Historians of early America currently are engaged in a prolonged debate over the origins, impact, and implications of republican ideology. At issue is whether Americans during and immediately after the Revolution primarily drew upon classical republican ideas emphasizing community over individual interests, and stressing selfless virtue ("civic humanism"), or, on the contrary, were shaped more decisively by the liberal Lockean strain marked by aggressive acquisitiveness.1 Recently Robert Shalhope, Gordon Wood, and Bernard Bailyn have argued compellingly that the two intellectual traditions coexisted, and that early Americans often simultaneously embraced elements of both. They and others have insisted that a veritable cluster of "systems of meanings" (as Shalhope has termed them) existed to shape early Americans and their institutions. That contradictions and paradoxes in behavior and institutional growth occurred in the early republic in part from these diverse ideological sources now seems clear.2 Still, the full

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implications of this reality for institutional development have yet to be fully explored.

This paper examines the evolution of the Pennsylvania Supreme Court in a society undergoing rapid changes and holding to confusing and often contradictory intellectual heritages. Specifically, it seeks to explain a Pennsylvania public willing to accept the concept of judicial review even as it increasingly came to denounce the court as a barrier to a new, enlightened, republican society. This work further seeks to determine whether the concept of republicanism serves adequately as a historiographical paradigm for understanding the responses of early Pennsylvanians to their Supreme Court.

In the two decades after its founding, in 1777, the Pennsylvania State Supreme Court underwent enormous changes. It greatly enhanced its power and influence, impressively multiplied its responsibilities, established its institutional independence, successfully urged upon the state a policy of moderation regarding Tories and disloyalty, and expanded its authority into heretofore unsettled or largely ungoverned territories. The unprecedented power and influence of the court elicited a storm of protest, ultimately including charges that its strength and position seriously threatened the democratic and egalitarian aspirations embraced by inhabitants of the state. This unhappiness with, and fear of, the court as a conservative and undemocratic agency accelerated in the first decade of the nineteenth century, provoking a move to hobble the court and to remove its justices.

During these same years the high court moved inexorably toward the exercise of judicial review, and it did so virtually without adverse comment from citizens of the state. Indeed, commentators came to argue that because courts more than either governors or legislatures stood above political strife and private interests, they were better able to offer unbiased

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decisions on and "disinterested" assessments of, and for, the public good. These seemingly irreconcilable trends—where courts were condemned as bastions of elitism committed to frustrating democratic and republican innovation, and at the same time celebrated as nonpartisan citadels of reason, ideally suited to protecting the public against unwise and harmful legislative enactments—occurred to some degree throughout the American states. The fact that citizens of the early republic came to view their high courts as an independent voice for the people's interests, even as they judged them an increasingly elitist expression, unresponsive to the popular will, has been largely unexplored by historians. Acknowledged in their independent identities, the paradoxical and perhaps symbiotic relationship between the two developments has escaped close scrutiny.¹

Changes in its power and authority experienced by the Pennsylvania Supreme Court during the Revolution transformed that tribunal beyond both its colonial counterpart and the agency anticipated by those who designed it in 1776-1777.² A number of factors drew to the court powers that under normal circumstances might not have come its way. Its small size and active personnel encouraged both the Assembly and the Supreme Executive Council (SEC) to draw the court into their deliberations, and then to assign it enlarged responsibilities. Revolutionary exigencies created a flurry of legal questions that demanded the court's attention and new situations that called for its counsel. Among the new responsibilities thrust upon the court were those involving divorce, the identification of lunatics and the supervision of their estates, vouching for contested deeds and defaced public records, the power to perpetuate testimony, and the


authority to determine the fate of all claims against estates forfeited to the Commonwealth and against the forfeiting persons. Public interest in questions touching treason, confiscation, legislative and judicial attainders, disputed elections, and colonial charters served to remove the court from the shadows of the other state agencies. Naturally enough, citizens of Pennsylvania turned to their state's Supreme Court to discover what remained of English law and what consequences the court's position on that question held for them. In addition, they came to look to it to learn the full ramifications of their republican and egalitarian experiment.  

By the mid-1780s the court's new-found authority permitted it to establish its own independence. Often in opposition to both the Assembly and Council, the state's Supreme Court issued writs of habeas corpus to deserving individuals. Its careful examination of evidence against suspected Tories, its willingness to discharge those not legitimately accused, and its propensity for allowing wide latitude to defense lawyers in treason cases brought it criticism from Joseph Reed, president of the SEC, and those who, like him, favored a Draconian policy toward the disaffected in the state. The high court upheld the process of outlawry and convictions secured under those procedures despite vigorous challenges from other state agencies. In the notorious Marbois-Longchamps affair (1784-1786), it maintained jurisdiction over the prisoner in opposition to the Assembly, the SEC, and the Continental Congress whose members believed that such a move would alienate foreign ambassadors and prompt a general evacuation of embassies from Philadelphia. The Supreme Court emerged from the Revolution a far more vital and autonomous tribunal than that contemplated by even the most zealous advocates of an independent state judiciary.

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7 These developments are more fully treated in Rowe, Embattled Bench, chaps 8-14
9 For three such separate incidents, see Rowe, Embattled Bench, chaps 9, 11
10 Rowe, Thomas McKean, 122-23, 128-32, 134-37
11 Rowe, Outlawry in Pennsylvania," 227-244
13 During the work of the Council of Censors in 1784 both political factions waxed eloquent on their commitment to an independent judiciary, but their actions made clear that neither aspired to a truly independent high court
If the degree of power and influence exercised by the Pennsylvania Supreme Court during and after the Revolution was novel, the public response to the tribunal was even more so. Revolutionary rhetoric emphasized and commended personal involvement in the body politic, a goal that in part translated into more frequent and strident assaults upon, among others, the state's Supreme Court judges. As much as any of the state's revolutionary leaders, Justices Thomas McKean and George Bryan rhapsodized about the will of the people, only to discover, along with their judicial colleagues, the uncomfortable reality that at times it was the will of the people to disapprove of the high court and its policies, and to express that disapproval passionately and publicly.

The McKean court (1777-1799) elicited more public comment—much of it adverse—than any previous Supreme Court in the state's history. In contrast, the courts of Chief Justices William Allen (1750-1774) and Benjamin Chew (1774-1776) provoked almost no public observation, critical or otherwise. Generally, the failures of the Allen and Chew courts were laid at the doorstep of the Executive.¹ Assults upon the McKean court were in part the product of McKean's often abrasive personality, and in part the role of the high justices in hotly contested political and legal questions. It was also in part the result of an upsurge in citizen involvement and a concomitant belief that citizens had a right to comment on public officials. As politics became more popularly oriented, public figures simultaneously reaped the rewards of popular praise and paid the price in public condemnation of their characters and programs. Still, what emerges from an examination of the court's history between 1777 and 1799, and the often hostile public response to it, is the presence of a growing ambivalence toward the high bench, a tendency to view the court in dichotomous, even contradictory, terms.

