in the court's structure").

45. *See, e.g.*, E.P. HURLBUT, CIVIL OFFICE AND POLITICAL ETHICS 81 (New York, Taylor & Clement 1840); JACOBY, *supra* note 22, at 24-26.

46. Steinberg, *supra* note 1, at 580.

47. *See id.* at 580-82.

In addition to having less discretion, early American district attorneys also were not full-time prosecutors. Like many other court officials, including clerks,[48] sheriffs,[49] and coroners,[50] early-nineteenth-century prosecutors were part-time officials who often had little legal experience.[51] Even the office of the Attorney General of the United States was originally conceived to be a part-time job; the incumbent received only half the salary of other cabinet officers.[52] As President Washington explained to Edmund Randolph in persuading him to accept the appointment, "[T]he Station would confer pre-eminence on its possessor, and procure for him a decided preference of Professional employment";[53] that is, being Attorney General would make Randolph's private practice more lucrative.[54] States likewise employed lawyers who supplemented their private practice with revenue from income as district attorneys.[55] As a result, many prosecutors were lawyers who did not have the

48. *See* ALEXANDER B. AIKMAN, THE ART AND PRACTICE OF COURT ADMINISTRATION 102 (2007) (noting that in the Jacksonian era, "the job of clerk of court often was less than a full-time job").

49. *See* WILLIAM L. MURFREE SR., A TREATISE ON THE LAW OF SHERIFFS AND OTHER MINISTERIAL OFFICERS § 7 (St. Louis, F.H. Thomas & Co. 1884).

50. Julie Johnson, *Coroners, Corruption and the Politics of Death: Forensic Pathology in the United States*, *in* LEGAL MEDICINE IN HISTORY 268, 268 (Michael Clark & Catherine Crawford eds., 1994) ("Whereas English coroners were often physicians, attorneys, or local magistrates, American coroners . . . were typically farmers, carters, or undertakers"); *see also id.* at 272 ("Coroner's physicians, who performed the autopsies . . . [w]ere granted the part-time position as a reward for faithful service as ward leaders or political organizers.").

51. *See* FRIEDMAN, *supra* note 2, at 66-67; Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43-44 (1995) ("[T]he office [of prosecutor] often attracted young, inexperienced attorneys or older, generally incompetent ones."); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 896-97 (2000) (explaining how most public prosecutors in nineteenth-century Massachusetts were part-time officials who maintained civil law practices).

52. Rex E. Lee, *Lawyering in the Supreme Court: The Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1059, 1059 (1988) ("[T]he attorney general's annual salary, $1500, was half that of the other cabinet officers.").

53. Letter from George Washington to Edmund Randolph, U.S. Att'y Gen. (Sept. 28, 1789), *reprinted in* 30 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799, at 418, 419 (John C. Fitzpatrick ed., 1939).

54. Randolph did maintain a private practice—notably, he represented the petitioner in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 NOTRE DAME L. REV. 1135, 1158 (2009).

55. The fees district attorneys could collect for their services were frequently lower than the fees for equivalent services in private practice. *See, e.g.*, Shattuck v. Woods, 18 Mass. (1 Pick.) 171, 177 (1822) (observing that a fee may be "inadequate compensation in some cases");

option of relying solely on more profitable private practices. Many governors therefore were "obliged from necessity to appoint those who are not fully competent to the discharge of the . . . duties devolved upon your prosecuting officers."[56]

B. Mississippi, 1832

In 1832, Mississippi became the first state in the nation to provide for the election of public prosecutors. Mississippi's original 1817 constitution limited suffrage to free white males who had served in the militia or had sufficient income to pay taxes.[57] Voters elected the governor and lieutenant governor, but the legislature chose all other state officials.[58] But within a few years, settlers in sparsely populated areas began to express discontent with the state's franchise limits.[59] By 1831, a legislature controlled by delegates from Natchez, the state's commercial center, dominated state and local court appointments.[60] A

Hatch v. Mann, 15 Wend. 44, 47 (N.Y. 1835) (declaring it an "absurdity" to believe compensation would be "full and adequate . . . for the performance of the service in each particular case").

56. REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN 520 (Lansing, R.W. Ingals 1850) [hereinafter MICH. DEBATES] (statement of Del. Charles W. Whipple); *see also* 2 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 9 (Annapolis, William M'Neir 1851) [hereinafter MD. DEBATES] ("[P]ersons had been appointed [district attorney] who never would have been thought of, if the proper persons could be induced to accept."); REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY, at 673 (Frankfort, A.G. Hodges & Co. 1849) [hereinafter KY. DEBATES] (statement of Del. Ben Hardin) ("I, too, have been state's attorney, and know the necessity for having men of talents to fill that office. I have seen that office dwindled down to a mere nothing when compared to what it once was."); Ireland, *supra* note 51, at 43-44 (quoting a delegate to the 1847 Illinois convention as complaining that the office of district attorney was "generally taken by young men who desired to become acquainted with the people, and get into practice; as soon as this was accomplished they gave way to others").

57. MISS. CONST. of 1817, art. III, § 1.

58. *Id.* art. IV, § 17.

59. JOHN W. WINKLE III, THE MISSISSIPPI STATE CONSTITUTION: A REFERENCE GUIDE 5-6 (1993).

60. *See* SHUGERMAN, *supra* note 27, at 70; *see also* PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at 491 (John E. Babout ed., 1942) [hereinafter N.J. PROCEEDINGS] (statement of Del. Richard Stockton Field) (arguing that Mississippi called its convention because "the people were so disgusted, so indignant at the manner in which appointments had been disposed of . . . [that they] resumed themselves the exercise of this power, so much abused by their representatives, and every officer in the State is elected by the people").

constitutional convention that met in September and October 1832 eliminated the taxpayer qualification for the franchise and gave voters the ability to elect, among other offices, state supreme court judges and district attorneys.[61] One delegate to the 1832 convention wrote to a friend: "We will give you a constitution . . . much more *democratic* than any other in the [U.S.] Not *republican*—but down right and absolute *democracy*."[62] Supporters of popularly elected judges and district attorneys argued that "*the competency of the people to govern themselves*" required the "*election of all important public officers* by direct popular agency."[63] The 1832 convention was also remarkable for its delegates' lack of political and legal experience—only three of the forty-eight delegates in 1832 had served as delegates to the state's first convention in 1817.[64] The inexperienced delegates had few ties to the existing system, giving them the freedom to make radical changes without endangering their personal interests.[65] Moreover, Mississippi's legal innovations did not halt after the convention—in 1839, it became the first common law jurisdiction to give married women the right to own property.[66]

Mississippi's reforms were noted outside the state, although not always in a positive light. One former Mississippi Supreme Court judge declared that "our constitution is the subject of ridicule in all the States where it is known. It is referred to as a full definition of mobocracy."[67] An anonymous letter published in the *American Jurist and Law Magazine* in 1834 chided the magazine's editors for failing to pay attention to developments in Mississippi. The letter-writer

61. *See* Drake, *supra* note 30, at 368. There was no printed record of the debates of the Mississippi convention, only a journal of proceedings that summarized the actions of the convention. *See* JOURNAL OF THE CONVENTION OF THE STATE OF MISSISSIPPI, HELD IN THE TOWN OF JACKSON (Jackson, Miss., P. Isler 1832).

62. Letter from Stephen Duncan to Levin Wailes (Sept. 14, 1832), *as reprinted in* EDWIN ARTHUR MILES, JACKSONIAN DEMOCRACY IN MISSISSIPPI 33 (1960).

63. MILES, *supra* note 62, at 37 (quoting Henry S. Foote in the MISSISSIPPIAN (Vicksburg), Jan. 9, 1832).

64. SHUGERMAN, *supra* note 27, at 73. Shugerman also notes that twenty-six of the forty-eight delegates were not listed in any biographical guides to Mississippi history. *Id.*

65. *See id.* at 74 (stating that the convention lacked "the established leaders who valued appointments and had benefited most from them").

66. 1839 Miss. Laws 72; *see also* Elizabeth Gaspar Brown, Comment, *Husband and Wife—Memorandum on the Mississippi Woman's Law of 1839*, 42 MICH. L. REV. 1110, 1118 (1944) ("[Mississippi's law] was the first departure in a common-law jurisdiction from the established theories of the common law as related to the persons or property of married women.").

67. MILES, *supra* note 62, at 42 (quoting George Winchester writing in the Nov. 9, 1832 edition of *The Natchez*).

noted that despite already having an appointment system that "would have been called republican and even democratic, by Thomas Jefferson himself," Mississippi had produced "a new constitution replete with republican simplicity."[68] The writer speculated that the Mississippi constitutional convention favored election of judicial officers, including both judges and prosecuting attorneys, because "under the old constitution, there was no economical way of removing a bad judge, trial by impeachment frequently resulting in acquittal, at a great expense to the state."[69] Nevertheless, in his view, "the *peoplish* politicians of Mississippi have carried their democratic notions too far" by deciding to elect judges.[70] Even with appointed officers, "there has never been any good and well known system of adjudications within the state," but "the difficulties, under which we labor, will not be obviated by electing judges by the people, for a limited term of years."[71]

Delegates at the constitutional conventions of other states over the next decade resisted Mississippi's reforms. At the 1844 New Jersey convention, one delegate doubted whether the constitution of sparsely populated Mississippi could offer lessons for other states.[72] A delegate at the Iowa constitutional convention that same year explained his opposition to popular elections by describing Mississippi as a state "of badly-administered laws, connected with popularly elected judges."[73] At the 1845 Louisiana constitutional convention, however, a supporter of elected judges cited Mississippi's experience positively, claiming that as a result of elections, "politics have been driven from the bench, and the judicial stations of the State have been filled with ability, learning and weight of character."[74] Although these criticisms concerned Mississippi's

68. Letter to the Editor, *Legislation of Mississippi*, 11 AM. JURIST & L. MAG. 363, 363 (1834).

69. *Id.*

70. *Id.* at 364.

71. *Id.*

72. N.J. PROCEEDINGS, *supra* note 60, at 129 (statement of Del. Andrew Parsons).

73. FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846, at 105 (Benjamin F. Shambaugh ed., 1900) (statement of Del. Elijah Sells); *see also* REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW-YORK, at 791 (William G. Bishop & William H. Attree eds., Albany, N.Y., Evening Atlas 1846) [hereinafter BISHOP & ATTREE, N.Y. DEBATES] (statement of Del. Conrad Swackhamer) (paraphrasing Swackhamer's remarks in favor of elected judges as expressing apprehension that "the libels against [Mississippi's] elective judiciary were so often repeated . . . that the calumniators would eventually believe they were telling the truth unless it was refuted").

