Independence and Accountability in State Judicial Selection

THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA.

Reviewed by John Dinan*

Although in designing governing institutions American state constitution makers have deviated from various arrangements in place in the U.S. Constitution, state-level departures have been nowhere more extensive or important than regarding judicial selection. Some states follow the federal approach in vesting the power of appointing judges in the governor, generally with a requirement of legislative confirmation.¹ In a couple of states the legislature makes the appointments.² In other states, in a method first adopted in the 1830s, judges are chosen in partisan elections.³ A number of states hold nonpartisan elections, an approach that gained favor in the 1910s.⁴ The most recent innovation, dating back to the 1940s and now used in some form in twenty-five states, is the merit plan. Under such plans, the governor makes the initial selection, generally working from nominees forwarded by a selection commission, and once on the bench, the judge stands for retention elections at periodic intervals.⁵ By the early twenty-first century, nearly ninety percent of state judges are subject to popular election in some fashion.⁶

Given that “almost no one else in the world has ever experimented with the popular election of judges,” Jed Handelsman Shugerman poses the following question in The People’s Courts: Pursuing Judicial Independence in America: “Why have Americans adopted such a strange practice, when

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2. Id. at 267 & 366 n.3 (listing the states where the legislature appoints judges).
3. Id. at 78, 267. Shugerman notes, however, that it was not until the 1840s that this method was adopted on a broad scale. Id. at 101.
4. Id. at 267.
5. See id. at 201–02, 208 (describing the merit plan first proposed in Missouri that was later adopted, in that same basic form, by other states from the 1950s–1970s).
almost no one else has done so before or after."\(^7\) In prior articles, scholars have traced the origin of particular selection systems, especially partisan elections and merit plans.\(^8\) But Shugerman provides "the first comprehensive, archival study of state judicial selection over American history"\(^9\) and considers the individuals, interests, and ideas responsible for changes over time. In doing so, he draws on an impressive array of sources, making particularly good use, among other archival records, of extensive debates in state constitutional conventions in the mid-nineteenth century as well as several relevant twentieth-century conventions.

Conceived as "a work of legal history and political history" and "also a history of an idea,"\(^10\) Shugerman's book makes his principal argument that the development of state judicial selection can be viewed as "the story of the ongoing American pursuit of judicial independence—and the changing understandings of what judicial independence means."\(^11\) As he argues: "Interest group politics, economics, and specific events drive these stories of judicial design at each stage, yet at the same time, ideas mattered. The idea of judicial independence has been surprisingly resilient and popular throughout American history."\(^12\) In contrast with conventional accounts that treat the evolving design of state judicial selection systems as the product of shifting support for the competing goals of judicial accountability and independence, with judicial elections understood as securing accountability,\(^13\) Shugerman emphasizes the predominant concern with independence and

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7. SHUGARMAN, supra note 1, at 5.
9. SHUGARMAN, supra note 1, at 268.
10. Id. at 7.
11. Id. at 5.
12. Id.
13. See, e.g., CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 7, 78–90 (2009) (explaining how competitive elections promote accountability and statistically exploring the link between electoral competition and accountability); see also PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 28 (1980) ("Although elections might serve other functions . . . their role in enabling the public to assert control over the course of judicial policy-making is the mainstay of the argument which supports the selection of state judges by election and not by some other method.").
maintains that “[j]udicial independence has long been the rallying cry in favor of judicial elections in their varying forms.”

This review proceeds in two parts. First, I summarize Shugerman’s account of the three major developments in state judicial selection: the mid-nineteenth century adoption of partisan elections, the Progressive Era turn to nonpartisan elections, and the mid-twentieth-century rise and spread of merit selection. Second, I assess his principal argument that the history of state judicial selection is best understood through the analytical framework of judicial independence. Although helpful in understanding certain historical moments, especially the adoption of partisan elections and the rise of merit selection, a predominant concern with judicial independence may be less helpful in understanding contemporary debates, especially in comparison with standard accounts that stress the strong degree of support for accountability alongside independence.

I. The Origin of Judicial Elections

Shugerman’s key contribution is to provide a comprehensive account of the development of state judicial selection from the early republic to the contemporary era, with particular attention to the origin of judicial elections. Although in the colonial era there were numerous examples of “elected officials who had some judicial responsibilities,”15 and in the late 1700s and early 1800s Vermont, Georgia, and Indiana elected certain lower court judges, it was not until 1832 that Mississippi opted to elect all its judges.16 However, “[b]y itself,” “Mississippi offered a laboratory with no prestige, and judicial elections remained rare for more than a decade” after their adoption in the Mississippi Constitutional Convention of 1832.17 Judicial elections were only adopted on a broad scale after the New York Convention of 1846 decided to make all judges elected in what Shugerman views as a response to the Panics of 1837 and 1839.18 As the understanding took hold that the Panics were attributable to state legislatures spending improvidently on roads, canals, and railroads that turned out to be unprofitable and resulted in significant state borrowing and increased taxes, state constitutional conventions in the 1840s and 1850s responded by enacting numerous constraints on legislatures.19 To promote transparency, bills were limited to a single subject and had to be read multiple times before passage.20 To prevent legislators from acting out of self-interest or under the influence of special interests, states restricted debt and stipulated in their
constitutions that taxes could be raised and debt incurred only after prior approval in a popular referendum.\textsuperscript{21} Additionally—and this is Shugerman’s key claim—convention delegates sought to ensure that state courts were willing and able to enforce these constitutional constraints against legislatures.\textsuperscript{22} Judicial elections were a means of endowing judges “with more popular legitimacy” and thereby leading them “to act more boldly.”\textsuperscript{23} As he concludes, “In this context, responsibility to the other branches was the problem, and responsiveness to the people was the solution.”\textsuperscript{24} New York’s turn to judicial elections triggered a wave of similar adoptions around the country, such that every state entering the Union from 1846 to 1912 adopted judicial elections, along with many longstanding states.\textsuperscript{25}