The shrill and incessant invective directed toward the Supreme Court justices was often aimed at the men rather than their office or the court. Intensely personal comments comprised a substantial part of the animadversion leveled against the justices. From the moment McKean

¹ This was especially true in cases such as Paxton and the Cumberland disturbances of 1765 and 1768, where frustration with the court's inability to gain indictments and to try and punish offenders was expressed primarily as discouragement with the Penn's ability to govern Votes and Proceedings (1768), 51-53, 54, Pennsylvania Chronicle, Feb 15, Feb 29-March 7, March 7-14, March 21-28, 1768
was elevated to the high court, he found himself the target of public ire. Edward Burd, who subsequently became prothonotary to the Supreme Court, scoffed in 1777 that McKean “behaves in the most violent & imperious manner. . . . He is governed by his Passions, an excellent Quality in a Chief Justice!” “The Tatler” argued that McKean possessed “strong and ungovernable passions,” that he was “generally insolent” and “overbearing in office,” and that he “tortured evidence” and was “petty.” Beyond this, it was said that McKean browbeat lawyers appearing before him and often “sneered” at their efforts. In addition, he was portrayed as rude to those testifying in his court, especially to those providing evidence that he disliked. The anonymous author of the *Quid Mirror* disparaged him as “the terror and abhorrence of the bar, jurors, and suitors.”

McKean’s impetuousness, his uncontrolled temper, and his unflagging arrogance were derided in the public press. When he sought to protect William Duane, Dr. James Reynolds, and two other Irishmen from arrest for riot and assault, in February 1799, after those gentlemen sought signatures among a hostile crowd for a petition opposed to the Alien Bill, he was characterized as “abandoning himself to paroxism [sic] of convulsive passion” and of being in “a delirium of rage.” He was said to have “bullied” the crowd and treated the mayor as an inferior.

Editor William Cobbett (“Peter Porcupine”) leveled nakedly ad hominem attacks upon McKean for his alleged personal failings. At various times, Cobbett assailed McKean as a “vile old wretch,” “formerly a stableman,” “a drunkard,” “a [political] trimmer,” “a brawler,” “tyrannical,” “arbitrary,” “a base coward,” “overbearing,” “a sneaking sycophant,” a “base speculator,” a “companion of a herd of sottish malcontents,” and a man habituated to “boozing and brawling in . . . public house[s] with . . . the rabble.” Francis Hopkinson, poet, lawyer, judge, and politician, did as much as anyone to keep criticism of McKean before

the public, supplying a torrent of abuse against McKean in the press throughout the 1780s. Even the most incompetent of previous chief justices had escaped such vitriol.

What was interpreted as McKean's overweening ambition and thirst for office clearly outraged some Pennsylvanians. That the chief justice sat in Congress as a delegate for Delaware during much of his tenure as chief justice of Pennsylvania, and that he served as president of Congress at one point, elicited bitter attacks. A writer calling himself "Simple X" launched a sustained attack upon McKean's pluralism early in 1779 when he asked publicly if McKean were not violating section 23 of the state constitution by holding both posts. The ensuing public debate over separation of powers and pluralism within the state found McKean at the center. Though ultimately he was aggressively and passionately lauded and supported by many, others were less charitable. "Can the state of Delaware find no other delegate?" asked "Tenax," "Can Pennsylvania find no other judge? Are we reduced to this distress in America?" Several writers concurred with "Simple X" that the 1776 constitution clearly prohibited McKean from holding both positions. "Anti-Quibbler" stigmatized the chief justice's reading of the constitution and his arguments for continuing to hold both offices as "tortured." Articles decrying McKean's dual office holding continued to appear well into 1783.

Frequently McKean was painted as a man thirsting after titles and insisting upon public obsequiousness to his exalted station. Lawyer David Paul Brown recounted an incident where a petition was submitted to McKean directed to "the Right Honorable Thomas McKean, Esq., Lord Chief Justice of Pennsylvania." McKean supposedly observed that "there are, perhaps, more titles than I can fairly lay claim to, but at all events, the petitioner has erred on the right side." Once he had been awarded

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18 For the background of their relationship and the events that fueled their mutual animosity, see Rowe, Thomas McKean, 48-49, 188 Hopkinson's criticisms of McKean can be found in Hopkinson, Miscellaneous Essays (3 vols., Philadelphia, 1793), 2 69-75, 76-83, 251-81
a Doctor of Laws degree he attached that title to his others on written documents. "Observator" accused the chief justice of "pomposity," and of having a "penchant for titles strung to the end of his name, like the tail of a boy's kite." Cobbett ridiculed McKean by calling him "Doctor of Laws, etc., etc." "Observator" insisted that McKean pretended to be a "Member of the Inner Temple, London" when, in fact, he had not attended that august institution.22

George Bryan too became the target of public attack for alleged personal failings. His supposed slipshod behavior as a judge came under severe scrutiny. It was said he was habitually tardy to court, that he kept witnesses and attorneys waiting, and that he was often ill-prepared when he did appear. Critics maintained that he sat on the bench inebriated (one writer said he was "in the habitual state of intoxication") and unable to serve effectively. He was also accused of not hesitating to sit on cases in which his own interests were paramount. One commentator insisted that he "eagerly [sat] in judgment in his own cause." Beyond this, it was said that in Bryan's off hours he "ke[pt] company with a sett of lawless villains."23

Bryan drew severe criticism for his response to the death of his associate, John Evans, and to Evans's replacement on the bench by Jacob Rush. Rumors circulated that the ambitious Bryan wished to use the opportunity of Evans's demise to move to third judge, arguing that the new appointee should come in as fourth judge rather than replace Evans as third. Bryan's reasoning was preposterous, his detractors maintained; under his scheme should William Atlee be recommissioned he would move from second judge to fourth. It was not the date of the commissions that determined position on the bench, but rather the designation on the commission that counted, Bryan was told. Only a man of unprincipled ambition would have made the fuss that Bryan had, according to his censors.24

22 David P Brown, The Forum (2 vols, Philadelphia, 1847), 1 327, "Observator," IG, Sept 23, 1787, Cobbett, Porcupine's Works, 11 287 Actually McKean had held status as a specialter that permitted him to be certified as a barrister without establishing residence at the Middle Temple
Almost as pathetic as Bryan's insistence upon his being third judge, critics argued, was the animosity he felt for Jacob Rush once Rush was confirmed as third judge. The bitterness and pettiness Bryan felt toward his new colleague not only was unbecoming, but it forced the already harried chief justice to adjust his own judicial schedule so that he could accompany Rush on circuit in one instance, then Bryan in another. When Bryan and Rush sat on the same court, McKean had to sit between the antagonists.25