74. LA. DEBATES, *supra* note 18, at 755 (statement of Del. James F. Brent). Brent also introduced a letter from J.A. Quitman, one of the former opponents of electing judges in Mississippi, into the Louisiana convention's record. In it, Quitman noted that he initially "feared that

decision to elect judges, opponents of elected prosecutors would make many of the same arguments at other states' conventions in the 1840s and 1850s.[75]

C. Ohio, 1833

Ohio was the second state to elect prosecutors, and like Mississippi, it made the change against a backdrop of popular discontent with the power of appointed judicial officials. Even before Ohio's statehood, the first federal territorial judges appointed for Ohio had "what one today might call conflicts of interest" on account of their personal interests in land disputes before them.[76] Lower judges were appointed to serve as "agents of central power" to enforce "national rules and regulations, which, in the end, had to trump local custom, and, if necessary, popular will."[77] Appointed state judges also sparked political controversy when, in 1807, the Ohio Supreme Court invalidated a law giving justices of the peace—who were elected officials[78]—jurisdiction over small civil claims.[79] In response, the state legislature impeached two judges who had voted to strike down the law and came within one vote of removing them from office.[80] By the 1820s, Ohioans of both parties were dismayed that political parties had taken control of government appointments to secure private advantages.[81]

The judge of the court of common pleas for each Ohio county initially appointed a prosecutor,[82] but in January 1833, the state enacted a statute

popular excitements would find their way upon the bench, that party spirit and political prejudices would generally determine the selection [of judges]," but later decided "these apprehensions were not well founded." *Id.* Quitman may have changed his mind because he proved successful at winning judicial elections. *See* SHUGERMAN, *supra* note 27, at 75 (citing ROBERT E. MAY, JOHN A. QUITMAN: OLD SOUTH CRUSADER 57 (1985)) (noting that Quitman won the first election for chancellor in 1833).

75. *See infra* notes 189-191 and accompanying text.

76. Andrew R. L. Cayton, *Law and Authority in the Northwest Territory*, *in* 1 THE HISTORY OF OHIO LAW 13, 20 (Michael Les Benedict & John F. Winkler eds., 2004).

77. *Id.* at 22.

78. *See* OHIO CONST. of 1802, art. III, § 11.

79. Rutherford v. M'Faddon (Ohio 1807), *reprinted in* OHIO UNREPORTED JUDICIAL DECISIONS PRIOR TO 1823, at 71, 83 (Ervin H. Pollack ed., 1952).

80. David M. Gold, *The General Assembly and Ohio's Constitutional Culture*, *in* 1 THE HISTORY OF OHIO LAW, *supra* note 76, at 88, 92-94.

81. ANDREW R.L. CAYTON, THE FRONTIER REPUBLIC: IDEOLOGY AND POLITICS IN THE OHIO COUNTRY, 1780-1825, at 133-34 (1986).

82. 1806 Ohio Laws 100.

providing for the election of prosecuting attorneys.[83] The Ohio House had previously considered a bill for elected prosecuting attorneys in March 1831, but tabled the measure after opponents saddled the bill with unfriendly amendments.[84] The bill was reintroduced in December 1832[85] and passed with little recorded debate.[86] Ohioans were already accustomed to electing other officers of the court: under the state's first constitution, in 1802, sheriffs, coroners, and justices of the peace were popularly elected;[87] in 1829, county recorders became elected,[88] and in 1831, county surveyors.[89]

Legislation in 1832 made the elected prosecuting attorney responsible for bringing "all complaints, suits, and controversies, in which the state shall be a party, within the county for which he shall have been elected."[90] Appointed prosecutors were not required to live in the county they served,[91] but if a

83. 1832 Ohio Laws 13 ("[T]here shall hereafter be elected in each organized county in this state, on the second Tuesday of October biennially, in the same manner that other state and county officers are elected . . . one prosecuting attorney, who shall hold his office for the term of two years . . . ."). Nevertheless, in 1838, Ohio enacted a law stating that, in the event of a vacancy in the office of the prosecuting attorney, "the supreme court, in term time, or any judge thereof, in vacation, may direct or permit any member of the bar to do and perform the duties . . . performed by the prosecuting attorneys of the several counties of this State." 1837 Ohio Laws 72; *see also* THE STATUTE LAWS OF THE TERRITORY OF IOWA: ENACTED AT THE FIRST SESSION OF THE LEGISLATIVE ASSEMBLY OF SAID TERRITORY, HELD AT BURLINGTON, A.D. 1838-39, at 394-95 (Dubuque, Iowa, Russell & Reeves 1839) (establishing identical procedures to fill vacancies). In 1852, Ohio shifted the responsibility to fill vacancies in the office of prosecuting attorney to the county court of common pleas. *See In re* Prosecuting Att'y, 2 Ohio Dec. Reprint 602, 4 West. L. Monthly 147 (Ct. Com. Pl. 1861).

84. *See Minutes of the Proceedings of the Legislature of Ohio*, OHIO ST. J. & COLUMBUS GAZETTE, Mar. 12, 1831, at 2 (noting that the bill was "further amended in its details" and then "indefinitely postponed").

85. *Ohio Legislature*, OHIO ST. J. & COLUMBUS GAZETTE, Dec. 26, 1832, at 2.

86. The paucity of the legislative record suggests that the issue of whether or not to elect prosecuting attorneys was relatively unimportant to legislators at the time. By contrast, a newspaper reprinted large portions of the bill to charter a state bank and the accompanying debates over the bank issue. *See Important Bill*, OHIO ST. J. & COLUMBUS GAZETTE, Dec. 29, 1832, at 3.

87. OHIO CONST. of 1802, art. III, § 11; *id.* art. VI, § 1.

88. 1828 Ohio Laws 65-67.

89. 1830 Ohio Laws 399-405. Note also that the county surveyor was capable of taking testimony from witnesses under oath in land disputes. *Id.* at 400-01.

90. 1832 Ohio Laws 13.

91. *Minutes of the Proceedings of the Legislature of Ohio*, OHIO ST. J. & COLUMBUS GAZETTE, Dec. 12, 1827, at 3 ("Officers generally . . . must be residents. But this i[s] not required in a

prosecuting attorney wanted to win reelection, he would have to spend sufficient time in a county to win the votes of its residents.

Ohio prosecutors became elected at a time when the office was gaining more authority over criminal prosecutions. The Ohio prosecuting attorney of the 1830s did not have a monopoly on initiating criminal prosecutions,[92] but in certain cases, his participation was mandatory. The same statute that established the office of prosecuting attorney stated that one of his duties was to issue a *praecipe* (an order to issue a writ) to the clerk of the state's supreme court to summon a grand jury for capital cases. Thus, the public prosecutor's participation was necessary for the most serious crimes.[93] A contemporary Ohio legal manual also portrays the prosecuting attorney as deciding the extent of charges filed against a criminal defendant.[94] In 1820, Ohio required grand jury bills of indictment to contain the endorsement of the prosecuting attorney of the county, effectively giving the prosecutor the ability to block private prosecutions.[95]

Another tool Ohio prosecutors relied on to exercise discretion over criminal prosecutions was the *nolle prosequi*. This writ—a declaration the prosecutor would no longer pursue charges—became an increasingly important tool not long after the state began electing its prosecutors. Elections may therefore have been a means of exercising popular control over increasingly powerful prosecutors. Ohio did not track the use of the *nolle prosequi* before 1846, when the office of Attorney General was established,[96] making it difficult to know how widely appointed prosecutors used *nolle* writs. But as elected officials,

Prosecuting Attorney . . . . He is not required to be a resident of the county in which he holds his office . . . .").

92. Private prosecutions remained common in Ohio throughout the nineteenth century, especially in actions to enforce liquor laws. *See, e.g.*, RICHARD F. HAMM, SHAPING THE 18TH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND POLITY, 1820-1920, at 145 (1995) (finding that in 1900, approximately three-quarters of liquor law prosecutions were conducted by private attorneys hired by the Ohio Anti-Saloon League).

93. 1805 Ohio Laws 57.

94. JOHN M'DOUGAL, THE FARMER'S ASSISTANT, OR EVERY MAN HIS OWN LAWYER 167 (Chillicothe, Ohio, J. Barnes 1813) ("If the verdict is not guilty, the clerk records it . . . after which the clerk asks the prosecuting attorney, if he has any thing further to allege against the prisoner." (internal quotation marks omitted)).

95. 1820 Ohio Laws 201.

96. *See Annual Report of the Attorney General*, *reprinted in* DOCUMENTS, INCLUDING MESSAGES AND OTHER COMMUNICATIONS MADE TO THE FORTY-FIFTH GENERAL ASSEMBLY OF THE STATE OF OHIO 318-19 (Columbus, Ohio, C. Scott 1847). The 1846 report states that of 2035 prosecutions, 1371 resulted in convictions and 413 in acquittals, leading to the conclusion that 251, or 12%, were dropped. *Id.* at 320. The report did not specify the number of nolle prosequis until a few years later.

prosecutors dismissed a significant portion of indictments through the *nolle* writ. In 1853, for example, Ohio prosecutors issued 111 *nolle prosequis* out of 449 total felony indictments over the course of the year, a rate of nearly 25%.[97] Three years later, prosecutors issued 184 *nolle* writs out of 1084 indictments, or 17% of the total,[98] and in 1859, the rate of *nolle prosequis* was 900 out of 2427 indictments, or 37%.[99] It is not clear why Ohio district attorneys discontinued so many prosecutions, but private prosecutions—many of which were frivolous—are said to have constituted a large proportion of antebellum criminal cases.[100] Ohio prosecutors may also have used the *nolle prosequi* as an early form of charge bargaining.[101] By charging a defendant with multiple criminal counts, prosecutors could bargain with the defendant to plead guilty to one or more charges, and then use the *nolle prosequi* procedure to dismiss the remainder.[102] Prosecutors who stood for reelection in the 1850s may therefore have used the *nolle* writ and the newfound discretion it conferred on them to focus their time and energy on the cases that would be most helpful to their political standing.

97. *See Crime in Ohio*, OHIO REPOSITORY (Canton), Mar. 8, 1854, at 1.

98. *See Biennial Report of the Attorney General*, DAILY OHIO STATESMAN (Columbus), Feb. 9, 1858, at 2. In 1857, there was a spike in *nolles* to 1047 out of 2493 prosecutions, or over 40% of all prosecutions. *Id.* The newspaper notes that the 1857 increase was caused by *Kelley v. State*, 6 Ohio St. 269 (1856). In *Kelley*, the Ohio Supreme Court invalidated the statute giving jurisdiction over criminal offenses to courts of common pleas because the law did not apply to some of the state's counties in violation of article II, section 26 of the Ohio Constitution of 1851. *See also Att'y General's Report—Statistics of Crime*, OHIO REPOSITORY (Canton), Mar. 10, 1858, at 2 ("So many nolles in 1857 grew out of the decision of the Supreme Court in Kelley vs. The State.").