Other justices fared better in the press than did McKean and Bryan, but they did not escaped unscathed. Evans, the quiet (and often ill) member of the court, was not assailed in the public press. Neither was Atlee attacked, although Atlee's perceived avarice provoked criticism within the Assembly.26 Jacob Rush was portrayed as "a needy practitioner of the law" who "has been gaping with rotundity of belly, vacant face, and open mouth, for an office." He was said to be haughty, abusive, vain, and verbose on the bench. One critic suggested that Rush claimed to be a Whig, but generally he was judged "never a useful [one]." Overall, Rush was described as a man of "volitability of tongue, unblushing confidence, and waspish impudence."27 Rush's petulance when it came to working with Bryan stimulated much comment. Relations between the two judges were so tense that on at least one occasion a prominent lawyer believed that Rush might refuse to "cross the mountains" and participate in the court's western circuit because of his antipathy toward Bryan.28

Justices Jasper Yeates, Thomas Smith, William Bradford, and Edward Shippen, who joined the court after it had been reconstituted by the state's Constitution of 1790, did not experience the slings and arrows of critics during their first commissions, at least insofar as their personal habits were concerned. Complaints regarding their alleged arrogance and elitism, however, and their insensitivity to things western, were common, especially outside Philadelphia.29 Though his judicial brethren made light

25 Konkle, George Bryan, 265, 298
26 See Bryan letter to Atlee, quoted in Konkle, George Bryan, 238
27 FJ, Oct 10, 1783
28 Thomas Smith to George Washington, Nov 17, 1785, quoted in Burton A Konkle, The Life and Times of Thomas Smith, 1745-1809 (Philadelphia, 1904), 179
29 Hugh Henry Brackenridge, Law Miscellanies (Philadelphia, 1814), 282-83
of the criticism, Yeates was reminded on occasion by them that some Pennsylvanians grumbled that he was "too rich."\(^3^0\)

The high judges paid dearly for their political affiliations and activities. That at least some of the criticisms leveled at the justices' personal attitudes and habits were politically inspired seems likely. Indeed, the often acerbic political divisions within the state elicited many of the more highly publicized attacks upon the Supreme Court and its justices. The fact that McKean initially opposed the state constitution of 1776 provided Republicans the opportunity to argue that he had no fast political principles and that his appetite for office readily overcame any political scruples he may have had. "What a lamentable situation we are reduced to, when we are obliged to go to another state for a Chief Justice," wrote "Simple X," "and when we know that he has bitterly execrated as tyrannical the very Constitution he has since sworn to execute." In that same month "A Republican" asked, "Do you know [a] more violent opposer of the [state] constitution than the . . . Chief Justice [was] a few months ago?" Similar criticisms of McKean's alleged unprincipled quest for office appeared when he supported the federal constitution in 1787, and again, when he became the Republican gubernatorial candidate in 1799.\(^3^1\)

The subject of McKean's alleged chameleon-like behavior in the state's political life remained the target of public commentators throughout his career. His leadership role in the formation of the national Republican party stimulated considerable adverse comment from those who perceived him as an autocratic personality. Typical were the observations of John Fenno, in his *Gazette of the United States*, who asked regarding McKean's alleged Republican principles, "Who is the plain, simple republican and who is the haughty, imperious monarchist?"\(^3^2\) McKean's advocacy of a Republican foreign policy also brought him detractors. Cobbett charged him with hypocrisy for attending meetings to denounce the Jay Treaty when those meetings inexorably led to violence against proponents of the treaty. Cobbett asked the people what kind of judge punishes rioters even as he himself participates in tumults?\(^3^3\) Other detractors insisted

\(^3^0\) Thomas Smith to Jasper Yeates, Aug., 1799, Legal Men of Pennsylvania Justices and Associate Justices of the Supreme Court, 1682-1882, HSP
\(^3^2\) *Gazette of the US*, Nov 4, 1796
\(^3^3\) Cobbett, *Porcupine's Works*, 6 92-95
that as chief justice McKean used the weight of his office in the 1790s to encourage pro-French celebrations and to frustrate anti-French demonstrations. They castigated his alleged efforts to enlist Irish immigrants as citizens to increase Republican voters. They denounced his partisan use of his office as demeaning to himself and to the court.\textsuperscript{34}

Judge Bryan did not escape public hectoring for his own supposed political and personal hypocrisy. Like McKean he was accused of first opposing the state constitution of 1776, then of putting aside his political principles to take office under it. "One of the Minority" insisted that in 1776 Bryan had complained that the constitution "contained within it slavery and misery," but when offered an office authorized by it he quickly accepted. Not only had he taken office under the new constitution, he rapidly became its most passionate advocate. The same writer reminded his readers that Bryan had avidly supported the Proprietary government in 1764, yet as a member of the Council of Censors in 1784 he viciously condemned the government of the Penns.\textsuperscript{35} "A Citizen of Pennsylvania" offered numerous examples where, allegedly, Bryan revealed his duplicity. One moment he was criticizing the fact that McKean lived in the seized mansion of Jacob Duché before formally purchasing the property, the next he was embracing McKean as friend and colleague and lending support to the chief justice's judicial opinions. One moment he was critical of the generalship of George Washington and seeking his removal, the next he was fawning after the man. "Beware judge," a "Citizen of Pennsylvania" wrote, "you stand on slippery ground."\textsuperscript{36}

A variety of groups and interests within the state lashed out at the court and its personnel. Tories and their sympathizers leveled attacks on McKean for his perceived bloodthirsty attitude toward Tories. The first oyer and terminer court held in Philadelphia, in September 1778, stamped McKean with an image he never successfully escaped. His impassioned statements prior to sentencing to death the Quakers Carlisle and Roberts and, later Abijah Wright, linked him with England's cruel and infamous

\footnotesize{\textsuperscript{34} An Address to the Freemen of Pennsylvania (Germantown, Pa, 1799), esp 12-14, To The Electors of Pennsylvania (Philadelphia, 1799), Gazette of the United States, Aug 28, 1799

\textsuperscript{35} "One of the Minority," PG, Sept 1, 1784

\textsuperscript{36} "A Citizen of Pennsylvania," PG, Aug 25, 1784}
Judge Jeffreys, a connection embraced eagerly by critics. McKean’s willingness to have Tories David Dawson and the Doans hanged without benefit of jury trial following their outlawry solidified his negative image. Periodically, throughout his tenure as chief justice, the epithet “Jeffreys” was directed toward McKean. Just prior to his reappointment as chief justice in July 1784, several writers again took pains to draw comparisons between his career and personality and that of the English jurist.

Religious and professional groups also cast stones at the court and its chief justice. Quakers singled out McKean for what they perceived to be his blind prejudice toward them and their ideals, accusing him of “endeavouring as it were to crush and root out from the very earth . . . an innocent harmless people.” Members of the army also decried what they judged to be the chief justice’s political bias against them in a series of cases. “Why did you fall so unmercifully . . . [so] ungenerously . . . upon the Army?” asked one writer. Bryan became a favorite target of the state’s professional lawyers. Seeking to place their own (who invariably were political opponents of the Constitutionalist Bryan) on the state’s benches, they dismissed Bryan’s mercantile background. His supposed ineptness as a judge and the fact that he was not professionally trained led the bar to argue for his removal in 1787 when his commission was to expire. “Is he to serve another seven years in the same station?” asked one writer, “Are the public to retain him . . . in their employ forever? Have we no other persons among the respectable practitioners of the law to fill that place? Yes, surely! There are some distinguished worthies whose professional skill and knowledge . . . entitled them to a commanding preference.”

Though much of the ridicule directed at the judges focused on their personal faults or their alleged political partisanship, a portion of the

37 At the trial of Carlisle and Robert, the Quod Mirror argued that McKean’s “conduct exhibited the executioner rather than the judge.”
38 Rowe, Thomas McKean, 202-9, 215-27
41 PJ, Oct 2, 1782, IG, Oct 1, 1782
42 IG, March 26, 1787
opprobrium aimed at them reflected a genuine concern with their judicial record. It is true that McKean often personalized his court’s proceedings against editors like Oswald and Cobbett, who directed great venom toward the chief justice, but thoughtful opponents recognized that the issues went beyond personality clashes, that the hyperbole obscured important questions touching freedom of the press, the role of grand juries, the wisdom of continuing to draw upon English precedents, and the fate of slavery in the state. The chief justice’s seeming coolness to the aims and stratagems of the Pennsylvania Abolition Society and supporters of the state’s 1780 Gradual Abolition Act produced particularly harsh commentary.  

The stand taken by justices McKean, Atlee, Rush, and Bryan in the 1782 outlawry proceedings against the Doans (who were thought to be guilty of robbing state tax collectors) also aroused deep and bitter feelings among Pennsylvanians who regarded it as a fatal step backward. The idea that men should die without benefit of trial appalled many people, who argued that the guarantee of a jury trial was firmly established by the state constitution. They pointed out that the right to a jury trial, especially in capital cases, was what set Americans above Europeans. No better example of an enlightened legal system could be offered. As “Z” pointed out, Pennsylvanians had been trying to humanize their law, to render it more progressive and enlightened. To execute the Doans would be a retreat to European arbitrariness and darkness.

Philadelphia’s publishers were particularly outraged by the court’s adherence to the British views of libel and contempt. On several occasions the high tribunal upheld citizen suits against editors accused of libel, then pronounced the editors guilty of contempt when they ignored pressure from the court to restrain their prose. Several of the more celebrated confrontations pitted Eleazer Oswald of the Independent Gazetteer against his favorite target, Chief Justice McKean. When, in 1788, Oswald used his newspaper to discuss charges against himself for libeling one Andrew Brown—and in the process denounced McKean and the court—McKean held him in contempt and fined him £10. Oswald argued that the English

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43 A more detailed discussion of the court and this law can be found in G S Rowe, “Black Offenders, Criminal Courts, and Philadelphia Society in the Late Eighteenth-Century,” Journal of Social History 22 (1989), 685-712. Also “Inimicus Tyrannis,” IG, March 14, 1787

concept of libel had never been "received" in Pennsylvania. He also protested the court's proceeding against him by attachment (thus denying him a jury trial) rather than by indictment. Both procedures, he maintained, were incompatible with American expectations. Oswald sought to use these two issues to have the Supreme Court justices impeached and removed, but the Assembly voted not to proceed.\footnote{Alexander J. Dallas, Reports of Cases Ruled and Adjudged in the Courts of Pennsylvania (11 vols., Philadelphia, 1790-98), 1:319-20, 324, 329; PP, July 26, Aug 20, Sept 22, 1788, McKean to William Atlee, Sept 17, 1788; Atlee Ms., Library of Congress, McKean to George Bryan, Bryan Papers, box 3, case 63, HSP, Debates of the 12th Gen'l Assembly of the Commonwealth of Pennsylvania (Philadelphia, 1788), 8, 20, 63-64, 65, 102-3, 135-37, 162-99, 311-13}

The court's practices and procedures frequently became targets of public condemnation. Its enthusiasm for employing "peace bonds" in criminal matters infuriated many Pennsylvanians. Though the practice existed prior to the Revolution and was recognized by statute as early as 1700, the McKean bench clearly viewed it as an integral part of the high justices' arsenal against potential troublemakers, and employed it frequently, even against persons exonerated by juries.\footnote{Paul Lermack, "Peace Bonds and Criminal Justice in Colonial Pennsylvania," PMHB 100 (1976), 173-90, Rowe, Embattled Bench, chap 6, "Petitions of Connecticut petitioners to the SEC," Sept 1784, Clemency Papers, Pennsylvania Historical and Museum Commission}

Often on the most informal allegations of criminal conduct, or the mere threat of criminal behavior, individuals were forced by the court to provide sureties and bonds for their good behavior. Like civil or criminal bail, a peace bond was a sum of money that the accused was required to guarantee in advance, and which would be forfeited if he or she carried out some explicitly forbidden act. Critics of the procedure argued that individuals neither formally charged with a specific offense nor given the opportunity to defend themselves were placed under heavy financial burden by the high court. The court's habit of demanding these bonds of individuals acquitted of criminal charges produced even more shrill criticism of the justices. It was bad enough to demand such bonds and sureties of people merely suspected of harboring evil thoughts, critics argued, but to do so of a person exonerated by a jury was perverse. The practice was particularly onerous when used against poor citizens; it smacked of class discrimination. Such a procedure punished the innocent and reflected European values more than American, critics maintained.\footnote{Rowe, Embattled Bench, chap 6}
High fees attached to the court’s proceedings became the source of considerable public discontent. Moreover, the fact that the court fined everyone convicted of the same crime a similar sum, while ostensibly fair, meant that poorer elements of the population paid proportionately higher fees for their criminal conduct. The judges and their retinue also charged tavern bills run up during their judicial stays to the individual counties. Poorer counties, like York, found the cost of the judges’ food, wine, and housing onerous before reforms in the last decade of the century forced the judges to survive on a per diem rate.  

Other court practices were bitterly denounced as well. Westerners in particular resented the delays (and thus the costliness) associated with the judicial circuit. The court’s historic habit of encouraging that cases be brought to the city for adjudication infuriated those who shouldered the burden of the additional costs and of guaranteeing necessary witnesses. Observers of the judicial circuit also found the practice of having the court sit en banc at jury trials “a monstrous misapplication of the [justices’] time.” The judges’ habit of taking copious notes and of reading each court document individually, and serially, also led to delays, and thus to greater expense.

The most persistent charge against the Supreme Court by the last decade of the century was that it was an elitist forum, dominated by men and laws antithetical to the state’s independent, republican aspirations. The ascendancy to the court of men like Jasper Yeates, Thomas Smith, and Edward Shippen after 1790, all of whom had opposed the democratic state constitution of 1776, lent weight to this view, as did the judges’ frequent reliance upon English law and English precedents. Their almost incestuous relationship to lawyers practicing before them and their passionate commitment to the practices and forms of English courts appeared both unwise and dangerous to onlookers.