99. *See Biennial Report of the Attorney General, for the Years 1858-9*, *reprinted in* 2 MESSAGES AND REPORTS TO THE GENERAL ASSEMBLY AND GOVERNOR OF THE STATE OF OHIO: FOR THE YEAR 1859, at 589, 615 (Columbus, Richard Nevins 1860).

100. *See* Steinberg, *supra* note 1, at 576-77.

101. *See* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 36-37 (2003). *But cf.* MIKE MCCONVILLE & CHESTER L. MIRSKY, JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY 155-56 (2005) (finding that in New York City, 90% of indictments in the early nineteenth century had only one count and 80% of guilty pleas by 1846 were to the most serious charge).

102. *See, e.g.*, Allen v. State, 10 Ohio St. 288, 289 (1859) ("The indictment contained three counts, but the prosecuting attorney entered a *nolle prosequi*, as to Allen, upon the first and second counts, and arraigned him upon the third."); Robbins v. State, 8 Ohio St. 131, 134 (1857) (describing how a defendant "withdrew his plea of not guilty to the indictment; whereupon the prosecuting attorney entered a *nolle prosequi* on the fifth count of the indictment"); *see also* 1 MD. DEBATES, *supra* note 56, 480 (statement of Del. William Grason) (recounting how a prosecutor had used a *nolle prosequi* to drop charges against a defendant who agreed to testify against his accomplices).

From its earliest days, the office of prosecuting attorney was politically sensitive in Ohio. Newspaper stories of election returns referred to successful candidates by party affiliation.[103] In one report, a newspaper alleged that a prosecuting attorney refused to investigate politically motivated crimes committed by his allies in the run-up to an election.[104] In 1845—when other states were making the decision to elect prosecutors—a state legislator asked the Ohio House to "inquire into the expediency of taking the Election of Prosecuting Attorney out of the hands of the People."[105] Nothing came of the request, but allegations of political influence on the decisionmaking of elected Ohio prosecutors persisted through the antebellum era.[106] One newspaper declared that "[t]he whig candidate for Prosecutor . . . is the *pet* of the whig clique in New Philadelphia, and for whom they exerted all of their energies."[107] A few years later, another article asked: "[U]pon what grounds was the removal [of a district attorney in a recent election] made but upon those of *party*?"[108] Political observers in other states would soon ask that same question.[109]

II. DISSATISFACTION WITH POLITICAL PATRONAGE

When President Andrew Jackson entered office in 1829, he sought to fill as many government positions as possible with his allies, both to ensure that his policy agenda would be carried out by sympathetic officials and to reward his

103. *See, e.g.*, DAILY OHIO STATESMAN (Columbus), Oct. 12, 1837, at 2 (announcing the election of a Democrat as prosecuting attorney in Delaware County); *Portage and Trumbull Counties*, DAILY OHIO STATESMAN, Oct. 20, 1837, at 3 (declaring that in Portage and Trumbull Counties, the Democrats "succeeded in electing their Prosecuting Attorney").

104. *See, e.g.*, *Failure of Public Justice—The Grand Jury and Prosecuting Attorney*, DAILY OHIO STATESMAN, June 12, 1855, at 3 (insinuating that a Know-Nothing prosecuting attorney in Franklin County failed to investigate a fellow Know-Nothing's assault on a rival newspaper editor).

105. *Ohio Legislature,* CINCINNATI WKLY. HERALD & PHILANTHROPIST, Dec. 17, 1845, at 1.

106. Prosecutors in Ohio also became important figures in the local abolition movement. *See, e.g.*, J.R. Giddings, *Fugitive Slaves in Northern Ohio*, *in* LIBERTY BELL 27, 34-36 (Boston, Mass. Anti-Slavery Fair 1846) (detailing how a county prosecuting attorney in Ohio brought criminal assault and battery charges against Kentucky slave-catchers for seizing escaped slaves by force in order to "deter other slave-hunters").

107. *Tuscarawas Election*, OHIO STATESMAN, Oct. 20, 1841, at 3.

108. *The Journal's Compliments*, DAILY OHIO STATESMAN, May 15, 1849, at 2.

109. *See infra* notes 212-224 and accompanying text.

supporters for their loyalty.[110] State governments followed suit shortly thereafter. In 1835, John C. Calhoun noted that "[a] majority of the states, instead of opposing, will be usually found acting in concert with the Federal Government . . . so . . . the sum-total of the patronage of all the states, acting in conjunction with the federal executive, must be added to [President Jackson's patronage]."[111] Popular dissatisfaction with patronage appointments also fueled the drive for state constitutional reform. In Louisiana, one delegate to the state's 1845 constitutional convention complained that "[s]warms and myriads of office hunters . . . besiege and beset every avenue which leads to the executive palace" when a new governor comes into office, and that these "hosts of individuals . . . follow in the wake of the two great political parties, as sharks follow in the wake of a ship for the offal that is thrown overboard."[112]

Appointed district attorneys were no exception to the trend of patronage. In the early days of statehood in Illinois, the governor initially appointed "all the State's attorneys," but the legislature, "vesting in their own body all the appointing powers they could lay their hands on," began appointing prosecutors, leading to "innumerable intrigues and corruptions."[113] In New York, patronage appointments dominated state government in the early

110. *See, e.g.*, SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 314-17 (2005) (noting that "[a]mong civil officers directly appointed by the president, the removal rate was nearly one-half" in the Jackson Administration, and that "[i]n 1829 and 1830, plummy postmasterships and deputy postmasterships changed hands by the hundreds"). Jackson's use of political appointments differed dramatically from that of previous presidential administrations, which had allowed civil servants to continue in office unless they proved grossly incompetent or corrupt. *See* CARL RUSSELL FISH, THE CIVIL SERVICE AND THE PATRONAGE 75-78 (1905); Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829-1861*, 117 YALE L.J. 1568, 1613-28 (2008).

111. John C. Calhoun, A Report on the Extent of Executive Patronage (Feb. 9, 1835), *reprinted in* LIFE OF JOHN C. CALHOUN 168, 176 (New York, Harper & Bros. 1843); *see also Communication from the Governor* (Doc. No. 51, Mar. 8, 1838), *reprinted in* DOCUMENTS, INCLUDING MESSAGES AND OTHER COMMUNICATIONS, MADE TO THE THIRTY-SIXTH GENERAL ASSEMBLY OF THE STATE OF OHIO 4-5 (Columbus, Samuel Medary 1837) (reciting a resolution passed by the Kentucky legislature that decried the "abuse, encroachments, and usurpations of the Executive Department" of the federal government against "all who do not conform to the creed of the dominant party—in a new and fearful version of the power of dismission from office").

112. LA. DEBATES, *supra* note 18, at 749 (statement of Del. James F. Brent); *see also supra* note 60 and accompanying text (describing popular dissatisfaction with patronage appointments in Mississippi).

113. THOMAS FORD, A HISTORY OF ILLINOIS, FROM ITS COMMENCEMENT AS A STATE IN 1818 TO 1847, at 26-27 (Chicago, S.C. Griggs & Co. 1854).

1840s.[114] In one high-profile case, the Rensselaer County district attorney challenged prospective jurors until he was able to empanel a jury he thought would convict a man whom he had charged with cutting down timber from the land of a political ally of the governor.[115]

Pennsylvania's 1838 constitution did not provide for the election of district attorneys,[116] but it nevertheless reflected popular sentiment in favor of reducing gubernatorial appointment powers.[117] The governor could appoint officers without legislative assent under the state's 1790 constitution, but the 1838 constitution required the consent of the Senate.[118] As one delegate to the Pennsylvania convention pointed out, requiring Senate confirmation "would have the effect to diminish the inordinate desire which was now too prevalent, to become favorites of the Executive."[119] When considering whether to give its consent for nominees, the Senate was required to sit with open doors so the

114. *See, e.g.*, 3 JABEZ D. HAMMOND, POLITICAL HISTORY OF THE STATE OF NEW-YORK 325 (Syracuse, N.Y., Hall & Dickson 1848) (describing William Bouck, governor from 1843 to 1844, as a man who "held out encouragements to friends of advancements and patronage"); *id.* at 359 (noting that a bill to abolish the office of bank commissioner originated "from a desire to curtail the patronage of the governor"); *id.* at 667 (contending that one of the 1846 constitutional convention's effects was to take from the governor "the prerogative of appointment to office" and give "to the people, acting in their sovereign capacity, the vast patronage which theretofore had been wielded by a central power").

115. *See* CHARLES W. MCCURDY, THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839-1865, at 100 (2001).

116. District attorneys became elected in Pennsylvania in 1850. *See* 1850 Pa. Laws 654, § 1. The 1838 constitution did make prothonotaries, clerks of court, registers of wills, recorders of deeds, coroners, sheriffs, and justices of the peace elected officers. PA. CONST. of 1838, art. VI, §§ 1, 3, 4, 7.

117. *See* ROSALIND L. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 23-24 (1960) ("During the long period of agitation for revision, one of the primary objects of criticism had been the broad appointive powers of the governor. . . . It was openly charged that this broad power of patronage had formed the basis for re-election of governors.").

118. PA. CONST. of 1838, art. II, § 8; PA. CONST. of 1790, art. II, § 8.

119. 2 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION 288 (Harrisburg, Pa., Packer, Barrett & Parke 1837) (statement of Del. George Woodward). Woodward also argued that legislators, being "well acquainted with the districts which they represent," would be better-suited than the governor to help select local government officers. *Id.* Some delegates at Pennsylvania's convention, including future U.S. Congressman Thaddeus Stevens, wanted to go even further in restraining the executive by "tak[ing] away from the Governor *all* agency in the appointment of all [county] officers . . . and giving their election to the people." *Id.* at 307 (statement of Del. Thaddeus Stevens). Stevens also argued that election of county officials would prevent "the officers of the small and remote counties" from being "filled by and with the advice, consent, and at the dictation of large and distant counties!" *Id.* at 309.

public could see its debates, supposedly making backroom horse-trading with the governor more difficult.[120]

The district attorney's transition from fee-based to salaried compensation during this same period compounded the patronage problem by making the office more lucrative. When paid by fees, a district attorney's compensation depended on the volume of criminal work in the jurisdiction and the schedule of fees, as fixed by statute. Frequently, these rates were below the comparable rates of pay for attorneys in private practice.[121] By contrast, when paid a regular salary, a district attorney could collect an income even when there was little criminal work in the jurisdiction.[122]

III. POLITICAL PATRONAGE AND THE ELECTED PROSECUTOR

In many states, supporters of elected district attorneys believed popular election would distance the office from patronage politics. Reformers believed that appointed prosecutors, like other appointed government officials, were beholden to the partisan interests that placed them in office. They hoped elected prosecutors would be more responsive to the concerns of voters. Moreover, in a largely rural nation where travel was difficult,[123] reformers

120. PA. CONST. of 1838, art. II, § 8.

121. *See, e.g.*, Shattuck v. Woods, 18 Mass. 171, 177 (1822) (observing that a fee may be "inadequate compensation in some cases"); Hatch v. Mann, 15 Wend. 44, 47 (N.Y. 1835) (declaring it an "absurdity" to believe compensation would be "full and adequate . . . for the performance of the service in each particular case"); MICH. DEBATES, *supra* note 56, at 339 (statement of Del. William Norman McLeod) ("For my own part, I can testify that my salary as prosecuting attorney is merely nominal. . . . I have sacrificed from $1,000 to $1,500 that I might have made by managing cases for the defense."); Ireland, *supra* note 51, at 44 (describing a speech by former Supreme Court Justice David Davis to the Illinois State Bar Association decrying the low compensation of state prosecutors).

122. *See, e.g.*, KY. DEBATES, *supra* note 56, at 358 (statement of Del. Elijah F. Nuttall) ("Our county gives two hundred dollars annually to the county attorney; he receives it whether he renders twenty-five dollars worth of service or not. We never enquire into the fact."); *cf. Hamilton County Criminal Court*, DAILY OHIO STATESMAN (Columbus), Dec. 5, 1855, at 2 ("Judge Flinn went through the regular farce of opening the Criminal Court, on Monday, and adjourning without the transaction of business. The Prosecutor, Sergeant-at-arms, &c., all wanted their pay, and *extra* pay at that, for their arduous duties—and the high price of brandy."). *But cf.* Evans v. City of Trenton, 24 N.J.L. 764, 767 (1853) (finding that an appointed prosecutor could not collect fees for "extra services" in addition to his salary because to do so "would soon introduce intolerable mischief").

123. *See, e.g.*, GEORGE ROGERS TAYLOR, THE TRANSPORTATION REVOLUTION, 1815-1860, at 142 (1966).

believed that elected prosecutors would also be more likely to reflect the priorities of local communities, rather than officials in the state capital.

A. Election as a Means of Removing Prosecutors from Patronage

The desire to curb patronage was the principal factor driving reformers to adopt prosecutorial elections. Tennessee, for instance, decided to elect prosecutors when patronage appointments dominated the state's judicial system. Under the state's 1796 constitution, the legislature nominally chose all local criminal justice officials, including state's attorneys and justices of the peace. In practice, however, the power to appoint local officers often devolved to militia companies in frontier areas. One state senator wrote of justice-of-the-peace selections that "custom seems to have taken the power from [the General Assembly], and placed it in the hands of the different militia companies, whose sole object . . . is to promote the views of some favorite partisan."[124] With "no direct responsibility to the local citizens," justices of the peace "tended to become authoritarian and unresponsive to the desires of the county."[125] A legislative report declared that the judiciary system of Tennessee was "the most expensive and least efficient of any in the United States."[126] The state's legislature was "besieged" at the start of every term with applicants for patronage positions, and politically motivated impeachments of judicial officials were common.[127] In 1834, a constitutional convention made justices of the peace and sheriffs elected officials.[128] Tennessee instituted popular election of state's attorneys and judges through a constitutional amendment in 1853, which was approved by popular vote.[129]

124. Sen. Adam Huntsman, Report of the Judiciary Committee to Whom Was Referred a Bill To Amend the Judiciary System, *in* 2 MESSAGES OF THE GOVERNOR OF TENNESSEE, 1821-1835, at 294 (Robert H. White ed., 1952). It is not clear whether militia companies dominated appointment politics in other frontier states in the 1820s and 1830s. The Mississippi Constitution of 1817, for instance, allowed only white males who paid taxes or served in their county's militia to vote, suggesting that militias were politically powerful there as well. *See* MISS. CONST. of 1817, art. III, § 1.

125. LEWIS L. LASKA, THE TENNESSEE STATE CONSTITUTION: A REFERENCE GUIDE 8 (1990).

126. Huntsman, *supra* note 124, at 292.

127. Lewis L. Laska, *A Legal and Constitutional History of Tennessee, 1772-1972*, 6 MEMPHIS ST. U. L. REV. 563, 604 (1976).

128. TENN. CONST. of 1834, art.VI, § 15 (justices of the peace); *id.* art. VII, § 1 (sheriffs). But not judges—proposals to elect judges were introduced and voted down five times at the 1834 Tennessee convention. N. Houston Parks, *Judicial Selection—The Tennessee Experience*, 7 MEMPHIS ST. U. L. REV. 615, 624 (1977).

129. *See* TENN. CONST. of 1834, art. VI, §§ 3-5 (1853); LASKA, *supra* note 125, at 11.

That same year, Massachusetts voters rejected a popular referendum proposing to elect both judges and district attorneys. Opposition centered around electing judges, however, rather than prosecutors, and a constitutional amendment to elect district attorneys succeeded in 1855.[130] The 1853 constitutional convention's committee on the judiciary reported having "but little doubt" that district attorneys should be popularly elected, and there was little debate before the convention approved the committee report.[131] Convention delegates voiced their concerns about the state's appointment system and worried that allowing the governor to appoint judicial officials would "[add] vastly to the executive power and patronage."[132] A supporter of elections declared that district attorneys should be "appointed strictly by the people," because only local citizens, not distant government officials, could know which lawyers were best suited for the task.[133]

Supporters of popularly elected prosecutors expressed few worries that nonlawyers would be unable to judge legal talent. Three years before the Massachusetts convention, one editorial approvingly quoted a local judge who argued that "there is no class of men of whose qualifications the people are better judges than of lawyers, as there is none whose success depends so little upon mere personal popularity."[134] At the convention, the chair of the judiciary committee noted that "[t]he people are conversant, within their own counties, with the people who reside among them, and they are better acquainted with the officers who may be selected, than the executive, or any one else to whom the power may be delegated, can be."[135] One supporter claimed that the district

130. *See* MASS. CONST. of 1780, amend. XIX (1855); SAMUEL ELIOT MORISON, A HISTORY OF THE CONSTITUTION OF MASSACHUSETTS 53-55 (1917).

131. 1 MASS. DEBATES, *supra* note 19, at 704 (statement of Del. Henry W. Bishop).

132. 3 MASS. DEBATES, *supra* note 19, at 186 (statement of Del. Richard H. Dana, Jr.); *see, e.g.*, *id.* at 55 (statement of Del. Richard Frothingham, Jr.) (supporting reforms in order to transform "[w]hat is now distributed as patronage, as matter of favor, political or otherwise" and make it "at the option of all, as matter of right"); *id.* at 143 (statement of Del. Richard H. Dana, Jr.) (stating that a plan which allowed appointments would "increase the patronage of your legislature; that is to say, we shall increase the evil which already exists under the present system").

133. 1 MASS. DEBATES, *supra* note 19, at 704 (statement of Del. Henry W. Bishop).

134. *An Elective Judiciary*, SUN (Balt.), July 27, 1850, at 2. Supporters of electing judges in other states also argued that local lay citizens were best able to evaluate legal skills. *See, e.g.*, LA. DEBATES, *supra* note 18, at 751 (statement of Del. James F. Brent) ("The governor . . . is generally forced to depend on the representations of others. The people have a personal and direct knowledge of the qualifications of the candidate. There is nothing so purely local as the reputation of a lawyer . . . .").

135. 1 MASS. DEBATES, *supra* note 19, at 704 (statement of Del. Henry W. Bishop).

attorney "is an office which the freedom and violence of popular elections do not greatly harm. There are certain specific duties to do for a compensation, and if these are well done, it does not much signify what a minority or what anybody thinks of him."[136]

Popular enthusiasm for laymen judging prosecutors' legal talent is also unsurprising in light of the then-contemporary trend toward easing the entry requirements for becoming a lawyer.[137] Many states dispensed with the requirement that applicants perform an apprenticeship before being admitted to the bar at the same time they decided to elect prosecutors.[138] Both decisions may have stemmed from the same prodemocratic impulse, and if lawyers needed only common sense, rather than formal training, to practice law, voters without legal training would also not have difficulty selecting which lawyer represented the state in court. Moreover, an "every man his own lawyer" policy broadened voters' choices beyond elite lawyers who might be affiliated with gubernatorial or legislative patronage.[139]

In Maryland, reformers sought to elect prosecutors in order to limit the governor's ability to distribute political patronage. One early historian noted that at the state's 1851 constitutional convention, "[i]t was . . . claimed that the appointive power was abused and that the governor and Senate were influenced more by political considerations than by public interest."[140] The 1851 convention abolished the office of Attorney General, replacing it with county-based district attorneys,[141] although the governor could hire outside counsel to

136. 2 MASS. DEBATES, *supra* note 19, at 805 (statement of Del. Rufus Choate).

137. *See, e.g.*, JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 1014 (2006); W. Raymond Blackard, *The Demoralization of the Legal Profession in Nineteenth Century America*, 16 TENN. L. REV. 314, 314-15 (1940).

138. *See, e.g.*, N.Y. CONST. of 1846, art. VI, § 8 (allowing "[a]ny male citizen, of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability" to practice law); 1849 Wis. Acts 95, ch. 152 (requiring judges to admit to the bar any applicant who shows "that he is a resident of the state, and is of good moral character"). Wisconsin began electing its prosecutors a year earlier, in 1848. *See* WIS. CONST. of 1848, art. VI, § 4.

139. *Cf.* Harlan F. Stone, *The Lawyer and His Neighbors*, 4 CORNELL L.Q. 175, 179 (1919) (describing attorneys in the early nineteenth century as "nearer to constituting an exclusive privileged class in the new republic than any other group in the community").