The fact that the high court wielded great powers made its seeming hidebound conservatism more dangerous, according to its critics. Francis Hopkinson was particularly disturbed by the power the McKean court

49 Brackenridge, Law Miscellanies, esp 283–86, “Montanus,” IG, June 28, 1788
50 Brackenridge, Law Miscellanies, 282–83
exercised by 1785. In part his concern was with McKean. "Excessive power has a natural tendency to debauch the best disposition," Hopkinson wrote, "but when it falls into the hands of a proud, capricious, and ambitious man, its operation must be watched with a jealous eye."51 To his credit, Hopkinson saw the larger manifestation of this growing concentration of power in the hands of the Supreme Court, as well. He warned of the dangers to a free society of one governmental agency gaining the type of power granted to the high court. Hopkinson strove to inform citizens that the court's impressive powers could be wielded as easily to blunt necessary reforms as to facilitate them. It could be used to diminish the rights of individuals as well as to expand them. It could be utilized to nurture English values and assumptions at the expense of American aspirations and priorities.52

The general public perception that the high court represented an elitist institution, and that its policies and practices mirrored aristocratic, European values and prejudices began early and became more pervasive as the nineteenth century neared.53 By 1799 a substantial number of Pennsylvanians held the position that the high court stood as a barrier to legitimate democratic and egalitarian aspirations within the state, and must be either weakened or removed if those hopes were to be fully realized. These convictions became more pronounced in the first decade of the nineteenth century, as political conditions worsened and offered more impetus for them to surface. Political leaders after 1800 drew upon this reservoir of fear and bitterness to spawn more direct and virulent attacks upon the court and its justices.54

Pennsylvanians inveighing against their high court and its justices customarily couched their criticisms in the language of classical republicanism. Critics denounced the justices' alleged lack of personal restraint, their vanity, hypocrisy, partisanship, ambition, and vacillation—in short, their lack of personal virtue, their unwillingness to subordinate private interests to the public good, and their forfeiture to the claim of public trust. Clearly, many citizens embraced the possessive individualism, personal

51 Hopkinson, Miscellaneous Essays, 2 93-95
53 "Montanus," IG, June 28, 1788
54 See works cited in fn 4
autonomy, and pragmatic group politics of Lockean liberalism. Yet these priorities seemingly did not shape and inform public attacks on the Supreme Court to the degree that assumptions implicit in classical republicanism did—or at least the Lockean tradition did not offer the compelling language and vivid catch words for their abuse of the court. Only in criticism of the justices’ perceived elitism and in protests against exorbitant court fees and the misuse of peace bonds did Lockean language emerge in complaints against the personnel and practices of the high court.55

Having said this, the impression left by a close examination of the public complaints leveled against the high court and its personnel is that classical republican rhetoric masked reality as much as it revealed it. That is to say, individuals unhappy with the high tribunal and its justices for a variety of reasons employed traditional republican rhetoric in almost formulaic terms, as ritual lamentation, as a sort of “secular jeremiad,” to attack the court. Richard Beeman has shown that such selective usage was not all that unusual.56 The vocabulary, borrowed from the country party tradition of English politics, offered convenient and highly charged words and traditional targets which were selectively drawn upon by opponents of the court to lend impact to their assaults. Whatever the nature of the high judges’ real or perceived failings, their detractors opted to emphasize the justices’ lack of “virtue” or their preoccupation with “selfish” or “private” interests rather than the public good. Apparently critics of the court understood that these charges held particular weight and influence with the general populace. But in so carefully choosing their vocabulary they also minimized or obscured the full range of their concerns regarding the court. The language was more convenient and effective than it was reflective of their real concerns.

The volume of vitriol directed at the Supreme Court and its justices, while significant and crucial to any understanding of Pennsylvania society in the last three decades of the eighteenth century, has obscured other important, and more positive, perspectives on the court, some of which were still in the process of being formulated. Among these emerging perspectives was an increasing ambivalence toward the high tribunal.

55 This paragraph and the following one are based on a study of materials cited in the previous footnotes
Even as citizens lashed out at the court for the personal failings of its judges, for the political views and practices of the justices, and for the court’s record in specific instances, large numbers of Pennsylvanians on a daily basis were ineluctably drawn to the court and, indeed, looked to increase its role within the state. Ironically, some of the court’s most vociferous detractors were, at the same time, those most responsible for its growth, and who were, in moments of calm and reflection, those most insistent after 1780 that the high bench serve as an essential and neutral spokesman for the people of the state.

Many Pennsylvanians worked to strengthen the court and to establish its independence from the time of its reconstitution in 1777. Angered by an abusive Parliament after 1763, Pennsylvanians, like other colonists, had come to consider checks against legislative tyranny. Many apparently concurred with James Otis who argued in the celebrated Writs of Assistance case (1761) that any act of Parliament “against the Constitution is void,” and that it was the responsibility of the courts “to pass such acts into disuse.” Opponents of the State Constitution of 1776 included in their list of its weaknesses the failure to establish a truly strong, independent judiciary. They sought adequate checks and balances to offset what they perceived to be democratic excesses. At least for public consumption, Republican critics of the constitution characterized the state judiciary in general and the high court in particular as too weak and subservient to both the Council and Assembly. Though supporters of the new constitution (“Constitutionalists”) insisted that the state judiciary was indeed independent, critics continued publicly to bemoan the fact that the court “on which life, liberty, and property of every citizen so greatly depends” was in the process of becoming a mere “creature of the legislature.” If the daily actions of Republicans did not always encourage the development
of a vital, independent Supreme Court, their public pronouncements consistently did.

When in 1783 the state called into session the Council of Censors charged with evaluating the 1776 constitution, Republicans continued to assert that the court remained dangerously dependent on the legislature. They urged a better balance in the state institutional arrangements and an independent court as part of that configuration. They further insisted that judges hold tenure during good behavior. Though nothing came of this demand in the short run, the change was successfully incorporated into the state constitution of 1790. Enthusiasm on the part of the state's Republicans (after 1787 called Federalists) and numerous former Constitutionalists, like McKean, who favored a more dynamic and influential high court, did not abate with the constitutional reorganization of 1789-1790.

Other Pennsylvanians, as well, found their interests served by the push for a stronger, independent Supreme Court. Westerners, occasionally offended by the demeanor of the high judges, angered by their decisions, frustrated by their practices and routine, and often bitter over the cost of the criminal justice system they carried out, nonetheless also accepted the need for the court to wield even greater dominion and offered it opportunities to do so. Western juries often brought forth "special verdicts" requesting that the court resolve issues or make judgments on the validity of laws, actions that could not fail to stimulate judges to expand their purview. When a jury in Wilkes-Barre was asked by the court to convict a defendant on the basis of a 1795 law, the jury agreed to return a guilty verdict, but only if the court first confirmed the validity of the law in question.

Often lost under the weight of western criticisms of the court was the fact that frontiersmen embraced the court as an important and necessary part of their existence and development. To look beyond the petty, personal, and often politically induced strictures directed toward the court

60 See Journal of the Council of Censors, convened at Philadelphia, on Monday, the Tenth Day of November, 1783 (Philadelphia, 1783-84), 53-55 Also "A Citizen of C C," PG, June 20, 1781
62 Dallas, 4 255-57 Also see statements by Philip Freneau in the National Gazette (Philadelphia), April 16, 1792
and its justices, is to discover a very real attachment westerners held for the Supreme Court. The high tribunal acted as an educational center, social arena, and political forum in borderland communities. The pages of the *Carlisle Gazette* offer numerous examples of how, through their judicial and administrative powers, the high justices contributed to the betterment of frontier Pennsylvania. These contributions were duly appreciated by citizens aspiring to "civilize" their counties. Thus, if the court was viewed at times as an arbitrary and capricious institution overseen by elitist judges, it was also accepted and, indeed, embraced as an integral, even vital part of life in early Pennsylvania. Despite fears, then, over the power of the court on one level, on another level positive results were anticipated from its enlarged role.

Pennsylvanians disturbed by changes within their legislature lent their voice to those preferring an independent and authoritative Supreme Court. Initially frightened that the Assembly might pass hasty or repugnant legislation, the writers of the constitution of 1776 provided that all public bills be printed and circulated among the people and be laid over for the following session to allow for greater discussion. As we have seen, they also provided for a Council of Censors to be elected in 1783, and every seven years thereafter, to inquire "whether the constitution has been preserved inviolate in every part." In part because the concept of a Council of Censors fell victim to partisan interpretation, it was not included in the state constitution of 1790. Thereafter, even more Pennsylvanians foresaw the high court acting as a viable check on legislative irresponsibility. Even before the revision of the 1776 constitution, they were prepared to tolerate, even encourage, a more pronounced judicial activism, including the exercise of judicial review by that tribunal.

In his law lectures of 1790-1791 James Wilson observed that in the United States "the constitution is the superiour law of the land" and "to that supreme law every other power must be inferior and subordinate." Therefore, legislative authority was subject to control in addition to that

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64 *Carlisle Gazette*, Nov 23, 1785, May 16, 30, 1787, June 4, 1788, April 22, 1789, *Pittsburgh Gazette*, Aug 20, 1786, Feb 3, 1787

stemming from natural and revealed law. It was also subject to control arising from the constitution. Hence, should legislatures pass acts obviously repugnant to some part of the constitution, according to Wilson, the supreme court must invalidate them. The judiciary has “the power of declaring and enforcing the superior power of the constitution—the supreme law of the land.” Doubtless influenced by the arguments of James Iredell, published in 1786, Wilson virtually provided the verbatim rationale for judicial review in *Van Horne's Lessee v. Dorrance* (1795). Wilson's observations, focusing on the federal judiciary, clearly were viewed by some as relevant to state constitutions as well.

The perception of the court as a legitimate mechanism to invalidate dangerous or irresponsible laws gained momentum throughout the Revolution, particularly after the failure of the Council of Censors, although the timing and specifics of its exact evolution is now almost impossible to pinpoint. Despite the difficulty in describing its growing public acceptance, it is incontestable that the idea of judicial review flitted among the shadows on the margins of the public consciousness throughout the last three decades of the eighteenth century.

Some of the same ideas and forces that explain the public distrust of what was perceived to be an elitist and narrowly conservative supreme court also were responsible for notions conducive to the evolution of judicial review. In the last half of the eighteenth century generally, and during and after the Revolution in particular, seismic shifts occurred in the structure of American society. Traditional habits and assumptions were replaced by new behavior and values. Public and private commercial interest and involvement greatly increased, for instance, and new ideas emerged from new habits of productivity and consumption. Americans bought and sold among themselves on a scale heretofore unknown in American society. Heightened commercial activity led both to an increase in competitiveness among citizens and unabashed expectations of gain. It also gave birth to new vocabularies and “systems of thought.”

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Increased economic and commercial competition produced beneficial as well as harmful effects. Its benefits were seen in the heightened energy that characterized American society in the post-Revolutionary years, in the expansion of economic activity, in the growth and movement of populations, in the push for greater egalitarian and democratic institutions and ways, in the glorification of personal equality, and in the fascination with building a truly remarkable and unique society. The downside of this competition was observable in a rising crime rate, a growing level of alcoholism, a pervasive disorderliness, widespread violence, weakened forms of social organization, and intensified feelings of bitterness and anger toward various groups and individuals. The heightened expectation of gain added a special dimension to these developments.

As Americans came to internalize the new economic promise and expectations, they also came to embrace the concept of individual and group economic interests, and an individual's right to protect and enlarge those interests. It was a short step from there to accept the idea that politics in large measure was the working out of these imperatives in competition with others. Once having conceded the presence of often conflicting personal and economic interests, it seemed reasonable to encourage the public, through popular elections, to weigh the competing interests and to select among them. Problems would arise only if some “interests” refused candidly to concede their own concerns while impugning the motives of those competing with them. If all openly admitted that “interests” existed, and sought public favor on that basis, such a system would work to the ultimate benefit of all. Political decisions accordingly would reflect the public's assessment of the wisdom and benefits of individual interest groups.

However, there were Pennsylvanians who reached different conclusions concerning the wisdom of openly admitting interests and having elected legislators represent those interests and compete on their behalf. "A Freeman" wrote that the “evils of legislative meddling” in private bills was “heightened when the society [was] divided among themselves;—one party praying the Assembly for one thing, and [the] opposite party for another thing.” "When the Assembly leave the great business of the State, and take up private business, or interfere in disputes between contending parties," he argued, "they are very liable to fall into mistakes, make wrong decisions, and so lose that respect which is due to them, as the Legislature of the State." He did not believe the presence of conflicting interests was necessarily bad, only that the legislature’s involvement in
them was ill-advised. Such involvement, he believed, would lead inexorably to questionable and unwarranted legislation. "In such circumstances," he wrote, "the Assembly ought not to interfere by any exertion of legislative power, but leave the contending parties to apply to the proper tribunals for a decision of their differences." The writer did not allude specifically to the state Supreme Court, or to judicial review, but in retrospect it appears likely that many Pennsylvanians envisioned both as possibilities.

Phillip Freneau spoke more directly of judicial review. When Justice James Wilson and his federal circuit court confederate in the Hayburn's case (1792) issued a ruling widely interpreted as voiding an act of Congress, Freneau observed in his National Gazette that the judicial invalidation of a bad congressional law was a legitimate act, one that promised protection of the people against legislative and executive oppression. "An independent judiciary," according to Freneau, "affords a just hope that not only future encroachments will be prevented, but also that any existing law of Congress which may be supposed to trench upon the constitutional rights of individuals or of States, will, at convenient seasons, undergo a revision." The editor of the General Advertiser also applauded the court's "spirited sentence" against an "unconstitutional law." These newspapers, and others, looked forward to the judicial invalidation of the entire Hamiltonian economic program.