140. JAMES WARNER HARRY, THE MARYLAND CONSTITUTION OF 1851, at 48 (1902).

141. MD. CONST. of 1851, art. V, § 3 ("The State's attorney shall perform such duties and receive such fees and commissions as are now prescribed by law for the attorney-general and his deputies . . . .").

advise him on legal questions.[142] One delegate reasoned that with a "State's Attorney in every section of the state . . . what duty is left to be performed by an Attorney General?"[143] Criminal prosecution and the representation of the state as a party to cases were duties "to be performed by the [district attorneys] proposed to be elected in . . . this bill."[144] Moreover, even a delegate opposed to popular elections attempted to frame his position as being "in favor of trusting the people rather than executive patronage and favoritism."[145]

Maryland delegates argued that allowing the governor to appoint judges and prosecutors was not only "contrary to the spirit of American institutions," but also expensive.[146] A report prepared by the state general assembly found that Maryland spent $41,500 on its judicial system in 1840, nearly twice the amount as Massachusetts, a state with a population nearly twice as large as Maryland's.[147] Many Maryland delegates believed that the high cost of their judicial system was the product of cronyism.[148] Appointed district attorneys also had been accused of failing to pursue charges against political allies.[149] One Democratic delegate believed the reforms were intended to deny patronage opportunities to the state's governor, declaring that the Whig party favored elected district attorneys so that it could "take from the Governor all responsibility and patronage."[150]

142. *See* 1 MD. DEBATES, *supra* note 56, at 530. The proposal to abolish the office of Attorney General passed by a 45 to 14 vote. *Id.* at 549.

143. *Id.* at 540 (statement of Del. George Brent).

144. *Id.*

145. *Id.* at 547-48 (statement of Del. Thomas B. Dorsey).

146. HARRY, *supra* note 140, at 18-19.

147. REPORT OF COMM. ON GRIEVANCES & COURTS OF JUSTICE, MD. H. J., at 7 (1844).

148. *See, e.g.*, 2 MD. DEBATES, *supra* note 56, at 491 (statement of Del. William A. Spencer) ("Our Governors are regularly nominated by party caucuses and party cliques. Why? Because the entire patronage of the State has been in his hands. Every clerk, every register, every justice of the peace . . . all are dependent on him."); 1 MD. DEBATES, *supra* note 56, at 519 (statement of Del. J.W. Crisfield) (calling on delegates to "strip" from the Attorney General "the patronage now exercised under law"); *id.* at 541 (statement of Del. George C. Morgan) (declaring he could "see no good" from the system of county district attorneys, except that it would "create employment for the benefit of attorneys, without any compensation fixed or limited by law"). In Michigan, the 1850 constitution fixed the salaries of judges and prosecutors, thus preventing the legislature or the governor from enacting increases. *See* MICH. CONST. of 1850, art. IX ("It shall not be competent for the legislature to increase the salaries herein provided.").

149. *See, e.g.*, *Mr. Clark's Fitness for Office*, HAGERSTOWN TORCH LIGHT, Sept. 21, 1846, at 2 (accusing the Washington County district attorney of failing to prosecute "an *active Federal partisan*" for violating gambling laws when less politically connected defendants were fined).

150. 1 MD. DEBATES, *supra* note 56, at 538 (statement of Del. Charles Jenifer).

The New York constitutional convention, held five years earlier in 1846, was also concerned with the governor's use of district attorney positions as political patronage. The committee tasked to study the possibility of electing local officers initially reported back that its draft proposing the election of sheriffs, county clerks, coroners, and district attorneys was intended to "strip the Executive of patronage,—believing that it was desirable that this central patronage and influence should be diminished, if not entirely obliterated."[151] According to the same delegate, gubernatorial appointments of local officers "had been a source of great complaint," and accordingly "there seemed to be a general disposition to cut this thing all loose from the capitol here, and throw these officers into the hands of the people, who were no doubt the best depositories of it."[152] Other delegates agreed that because the district attorney "was emphatically the people's officer . . . there was great propriety in electing him."[153]

The initial draft of the 1846 New York Constitution singled out the district attorney as the one local officer whom the governor could not remove—a sign that the committee was particularly concerned with restraining executive power over prosecutors. In that draft, the governor could remove "any such officer, *except district attorney*, within the term for which he shall have been elected" by "giving to such officer a copy of the charges against him, and an

151. CROSWELL & SUTTON, N.Y. DEBATES, *supra* note 12, at 769 (statement of Del. William G. Angel); *accord* BISHOP & ATTREE, N.Y. DEBATES, *supra* note 73, at 1006. William G. Angel, who spoke for the committee, was a Jacksonian Democrat who had previously served three terms in Congress. *See* LUCIEN BROCK PROCTOR, THE BENCH AND BAR OF NEW-YORK 742-44 (New York, Diossy & Co. 1870). New York and Maryland were not the only states where convention delegates aimed to reduce gubernatorial appointment powers. *See, e.g.*, KY. DEBATES, *supra* note 56, at 216 (statement of Del. Benjamin Hardin) ("[M]y colleague desires, and I think I shall go with him, to strip [the governor] of all power save that of appointing a secretary perhaps, or of giving entertaining parties to the legislature when they meet here . . . .").

152. CROSWELL & SUTTON, N.Y. DEBATES, *supra* note 12, at 769 (statement of Del. William G. Angel). *But cf.* JAMES WILTON BROOKS, HISTORY OF THE COURT OF COMMON PLEAS OF THE CITY AND COUNTY OF NEW YORK 74 (New York, Werner, Sanford & Co. 1896) (noting in a discussion on the judge of the Court of Common Pleas in 1844 that "[a]s it was a local appointment, the jurisdiction of the Court being confined to the city of New York, it was the custom of the Governor to appoint the person agreed upon by the representatives of the city of New York, of his own party, in the Legislature"). If governors followed the same custom of deferring to the choice of the local legislators for district attorney appointments, the reaction against patronage politics may have been as much anti-legislative as anti-executive in nature.

153. CROSWELL & SUTTON, N.Y. DEBATES, *supra* note 12, at 770 (statement of Del. Conrad Swackhamer).

opportunity of being heard in his defense."[154] In debate, however, the exception for district attorneys was eliminated after a Whig delegate objected that "it would not do to sever the Chief Executive from the subordinate executive officers of counties. There might be occasion for the prompt exercise of this power of removal—pervading excitement, which would admit of no delay in the removal of the officer."[155] The final version of the constitution nevertheless preserved the requirement that a governor seeking to remove a district attorney must provide him with a statement of the charges against him and an opportunity to be heard.[156]

New York also adopted other safeguards against political influence on district attorneys, including staggered terms. District attorneys, along with other local law enforcement officers, were to be elected every three years rather than every two, ensuring that two-thirds of all district attorneys would be elected separately from the governor.[157] One delegate explained that he favored three-year terms because "it would bring round the election for sheriff [and district attorney] in a different year from that of governor, &c."[158]

Financial considerations also motivated the delegates of the New York convention. Prosecutors elected by the people rather than selected for political patronage were seen as less likely to be a drain on the state's finances. Delegates to the convention asked the Secretary of State to prepare a report on

154. *Id.* at 769 (Report of Committee No. 7, § 1) (emphasis added).

155. *Id.* at 770-71 (statement of Del. George A. Simmons). Simmons had served several terms in the state assembly as a Whig. *See* JOHN STILWELL JENKINS, HISTORY OF POLITICAL PARTIES IN THE STATE OF NEW-YORK 430, 437 (Auburn, N.Y., Alden & Markham 1846). There are echoes of the modern unitary executive theory in the Whigs' objections to prohibiting the governor from being able to remove district attorneys. *Compare* BISHOP & ATTREE, N.Y. DEBATES, *supra* note 73, at 1007 ("Mr. STOW hoped . . . it would not be imposed upon the Governor to see that the laws were faithfully executed. [The Governor's] powers had already been so restricted that he could not do much more than look on and wish that the government might do well."), *with* Morrison v. Olson, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) ("[T]he Court greatly exaggerates the extent of . . . Presidential control. Most important among these controls, the Court asserts, is the Attorney General's power to remove the [independent] counsel for good cause. This is somewhat like referring to shackles as an effective means of locomotion." (citations, footnotes, and internal quotation marks omitted)).

156. N.Y. CONST. of 1846, art. X, § 1.

157. *Id.* Other states also considered staggered or lengthened terms for district attorneys to guard against partisan influence. *See, e.g.*, Report of the Committee on the Judiciary, *in* JOURNAL, ACTS AND PROCEEDINGS OF A GENERAL CONVENTION OF THE STATE OF VIRGINIA 6 (Richmond, Va., William Culley 1850) (proposing seven-year terms for district attorneys).

158. CROSWELL & SUTTON, N.Y. DEBATES, *supra* note 12, at 770 (statement of Del. George A. Simmons).

the extent of fees and other compensation, including fees for collecting bail bonds and recognizances on behalf of the county courts.[159] Later in the convention, delegates considered a proposal for county boards of supervisors, rather than any state government official, to set salaries for district attorneys, and to prohibit any change of salary during that term in office.[160] This proposal was ultimately rejected in favor of "leaving the whole subject in the hands of the legislature" after one delegate argued it was "not a matter for a constitution."[161]

Many states attempted to insulate the district attorney from political patronage by restricting the district attorney from holding other government positions. It had been common for appointed district attorneys in many states to serve simultaneously in other government positions and maintain private practices.[162] Many of the constitutional conventions that decided to elect district attorneys also restricted prosecutors' ability to serve in other branches of government, making it less likely that potential prosecutors would become entangled in partisan politics.[163]

159. BISHOP & ATTREE, N.Y. DEBATES, *supra* note 73, at 86, 100. In 1818, New York required district attorneys to collect recognizances, 1818 N.Y. Laws 307, but state courts gave district attorneys wide discretion over the manner of collecting the recognizances and allowed the district attorneys to earn a fee for each successful collection. *See, e.g.*, People v. Allen, 2 How. Pr. 34 (N.Y. Sup. Ct. 1845); People v. Van Eps, 4 Wend. 387 (N.Y. Sup. Ct. 1830).

160. CROSWELL & SUTTON, N.Y. DEBATES, *supra* note 12, at 774 (Report of Committee No. 7, § 9). Another amendment, ultimately rejected, would have stipulated that the compensation received by district attorneys could not exceed the amount of fees they generated for the state treasury. *Id.* at 773-74 (amendment offered by Del. David B. St. John).

161. *Id.* at 774 (statements of Del. George A.S. Crooker and Del. Ira Harris). *But cf.* MICH. CONST. of 1850, art. IX (prohibiting the legislature from increasing the salary of the attorney general during his term in office).

162. *See, e.g.*, Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1723 (2005) (reviewing FISHER, *supra* note 101) ("In the early nineteenth century, prosecutors often combined their responsibilities with other forms of lawyering, and for such part-time prosecutors, quick guilty pleas provided more time for the rest of their (paying) clientele."). This practice was not unique to state district attorneys—even U.S. Attorney General Edmund Randolph maintained a private practice. *See supra* note 54 and accompanying text.