The response to the Hayburn's case in Pennsylvania made at least two things evident: the first was that, with the exception of a protest from "Camden" in the General Advertiser, no strong public sentiments existed in opposition to the court's action or to Freneau's arguments; the second was that the concept of judicial review remained flexible (or still ill-defined), and thus obviously differed from the modern understanding of that process.

Understandably, then, the state Supreme Court's exercise of judicial review in Isaac Austin v. the Trustees of the University of Pennsylvania (1793)

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69 "A Freeman," PP, Sept 2, 1786
70 National Gazette (Philadelphia), April 16, 1792, General Advertiser (Philadelphia), April 20, 1792, Claypoole's Daily Advertiser, April 16, 1792, Levy, Original Intent, 118
71 Freneau implied that the court's action might be one of many steps in defining for legislators what constituted a legitimate bill "Camden" and the editor suggested that perhaps all circuit court justices should be consulted before a law could be declared unconstitutional or that a "general convention" might serve the same purpose General Advertiser, April 20, 21, 1792. Also see the letter from John Blair, James Wilson, and Richard Peters in ibid, April 25, 1792
raised no ripple among Pennsylvanians. The Austin case initially centered on the disposition of a confiscated estate. When one William Austin was convicted on an attainder early in the Revolution, his property, consisting of "one messuage, one kitchen, two stores, one ferry landing" and a plot of ground on the north side of Mulberry Street in Philadelphia, was put up at public auction and sold in August 1780 to William's brother, Isaac. However, when Isaac Austin failed to comply with requirements attached to the purchase, the property was auctioned once more. Isaac Austin again proved to be the highest bidder.72

Confusion mounted when, at that point, the disgruntled SEC granted the property to the trustees of the University of Pennsylvania to help support that institution. Unhappy with the actions of the SEC, the legislature, on August 6, 1784, formally vested the premises in Isaac Austin. It was the animosity attached to the legislature's struggle to clarify whose interests ought to be served that persuaded some Pennsylvanians, at least, that the Assembly ought to stay out of such controversies and leave them to the courts for final determination.73

Austin's suit against the trustees originally came before the Supreme Court in January 1791. At issue was whether the law of August 6, 1784, granting to Austin the disputed property, was a valid, constitutional enactment.74 After nearly two decades of ruling on crucial issues, of helping both formally and informally to define state policy, and of clarifying the status and rights of large segments of the state's population, the court suffered no crisis of confidence in its approach to the Austin proceedings. It did not hesitate to accept the case nor to rule on it.

Nonetheless, circumstances served to dilute the court's voice in the Austin case. Because both Justices Edward Shippen and Thomas McKean were trustees of the university, they opted not to participate in the Austin ruling. William Bradford "felt the same delicacy," as he had formerly been retained as counsel for the trustees. As a result, Jasper Yeates, alone of the justices, spoke for the court. Yeates correctly observed that the weight of Austin's case lay in the legitimacy of the 1784 law. Because he found "a manifest defect of title on the part of the plaintiff," and

73 *PP*, Sept 2, 1786
74 Yeates, 2:259-73, Notes and arguments, Misc Legal papers, Yeates Papers, HSP
because the law upon which he rested his title had been repealed "by the same authority which enacted it" prior to the instigation of the suit, Yeates found for the defendants. Significantly, Yeates "had no difficulty in declaring that . . . the act [of 1784] was unconstitutional." But by emphasizing the defect in the title and the fact that the law was no longer in effect, Yeates diminished the impact of his larger conclusion that the law was unconstitutional.

Judicial action on the federal level further nurtured the idea on the part of state judges, as well as the public, that judicial review was a legitimate weapon of the court. By 1799 Pennsylvanians and their high judges were familiar with federal court rulings in *Hylton v. United States* (1796), *Ware v. Hylton* (1796), and *Calder v. Bull* (1798), where judges offered compelling rationale for their right to weigh the legitimacy of legislative acts and, in several cases, actually struck down state statutes.75 Pennsylvania judges and the public also were acquainted with Justice William Paterson's ruling in *Van Horne's Lessee v. Dorrance* (1795) wherein Paterson, a federal judge in a Pennsylvania circuit case, declared a Pennsylvania law unconstitutional and proclaimed that courts must hold as unconstitutional any legislative encroachment on property rights.76 Pennsylvanians witnessing state statutes such as those struck down in the Van Horne proceedings, and the passage of such congressional laws as Hamilton's excise tax (1791), the Alien and Sedition Acts (1798), and the "window tax" law (1798)—all unpopular among large segments of Pennsylvania society—yearned for a constitutional mechanism capable of protecting citizens against unwanted and unconstitutional acts. Increasing numbers of citizens discovered that protection in their own courts. Actions by both courts and legislatures helped to convince Americans that judicial review was a legitimate function in America's rapidly evolving constitutional arrangements. Historian Leonard Levy is correct: "Judicial review would never have flourished had the people been opposed to it." They might oppose its exercise in particular cases, and they might quarrel over which situations warranted it, but by the 1790s they did not deny the power itself.77

75 Dallas, 3 171, 199, 386
76 Dallas, 2 304
77 Levy, *Original Intent*, 123
When the Pennsylvania Supreme Court, late in 1799, weighed the constitutionality of a 1795 state statute, it stirred no public comment. What was at issue was a law prohibiting the erection of wooden buildings in certain parts of Philadelphia. The law's proponents were activated by a desire to reduce the possibility of a major fire within the city. Because one Philip Urbin Duquet had built several wooden structures in defiance of the law, he was brought before the Mayor's Court to answer for his conduct. The case wound its way to the Supreme Court in September 1799 and was determined in December of that year. The court, now overseen by Edward Shippen, found against Duquet, and upheld the constitutionality of the legislation. By legitimating a legislative act the justices also accepted their authority to invalidate laws.

As in the previous *Austin* proceedings, no uniform defense of the practice of judicial review accompanied the court's ruling. Nor was there clarification in either case as to whether the court believed its authority over legislation was derived from an equality of the three branches of government under fundamental law or, as in the *Marbury v. Madison* decision, from an extraordinary judicial responsibility to a written constitution.

It is perhaps worth noting that rulings rendered by the court in both the *Austin* and Duquet actions favored public over private interests. Both decisions rejected the property claims of individuals seeking to benefit at the expense of larger public interests or public safety. The court's willingness to throw its weight on the side of community rather than individual rights may account for the absence of adverse comment regarding its assertion of judicial review. Whether the high tribunal would have accepted its right of judicial review in proceedings touching personal liberty rather than property rights is unclear, and whether the public would have exhibited the same equanimity toward the court in such an instance is also unknown and probably unknowable.