163. *See, e.g.*, ARK. CONST. of 1836, amend. VIII (1848) ("That no member of the general assembly shall be elected to any office within the gift of the general assembly during the term for which he shall have been elected."); ILL. CONST. of 1848, art. III, § 29 ("No . . . attorney for the State . . . shall have a seat in the general assembly . . . ."); VA. CONST. of 1850, art. IV, § 7 ("[N]o attorney for the commonwealth shall be capable of being elected a member of either house of assembly.").

B. Prosecutors' Responsibility to Local Constituencies

Electing prosecutors also allowed communities to maintain control over the functions of local government. Alexis de Tocqueville, in his 1831 visit, noticed that "the organization of towns and counties in the United States is everywhere based on the same idea, namely, that each is the best judge of what pertains only to itself."[164] The "first consequence of this doctrine was to have all the administrators of towns and counties chosen by the residents themselves."[165] Gubernatorial appointments of local officers had proved, in the words of a delegate at the 1845 Louisiana convention, to be "disgraceful and degrading."[166] The same delegate recalled how "the governor [would] take a man from New Orleans and send him up the coast as parish judge, when there were many persons more competent than he, residing in the parish to which he was sent."[167] In addition to requiring that a prosecutor win the votes of his local constituency, some states mandated that a candidate for prosecutor have lived for a minimum period of time in the county or district he sought to represent.[168]

Delegates at the 1849 Kentucky constitutional convention devoted significant energy to debating whether to establish prosecutors at the county level, judicial circuit level, or both. The 1799 Kentucky Constitution established "[a]ttorneys

164. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 91 (Arthur Goldhammer trans., Library of Am. 2004) (1835).

165. *Id.* at 92. Tocqueville was stunned to learn that "[s]ome [state] constitutions provide for *election* of members of the courts and require them to submit to frequent reelection." *Id.* at 310. He ventured "to predict that these innovations [would] sooner or later lead to disastrous results . . . ." *Id.*

166. LA. DEBATES, *supra* note 18, at 749 (statement of Del. James F. Brent).

167. *Id.* at 750 (statement of Del. James F. Brent); *see also* KY. DEBATES, *supra* note 56, at 360 (statement of Del. Larkin J. Proctor) ("It is a very difficult matter sometimes for the commonwealth attorney to carry through a prosecution successfully – not being a resident of the county, and not being cognizant of the facts attending a case that may arise . . . .").

168. *See, e.g.*, COLO. CONST. of 1876, art. VI, §§ 16, 21 (requiring candidates for district attorney to be "an elector within the judicial district for which he is elected"); KY. CONST. of 1850, art. VIII, § 11 (requiring all "district, county, or town officers" to reside within their respective districts, counties, or towns); MD. CONST. of 1851, art. V, § 4 (establishing a requirement for a district attorney to have resided for one year in the city or county he represents); State *ex rel.* Howard v. Johnston, 101 Ind. 223 (1885) (construing Article VII of the 1851 Indiana Constitution to require a prosecuting attorney to reside in the circuit for which he is elected); Territory *ex rel.* Parker v. Smith, 3 Minn. 240 (1859) (holding that six months' residence in a county was necessary to be eligible for election as district attorney). *But see* VA. CONST. of 1850, art.VI, § 31 (requiring all county court officials except county or district attorneys to reside in the county or district where they were elected).

for the commonwealth" for each judicial circuit,[169] but the practice arose of also appointing a "county attorney" for each county.[170] The two offices had similar functions,[171] but the commonwealth attorney represented the interest of the state in circuit court, and the county attorney in county court.[172] The initial draft of the 1849 Kentucky Constitution formally established popularly elected commonwealth attorneys for each judicial circuit and county attorneys for each county.[173] Some delegates objected, however, to including county attorneys in the constitution on the grounds that "[i]n a great many counties in the state, there is no county attorney at all . . . and to require . . . such officers would be neither more nor less than burdening the county, with the payment of salaries to persons not properly qualified to discharge the duties devolving upon them."[174]

Supporters of the county attorney responded that "an attorney is necessary to attend to the duties of that office in the county court" in two kinds of cases: "if anything should come before that court, of a public nature," giving the example of "opening roads," and "a class of cases also touching directly the public morals."[175] In these circumstances, private citizens would be unlikely to initiate litigation, making a public prosecutor necessary.[176] Supporters of county attorneys also argued the office would be inexpensive to maintain

169. KY. CONST. of 1799, art. III, § 23.

170. *See* KY. DEBATES, *supra* note 56, at 360 (statement of Del. George W. Kavanaugh).

171. *See, e.g.*, 1835 Ky. Acts 181, § 14 (stating that "[i]n all motions or suits brought by the [county road] commissioners . . . the attorney for the commonwealth, if in the circuit court, and the county attorney, if in the county court, shall, ex officio, prosecute the same").

172. *See, e.g.*, Tesh v. Commonwealth, 34 Ky. (4 Dana) 522, 526 (1836) ("It is our opinion, however, that attorneys for the county courts, to be appointed by those courts exclusively, constitute one class; and that attorneys for the Commonwealth, for superior courts of more general, criminal jurisdiction, belong to the other class.").

173. *See* KY. DEBATES, *supra* note 56, at 356.

174. *Id.* (statement of Del. Silas Woodson); *see also id.* at 359 (statement of Del. Beverly L. Clarke) ("There are counties where [county attorneys] may not be necessary . . . .").

175. *Id.* at 356-57 (statement of Del. Squire Turner); *see also id.* at 358 (statement of Del. Elijah F. Nuttall) (describing the county attorney as "an officer who is to supervise . . . the morals of the county"); *id.* at 360 (statement of Del. George W. Kavanaugh) ("[I]n every county of the state, there are laws operating which relate to the state revenue, in regard to tavern licenses, and to peddling clocks, watches, and other goods, which it is the duty of the county attorney to enforce.").

176. *See, e.g.*, Gross v. Jones, 60 Ky. (3 Met.) 295, 297 (1860) (construing an act that entitled county attorneys who prosecuted certain "public offenses" to a share of any monetary recovery as "intended . . . to introduce promptitude and diligence in their prosecution"); Steinberg, *supra* note 1, at 579 (describing private prosecution as "an ineffective means of law enforcement in the matter of breaches of public order").

because "the salaries of the county attorneys are to be regulated by the electors of the country, and if there should be little or no service to be rendered, of course the salaries will be small."[177] The voters of each county, not the state government in Frankfort, were best positioned to ensure salaries of prosecutors would be "proportioned to the service."[178] In Kentucky, as well as in other states, voters therefore sought to control public prosecutors who held greater discretion over which crimes to prosecute.[179]

The Kentucky convention also debated whether the county attorney would be constitutionally required or left to the discretion of the counties to create. If established by the constitution, many delegates favored "electing county attorneys" so as "to give to the people as much power as possible."[180] One delegate also pointed out that under the appointment system, there had been incidents in which "the county attorney has prostituted his office for sinister motives."[181] But other delegates were apathetic about electing county attorneys. One declared that "[w]e are electing all the other officers in the state, and we may as well elect him,"[182] and another that the county attorney was a "small officer[]" who was "too unimportant to trouble the people about."[183] Ultimately, the Kentucky convention opted for an elected attorney for every county.[184]

177. KY. DEBATES, *supra* note 56, at 357 (statement of Del. Squire Turner).

178. *Id.*

179. *See, e.g.*, Clarke v. State, 23 Miss. 261, 262 (1852) (holding that when a trial court quashed an indictment in 1834, it was "a matter entirely discretionary with the district attorney, who had the power to enter a *nolle prosequi*"); People *ex rel.* Peabody v. Att'y Gen., 13 How. Pr. 179, 3 Abb. Pr. 131, 22 Barb. 114, 117 (N.Y. Sup. Ct. 1856) ("The only remedy [for crimes without a specific victim] is by an action in the name of the people. It is a public prosecution, instituted and conducted by the public prosecutor under his official obligation and responsibility."); *see also* Steinberg, *supra* note 1, at 580 (noting a "distinct increase in the discretionary power of the district attorney" between 1850 and 1874 in Pennsylvania); *cf.* People v. Allen, 2 How. Pr. 34 (N.Y. Sup. Ct. 1845) (finding that the district attorney had the discretion to choose in which court to sue a defendant on a recognizance).

180. KY. DEBATES, *supra* note 56, at 360 (statement of Del. Silas Woodson); *see also id.* at 361 (statement of Del. Richard L. Mayes) ("We are electing all the other officers in the state, and we may as well elect [the county attorney].").

181. *Id.* at 359 (statement of Del. Larkin J. Proctor). If a county could choose to have a county attorney only when necessary, election would not be a practical means of selecting an attorney because "the people could not determine whether they would have the county attorney or not, until they had had a special election for the purpose." *Id.* at 361 (statement of Del. Richard L. Mayes).

182. *Id*. at 361 (statement of Del. Richard L. Mayes).

183. *Id*. at 360 (statement of Del. Squire Turner).

184. KY. CONST. of 1850, art. VI, § 1.

Delegates to the Illinois 1847 constitutional convention also confronted the question of whether elected district attorneys should be responsible to a judicial circuit or should be county-level officers. When debating an amendment to allow the legislature to create district attorneys "for each county, in lieu of the circuit attorneys," one delegate stated that "the duty of these prosecuting attorneys would be to represent and attend to the interests of the people in each county."[185] Another argued that "an acquaintance in the county is absolutely necessary to a faithful and efficient discharge of the duties of a prosecuting attorney," and that an attorney who represented an entire judicial circuit "cannot have that necessary acquaintance with the people, their morals, the state of society, and the character of the parties concerned in the case."[186]

The worry that circuit-level prosecutors would be less familiar with their jurisdictions was a rare example of a concern about the efficacy of criminal justice entering the debate over elected prosecutors. The Illinois delegates feared that a prosecutor responsible for more than one county might be unable to travel to court proceedings, and, even if present, might be unprepared. One supporter noted that frequently, "when a man is arrested on any criminal charge, there is no person near to attend to the interests of the people."[187] As a result, at recognizance hearings, "there is no one there to represent the people, and secure sufficient bail to require his appearance at court, and thus many criminals were suffered to escape for the mere want of such an officer."[188] Another delegate pointed out that, because circuit attorneys were unfamiliar with local events, "[i]n many cases a *nolle prosequi* had been entered where, if the prosecutor had been acquainted with the circumstances . . . this course would have been resisted, and criminals would have been brought to justice."[189] The Illinois convention passed by a 77-61 vote an amendment providing that each county would have an elected prosecutor.[190]

185. THE CONSTITUTIONAL DEBATES OF 1847, at 793-94 (Arthur C. Cole ed., 1919) [hereinafter ILL. DEBATES] (statement of Del. William R. Archer).

186. *Id.* at 794-95 (statement of Del. O.C. Pratt).