The timing of the Supreme Court's action in reviewing legislative acts may have been merely happenstance, but the court's new-found power came to serve the interests of popular sovereignty within Pennsylvania at the very time that other democratic mechanisms and institutions were

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78 Yeates, 2 493-501, Misc Legal Papers, 1795, Yeates Papers, HSP
79 For a discussion of this distinction, see Snowiss, *Judicial Review and the Law of the Constitution*, 3
being eliminated by conservative forces. If no direct cause and effect relationship existed between those two historical developments, popular voices in the state were prepared to accept what came their way in this respect. They apparently concluded that the commonweal could be expressed through an impartial court as readily and as effectively as through a unicameral Assembly.

It is the argument of this paper that Pennsylvanians critical of their state Supreme Court—even those who after 1800 were responsible for the violent rhetoric directed against the court, its personnel, and the legal community supporting them—joined their less critical neighbors in conceding the power of the court to exercise judicial review. Answers as to why this paradox came to be, and what we are to make of it, can be discovered in the conditions that fostered it and in the ideas and visions that shaped those conditions.

If the court at times pursued inconsistent policies, the public often responded idiosyncratically to the judicial record. Post-Revolutionary Pennsylvanians lived in novel circumstances. They were poised between two worlds: the older, hierarchical, organic world shaped by their British and colonial heritages and reshaped by the Revolution, and the new, atomistic, egalitarian, and individualistic world encouraged by economic changes during their Revolution. Diverse systems of meanings urged them in different directions and offered them differing emphases and dissimilar versions of the future. The world inhabited by Pennsylvanians in the 1780s and 1790s was in flux, harboring and fostering often dichotomous values and aspirations.

No state agency more intensely felt or more obviously reflected the tensions created by independence and by the divergent systems of meaning within Pennsylvania during the last decades of the eighteenth century than the state Supreme Court. It grappled daily with matters of law and custom—both old and new. Not only did its judges struggle with the divisions of the times, they themselves functioned as private citizens in a bifurcated world. Trained as professional practitioners of the law, and committed to its traditional vision and practices, at the same time they operated as successful farmers, businessmen, and merchants in an increas-

80 Historians of Pennsylvania concur that reforms between 1786 and 1791 clearly were designed to red the state of, among other things, democratic institutions such as the Council of Censors and the unicameral legislature.
ingly novel and volatile commercial environment. Each day in their judicial capacity they wrestled with causes thrust upon them by individuals and interest groups seeking new rights and novel opportunities, and looking to gain legal sanction for fresh approaches—schemes that on a private level they themselves surely found attractive. Given these forces acting upon the justices and those observing and judging their professional work, it is understandable that contradictions, both in the court’s record and in the responses of the citizenry to its proceedings, should exist, even flourish.

To determine with precision what individual Pennsylvanians thought about their state Supreme Court is impossible. Not every critic of the court between 1777 and 1799 can be clearly identified, nor his motivation discerned. But two things seem clear: the first is that intense political divisions within the state lay behind much of the adverse comment directed toward the high bench; the second is that the resulting political tension seriously inflated the rhetoric against the court and its judges.

Certainly, before 1790 much of the support for the Supreme Court emanated from the ranks of the Constitutionalists, while most of the unfavorable comment was provided by Republicans. These roles were reversed after 1791, as Republicans (most of whom were former Constitutionalists) found much to lament in the newly constituted high court, while Federalists (generally the earlier Republicans) for the most part defended its record and its personnel. This pattern makes sense in light of the greater Constitutionalist-Republican commitment to the new egalitarian and democratic ideas and the Republican-Federalist preoccupation with checks and balances and the value of free competition in an open market.

But partisanship provides only a partial explanation. The Supreme Court prior to 1790 was not a “Constitutionalist court,” despite its relationship to a Constitutionalist-dominated government. Nor did it act


82 For an argument that the rhetoric was inflated and that Ellis (The Jeffersonian Crisis) took too literally rhetorical attacks upon the court, see Rowe, Embattled Bench, chap 16.

83 Arnold, A Republican Revolution, provides an elaboration of these themes.
in a predetermined or easily anticipated manner. Its rulings in the cases of the Penn lands, in granting Quakers writs of habeas corpus, and in introducing the process of outlawry—all of which antagonized Constitutionalists—are cases in point. Similarly, it was not a “Federalist court” after 1791, in part at least because of the continuing presence of McKean, whose judicial record from the beginning defied easy characterization. The court’s post-1790 stands in cases involving slavery, western land titles, and indentured servitude reveal no immutable consensus among the justices on the high bench. Members of both parties were dismayed by the court’s ruling on the role of grand juries (1782, 1788) and developments in the Wyoming Valley (1787). Both parties generally embraced its position on divorce and penal reforms. 84

Despite frequent partisan jabs at the bench and the often exaggerated characterizations of the court stimulated by personal and political feuds, generally speaking Pennsylvanians made intelligent distinctions in their ongoing assessment of their Supreme Court. If one can judge fairly from public and private comment, virtually no one bemoaned the court’s increasing role as a legitimate check on legislative excesses, or as a neutral voice among competing interests. Pennsylvanians were not frightened by judicial activism after 1776. Debates, when they occurred, generally centered on how and why the court acted as it did rather than if the court should have acted.

Whether from an affinity with Lockean ideas of individualism and aggressive acquisitiveness, or from a predilection for classical republican ideas emphasizing civic humanism, or from motives and responses based on neither, they accepted a court capable of defining and protecting individual and collective interests within the state. Pennsylvanians were result-minded. Habituated to pragmatic solutions, they accepted pragmatism from the high judges. The ongoing need to adjust to and take advantage of rapidly changing social and economic conditions more than any commitment to “republicanism” shaped individual views of the court throughout the political spectrum. To view either the development of the court or popular responses to it exclusively through the lens of republicanism or Lockean liberalism is to miss a great deal. 85

84 Details of these developments are provided in Embattled Bench, chaps. 10-14.
85 Rodgers, “Republicanism: The Career of a Concept,” esp. 34-38, explores limitations attached to “republicanism” as a paradigm.
Only the court's capacity and preference for looking backward, championing the ideals and practices of the past, stirred widespread discontent among the citizens of Pennsylvania. Unhappiness with the court's endorsement of traditional behavior (e.g., pluralism, the employment of outlawry, seditious libel laws, and procedures for punishing judicial contempt) provoked strident reactions. Pennsylvanians did not weigh their court between aspirations and viewpoints defined by republican and liberal ideas so much as they weighed it in the context of its commitment to the old and the new, between what they viewed as "enlightened" (flowing logically and naturally from America's new independent and republican status) and "unenlightened" (the product of monarchical Europe) ideas. They tolerated, even encouraged, its "enlightened" voice; they moved to muzzle its "unenlightened" decisions and pronouncements. In struggling to readjust the admixture of old and new that defined their lives, they gave modern shape to their state's high court.

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