187. *Id.* at 794 (statement of Del. William R. Archer); *see also* MICH. DEBATES, *supra* note 56, at 520 (statement of Del. Alexander R. Tiffany) ("How, then, would it be if you had not a prosecuting attorney residing in the county? For five months out of the six you must be left without the aid of his services . . . .").

188. ILL. DEBATES, *supra* note 185, at 794 (statement of Del. William R. Archer); *see also id.* at 795 (statement of Del. James Brockman) (pointing out that the circuit attorneys "did not . . . think it worth their time to come" to Brown County, where Brockman lived).

189. *Id.* at 795 (statement of Del. O.C. Pratt); *see also* MICH. DEBATES, *supra* note 56, at 520 (statement of Del. Alexander R. Tiffany) ("You cannot find a man that can come into court and carry a case through unless he has been previously acquainted with the case.").

C. Opposition to Elected Prosecutors and Retention of Appointed Prosecutors in the South

Observers who opposed electing district attorneys foresaw the danger of political influence on criminal prosecutions. In Massachusetts, one critic wrote:

> [A]s to the Attorney-General . . . [and] District Attorneys . . . no good reason has been given for a change. The present mode of appointment has worked well; it has secured to us faithful and competent officers. . . . Moreover, I hold it to be unsafe to have an attorney-general dependent on the popular will of a party, where the party may be very desirous that some of its members should not be prosecuted, who ought to be . . . .[191]

Critics also argued that voters might not be able to judge the qualifications of candidates for prosecutor,[192] and that voters would not be likely to learn enough in order to make informed decisions about such candidates. In the words of one Kentucky delegate, the county attorney "is a little trifling office of no account, and the people care but little about it."[193]

Although Mississippi was the first state to adopt elected prosecutors, other Southern states were slow to follow. Of the fifteen states that made prosecutors elective before 1851, only three were in the South.[194] The Southern states that retained appointed prosecutors did not lack opportunities for constitutional change—in fact, many of them held constitutional conventions within a few years of the states that did adopt elected prosecutors.[195] But in Southern states,

California went so far as to effectively fine an absent district attorney and give the money to the lawyer the court appointed to represent the state. *See* 1850 Cal. Stat. 112, 113.

190. ILL. DEBATES, *supra* note 185, at 795.

191. George Stillman Hillard, *The Letters of Silas Standfast, to His Friend Jotham*, *in* DISCUSSIONS ON THE CONSTITUTION PROPOSED TO THE PEOPLE OF MASSACHUSETTS BY THE CONVENTION OF 1853, at 81, 138-39 (Boston, Little, Brown & Co. 1854); *see also* MICH. DEBATES, *supra* note 56, at 87 (statement of Del. Joseph R. Williams) ("If society relies upon a prosecuting attorney, and he is made elective . . . he may owe his election to a dozen votes of men whom it is his duty to bring to justice.").

192. Hillard, *supra* note 191, at 139 ("The qualifications of . . . a district attorney . . . are professional rather than political. They rest upon professional attainments, which the general public can only estimate by their results, and from the report of their professional brethren.").

193. KY. DEBATES, *supra* note 56, at 362 (statement of Del. John Louis Hargis).

194. Mississippi, Arkansas, and Texas. *See infra* Appendix.

195. Tennessee held a constitutional convention in 1834, North Carolina in 1835, Florida in 1838, and Texas in 1845. *See* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS,

it was largely the legislature, rather than the executive, that was responsible for appointing prosecutors.[196]

The debates of the 1845 Louisiana constitutional convention offer a look into the deliberations of a state that retained its appointed prosecutors. The original Louisiana constitution, adopted in 1812, gave the governor—who was chosen by the legislature from the two candidates who received the most popular votes[197]—the power to appoint all statewide and county officials, with the advice and consent of the state senate.[198] The 1812 constitution also contained property qualifications for voting[199] and an apportionment scheme that favored rural, wealthy Francophone plantation owners over the non-landowning white residents of New Orleans.[200] By 1845, however, an influx of Anglophone immigrants prompted demands for a new constitution that would expand suffrage and reapportion the legislature.[201]

At the 1845 convention, some delegates attempted to make the state's prosecuting attorneys elected, but they failed by a 31-23 vote.[202] The convention's records show no sign of debate on the question of electing prosecuting attorneys, but the delegates who voted against the proposal also opposed expanding suffrage,[203] electing judges,[204] and other electoral reforms.[205] A pro-reform newspaper accused the convention's majority of "the determination to stifle discussion upon the illiberal provisions which they are

AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3426 (Francis Norton Thorpe ed., 1909) (Tenn.); 5 *id.* 2794 (N.C.); 2 *id.* 664 (Fla.); 6 *id.* 3547 (Tex.).

196. *See, e.g.*, ALA. CONST. of 1819, art. V, § 18; GA. CONST. of 1798, art. III, § 3; N.C. CONST. of 1776, art. XIII; TENN. CONST. of 1834, art.VI, § 5; TEX. CONST. of 1845, art. IV, § 12.

197. LA. CONST. of 1812, art. III, § 2.

198. *Id.* art. III, § 9.

199. *Id.* art. II, § 8.

200. SCALIA, *supra* note 5, at 62-63 (noting that the Louisiana Senate allotted fewer than one-fifth of its seats to New Orleans, which constituted one-half of the state's population).

201. HARGRAVE, *supra* note 11, at 3-4.

202. LA. DEBATES, *supra* note 18, at 770.

203. *See id.* at 503 (statement of Del. Thomas M. Wadsworth) (speaking in favor of property qualifications).

204. *See id.* at 272 (statement of Del. C.M. Conrad) (declaring that judges "ought not to be involved in the party politics").

205. *See id.* at 19-20 (statement of Del. Bernard Marigny) (proposing to hold state elections at a time when transients would not be in New Orleans); *id.* at 542 (statement of Del. C.M. Conrad) (advocating for legislative representation to be allocated by wealth, rather than population).

incorporating in the new Constitution" by voting down proposals to make judicial officers elected "without permitting a word of debate."[206]

The reluctance of Southern states to elect prosecutors stemmed in part from a general hostility to constitutional reform. Several antebellum Southern states were slow to adopt political or legal reforms. Virginia, for instance, did not allow all its adult white males to vote until 1851.[207] And in many Southern states, the electorate could only choose a limited number of offices. Louisiana did not elect any officials except legislators before 1845;[208] South Carolina did not elect executive officials before 1865.[209]

D. Prosecutorial Vacancies

Reformers also took steps to limit the power of state governors to appoint district attorneys to fill intra-term vacancies. In many states, judges of the county court, not the state governor, were given the power to fill such vacancies.[210] In some states in which the governor was permitted to fill a vacancy, the consent of the legislature or the governor's council was required.[211] These measures prevented governors from exercising unchecked patronage powers over temporary appointments.

206. *The Convention*, JEFFERSONIAN REPUBLICAN (New Orleans), Apr. 25, 1845, at 2.

207. ROBERT M. BASTRESS, THE WEST VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE 8 (1995).

208. HARGRAVE, *supra* note 11, at 4.

209. *See* JAMES LOWELL UNDERWOOD, 1 THE CONSTITUTION OF SOUTH CAROLINA 18 (1986); *see also* S.C. CONST. of 1865, art. II, § 2 (providing for an elected governor for the first time in the state's history).

210. *See, e.g.*, MICH. CONST. of 1850, art. VI, §10; 1852 Va. Acts §14, at 66-67; Amendment to the Judiciary Act, § 33, 3 How. Pr. 143 (N.Y. 1847); Welsh v. Mechem, 2 P. 816 (Kan. 1884); State v. Bass, 12 La. Ann. 862, 862-63 (La. 1857); Commonwealth v. King, 74 Mass. (8 Gray) 501 (1857); Keithler v. State, 18 Miss. (10 S. & M.) 192 (1848); *In re* Prosecuting Att'y, 2 Ohio Dec. Reprint 602, 603, 4 West L. Monthly 147, 148 (Ct. Com. Pl. 1861); Commonwealth v. McHale, 97 Pa. 397 (1881). It is also worth noting that at the federal level, the Circuit Justice was given the power to fill vacant U.S. Attorney positions until the President nominated a successor. *See In re* Farrow, 3 F. 112 (C.C.N.D. Ga. 1880).

211. *See, e.g.*, Territory *ex rel.* Klock v. Mann, 120 P. 313, 314 (N.M. 1911); 3 MASS. DEBATES, *supra* note 19, at 390 (statement of Del. Benjamin F. Butler) ("[T]he governor, with the advice and consent of the Council, may appoint suitable persons to fill such vacancies until an election by the people." (quoting the Report of the Special Committee upon Justices of the Peace)).

IV. POLITICAL INFLUENCES ON ELECTED PROSECUTORS

In New York, it was not long before party politics began to influence criminal prosecutions. In 1853, A. Oakey Hall was elected district attorney for New York County. Hall was affiliated with the Tammany Hall political machine, allowing him to win reelection four times and hold the office with only short interruption until 1869.[212] One contemporary wrote, "Mr. Hall is the only man at the New York bar who makes politics a business, and succeeds at it."[213] The Tammany Hall Democrats depended on the votes of Irish and German immigrants, many of whom patronized the taverns and beer gardens that were regular violators of the city's liquor laws.[214] Hall quickly pioneered the practice of suppressing indictments against members of politically important constituencies, known as "pigeon-holing."[215] As a result, the city's liquor laws often went unenforced.[216] By the 1880s, newspapers decried how the New York County District Attorney's office was in Tammany control. The office was "managed with much deference to the views and interests of the criminal classes,"[217] and "badly need[ed] "overhauling"[218] because district attorneys failed to try cases "when the offenders happen[ed] to be politicians with a 'pull.'"[219]

New York was not the only state in which prosecutors became entangled with partisan politics. In Pennsylvania, an 1850 statute made district attorneys

212. MCCONVILLE & MIRSKY, *supra* note 101, at 197.

213. MATTHEW HALE SMITH, SUNSHINE AND SHADOW IN NEW YORK 542 (Hartford, Conn., J.B. Burr & Co. 1868).

214. *See, e.g.*, MCCONVILLE & MIRSKY, *supra* note 101, at 197-98; *see also* EDWIN G. BURROWS & MIKE WALLACE, GOTHAM: A HISTORY OF NEW YORK CITY TO 1898, at 777 (1999) ("[A]lcohol purveyors ranging from merchant importers to waterfront barkeepers mobilized into a formidable pressure group—the Liquor Dealers Protective Union had eight hundred members by 1855—and sponsored mass meetings to mobilize antiprohibition sentiment.").

215. *See, e.g.*, MCCONVILLE & MIRSKY, *supra* note 101, at 198; Harrie Davis, *Jerome vs. Crime*, 9 PEARSON'S MAG. 600, 602 (1903) ("[T]he indictment died a lingering death in a pigeon-hole of some official's desk.").

216. MCCONVILLE & MIRSKY, *supra* note 101, at 314.

217. *The District-Attorney's Office*, N.Y. TIMES, Nov. 23, 1883, at 4.

218. Editorial, N.Y. TIMES, May 17, 1883, at 4.

219. *The District Attorney's Neglect*, WORLD (N.Y.), June 22, 1889, at 4. Other elected judicial officials, such as the clerk of the court, were similarly captured by party politics. *See, e.g.*, *Divorce Frauds*, NATION, Mar. 13, 1884, at 227 ("Clerks of court, in the States where the elective system has been thoroughly applied to the administration of justice, are politicians or henchmen to politicians, and owe their appointment and their hold on office to 'influence' of some sort.").

elected officials. Shortly thereafter, an anonymous letter-writer to a Philadelphia newspaper lamented that "[a] moment's reflection will convince any man of common reason how incomparable it is with the dignity and responsibility of the office of Prosecuting Attorney . . . that the man who seeks to be elected should be found electioneering," since, given that "[t]he candidate for the office in question importunes the delegates for their votes, he contracts a debt which he will surely be called on to pay."[220] Pennsylvanians opposed to electing district attorneys also observed how quickly New York's newly elected criminal justice officials had become political actors. As one opponent pointed out, "[I]n New York, where it is known they have lately adopted an elective judiciary, [at a political party convention] one side voted to give up the nominations for the places of Attorney-General and State Engineer, provided the other would give them in return those for judges of the Court of Appeals and State Prison Inspector!"[221] In Louisiana, where district attorneys became elected officials in 1852,[222] they quickly became aligned with political factions and became "reluctant to prosecute either those aligned with [their] own faction or particularly dangerous elements."[223] Other scholars have also noted that, once elected, many state court judges also became influenced by partisan politics.[224]

Delegates to the Maryland 1851 convention had also voiced concerns about the potential for political considerations to influence prosecutions. The state's original 1776 constitution made no mention of district attorneys. In 1817, the governor was granted the power to appoint a district attorney in each judicial district to prosecute crimes and represent the state in civil actions originating

220. Citizen, Letter to the Editors, *Nomination of District Attorneys*, PUB. LEDGER (Phila.), Aug. 16, 1850, at 4.

221. SOME OBJECTIONS TO A JOINT RESOLUTION PASSED AT THE LAST SESSION OF THE LEGISLATURE, AND ABOUT TO BE SUBMITTED AT THE APPROACHING SESSION, RECOMMENDING TO THE PEOPLE OF PENNSYLVANIA AN ELECTIVE JUDICIARY 37 (1849). This anonymous pamphlet was widely believed to have been written by Charles J. Ingersoll, a prominent Philadelphia lawyer. *See* BURTON ALVA KONKLE, THE LIFE OF CHIEF JUSTICE ELLIS LEWIS, 1798-1871, at 156, 158 n.1 (1907).

222. LA. CONST. of 1852, tit. IV, art. 83.

223. SAMUEL C. HYDE, JR., PISTOLS AND POLITICS: THE DILEMMA OF DEMOCRACY IN LOUISIANA'S FLORIDA PARISHES, 1810-1899, at 204 (1996).

224. SHUGERMAN, *supra* note 27, at 145-46 (describing how judicial elections attracted "more political personalities to the bench" and recounting one commentator's outrage that judges would be ousted from office for ruling on "principles of law rather than in obediance to a popular demand").

within the district.[225] By 1851, the idea that district attorneys should be elected was so widely held that the committee appointed to consider the office of Attorney General reported back that they "were unanimously of [the] opinion, that . . . in each county . . . the legal voters should elect a Prosecuting Attorney."[226] The chief concern of the delegates was how long the term of the district attorney should be. Proponents of a four-year term claimed that in a shorter term, "the emoluments would not be a sufficient inducement to prevail upon competent men to accept the office"; moreover, a four-year term would enable the state "to have as few elections as possible."[227]

Once settled on the length of the district attorney's term, the Maryland delegates concerned themselves with the question of whether the office should be elected on the same ballot as other statewide elected officials, or on a different date. Delegates who favored a different date for prosecutors fretted that electing the district attorneys alongside state offices would cause them to "be mingled with party politics."[228] Those who favored simultaneous elections replied that party politics already permeated the appointed system. One delegate claimed that the incumbent Attorney General had already "removed, he believed every Whig deputy in Maryland and appointed Democrats in their stead."[229] Those favoring simultaneous election argued that the "concentration of elections" would spare the "continual recurrence to the ballot box."[230] The proposed amendment to elect district attorneys on the same date as other officials failed by a 24-39 vote.[231]

225. 1817 Md. Laws 155-56; *see* MD. CONST. of 1776, art. XLVIII ("[T]he Governor, for the time being, with the advice and consent of the Council, may appoint . . . the Attorney-General . . . and all other civil officers of government (Assessors, Constables, and Overseers of the roads only excepted). . . .").

226. 1 MD. DEBATES, *supra* note 56, at 283.

227. 2 MD. DEBATES, *supra* note 56, at 9 (statements of Del. Thomas B. Dorsey and Del. John Newcomer). Dorsey recounted how the fee-based compensation system for prosecuting attorneys was insufficient to attract quality candidates to the post. He noted that "the present Attorney had had great difficulty in some of the counties, in finding suitable persons who would serve; and in some cases persons had been appointed who never would have been thought of, if the proper persons could be induced to accept." *Id.* at 9. The latter concern was motivated not only by the instability produced by the "continual recurrence to the ballot box," *id.* at 10 (statement of Del. Francis P. Phelps), but also the cost of conducting additional elections. *See id.* at 13 (statement of Del. George W. Sherwood) ("Special and repeated elections were inconvenient as well as expensive . . . .").

228. *Id.* at 10 (statement of Del. William A. Spencer).

229. *Id.* at 11 (statement of Del. Francis P. Phelps).

230. *Id.* at 10.

231. *Id.* at 11.

CONCLUSION

By the outbreak of the Civil War, twenty-five of thirty-four states had adopted elected prosecutors, and all but four would soon follow.[232] Because most Western states and newly organized territories based their founding documents on existing states' constitutions,[233] every state admitted to the Union after the Civil War also created elected prosecutors. One Illinois newspaper wrote during the state's 1847 constitutional convention, "Power once surrendered to a people is seldom returned."[234] Although some states shifted judicial selection from popular election to gubernatorial appointment or merit selection processes in the twentieth century,[235] no state has done so for prosecutors.

The state constitutional conventions of the mid-nineteenth century did not carefully consider or thoroughly debate electing prosecutors, but at those conventions, supporters of elected prosecutors cited popular control over government, eliminating gubernatorial patronage, and making government officials more responsive to local communities as the chief reasons for the change. These motivations were similar, yet not identical, to the reasons many states decided to elect judges and other court officials.[236] In a period when prosecutors were gaining discretionary power, supporters of popular election sought to ensure that prosecutors would remain accountable to the local communities they served. In doing so, however, supporters of the elected prosecutor neglected to consider the effect elections would have on the administration of criminal justice.

232. *See infra* Appendix.

233. *See, e.g.*, ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 9 (2002) (discussing the Washington Constitution drafters' reliance on the constitutions of Oregon, Indiana, and California).

234. *The New Constitution—The Tendency of Its Power*, WKLY. NW. GAZETTE (Galena, Ill.), Sept. 17, 1847, at 2 (quoted in Shugerman, *supra* note 26, at 1145).

235. *See History of Reform Efforts: Formal Changes Since Inception*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm (last visited Apr. 24, 2011).

236. See *supra* notes 25-31 and accompanying text for theories explaining elected judges.

APPENDIX: CHRONOLOGY OF THE ELECTED DISTRICT ATTORNEY

(Among States Admitted to the Union by the Civil War)[237]

STATE	YEAR PROSECUTORS BECAME ELECTED	METHOD	CITATION
Miss.	1832	Convention	MISS. CONST. of 1832, art. IV, § 25
Ohio	1833	Statute	1832 Ohio Laws 13
Me.	1842	Statute	1842 Me. Laws 2, ch. 3
Ind.	1843	Statute	1842 Ind. Acts 22
Iowa	1846	Convention	IOWA CONST. of 1846, art. V, § 5
N.Y.	1846	Convention	N.Y. CONST. of 1846, art. X, § 1
Ark.	1848	Amendment	ARK. CONST. of 1836, amend. VI (1848)
Ill.	1848	Convention	ILL. CONST. of 1848, art. V, § 28
Wis.	1848	Convention	WIS. CONST. of 1848, art. VI, § 4
Cal.	1849	Convention	CAL. CONST. of 1849, art. VI, § 7
Ky.	1850	Convention	KY. CONST. of 1850, art. VI, § 1
Mich.	1850	Convention	MICH. CONST. of 1850, art. X, § 3.
Pa.	1850	Statute	1850 Pa. Laws 654
Vt.	1850	Amendment	VT. CONST. of 1793, amend. 16 (1850).
Texas	1850	Statute	1849 Tex. Gen. & Spec. Laws 161-62
Md.	1851	Convention	MD. CONST. of 1851, art. V, § 1
Mo.	1851	Amendment	MO. CONST. of 1820, art. VIII, § 4 (1851)
Va.	1851	Convention	VA. CONST. of 1851, art. VI, § 19
La.	1852	Convention	LA. CONST. of 1852, tit. IV, art. 83
Tenn.	1853	Amendment	TENN. CONST. of 1835, art. VI, § 5 (1853)
Mass.	1855	Amendment	MASS. CONST. of 1780, art. XIX (1855)
Ga.	1855	Statute	1855 Ga. Laws 105-06
Kan.	1857	Convention	KAN. CONST. of 1857, art. VI, § 19
Minn.	1857	Convention	MINN. CONST. of 1857, art. XI, § 4
Or.	1857	Convention	OR. CONST. of 1857, art. VII, § 17
Fla.	1865	Convention	FLA. CONST. of 1865, art. V, § 19
Ala.	1868	Convention	ALA. CONST. of 1868, art. VI, § 17
N.C.	1868	Convention	N.C. CONST. of 1868, art. IV, § 29
S.C.	1868	Convention	S.C. CONST. of 1868, art. IV, § 29
N.H.	1877	Amendment	N.H. CONST. of 1784, pt. 2, art. LXXI (1877)

237. Connecticut, Delaware, New Jersey, and Rhode Island have all retained appointed prosecutors. *See* Jacoby, *supra* note 3, at 28 & n.12.