Shugerman’s account in this section, based on his 2010 \textit{Harvard Law Review} article,\textsuperscript{26} is the latest entry into a longstanding scholarly inquiry into the origin and spread of judicial elections. Although for many years judicial elections were seen as a logical outgrowth of the Jacksonian-era movement to democratize governing institutions,\textsuperscript{27} a close reading of the relevant state convention debates led Kermit Hall and then Caleb Nelson to reject this understanding, albeit in different ways. Hall concluded in a pair of articles in 1983 and 1984 that “constitutionally moderate lawyers and judges” were primarily responsible for adoption of judicial elections.\textsuperscript{28} Representatives of the legal profession were well positioned in leadership roles in state conventions to push for an elected judiciary that would “command more, rather than less, power and prestige” and provide “judges a democratic means of countering legislative power.”\textsuperscript{29} Nelson’s exhaustive canvassing of the convention debates in a 1993 article led him to side with Hall’s conclusion that “the reformers who backed the elective judiciary intended to check legislatures.”\textsuperscript{30} But Nelson maintained that “the switch to the election of judges was as much a popular reform as a lawyer’s reform.”\textsuperscript{31} He also emphasized that “[t]he rise of the elective judiciary marked not a mere transfer of power from one branch of government to another, but an effort to decrease official power as a whole.”\textsuperscript{32}

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\item \textsuperscript{21} \textit{Id.} at 104.
\item \textsuperscript{22} \textit{Id.} at 105.
\item \textsuperscript{23} \textit{Id.} at 97.
\item \textsuperscript{24} \textit{Id.} at 99.
\item \textsuperscript{25} Hall, \textit{Progressive Reform}, supra note 8, at 346–47.
\item \textsuperscript{27} Hall, \textit{Progressive Reform}, supra note 8, at 346–47; Shugerman, supra note 1, at 77.
\item \textsuperscript{28} Hall, \textit{Progressive Reform}, supra note 8, at 347–48; Hall, \textit{Judiciary on Trial}, supra note 8, at 346–47.
\item \textsuperscript{29} Hall, \textit{Progressive Reform}, supra note 8, at 348.
\item \textsuperscript{30} Nelson, supra note 8, at 203.
\item \textsuperscript{31} \textit{Id.} at 202.
\item \textsuperscript{32} \textit{Id.} at 203.
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Shugerman’s comprehensive investigation into the relevant convention debates and the political, economic, and partisan dynamics of these conventions dovetails with these recent interpretations to some extent but also differs in certain respects. Each of these accounts rejects the notion that judicial elections were simply an outgrowth of Jacksonian democracy; as Shugerman notes, the full-scale adoption of judicial elections came a decade after other democratizing changes were enacted in the 1830s.33 As to whether this change was primarily driven by the legal profession, Shugerman follows Nelson and departs from Hall in arguing that judicial elections are best understood as a popular movement.34 As Shugerman points out, adoption of judicial elections was such a foregone conclusion in the pivotal New York Convention of 1846 that the only question was whether to elect judges statewide or by district.35 In terms of whether judicial elections were intended primarily to empower courts to check legislatures rather than to rein in officials in all departments, Shugerman argues, along with Hall and contrary to Nelson, that this was indeed their purpose.36 In this key respect, Shugerman’s account confirms Andrew Hanssen’s conclusion in a 2004 article that judicial elections were adopted out of a recognition that “legislators did not always act in the public interest, and the need for an effective third-party enforcer (to ensure legislative adherence to constitutional and statutory guarantees) became increasingly clear” and a realization that judges were ideally suited to perform this role, especially if they were given “a power base of their own, through popular elections.”37

II. The Turn to Nonpartisan Elections

The Progressive Era turn to nonpartisan judicial elections has generally attracted less scholarly interest and receives less attention in Shugerman’s book. He devotes multiple chapters to the earlier adoption of partisan elections and later rise of the merit system but deals with the Progressive Era in a single chapter taking note of conflicting trends in the first two decades of the twentieth century.38 On one hand, reformers sought to constrain judicial decision making through various institutional mechanisms.39 At the same time, reformers sought to modify judicial selection systems by reducing the

33. Shugerman, supra note 1, at 78 (arguing that “Jacksonian populism was an insufficient cause of judicial elections” and noting that the wave of judicial elections of state judges did not take place until the 1840s–1850s).
34. Id. at 115–16.
35. Id. at 95.
36. See id. at 105 (describing the limits that the constitutions imposed on legislatures and concluding that “[j]udicial elections were part of” an agenda to curtail legislative power).
37. Hanssen, supra note 8, at 441.
38. Shugerman, supra note 1, ch. 8.
39. Id. at 159–60.
influence of partisanship and, it was hoped, the special interests seen as advantaged by partisan elections.  

The chief concern in the first two decades of the twentieth century was the willingness of state courts, even more than the U.S. Supreme Court, to block enactment of maximum-hours protections, minimum-wage guarantees, workers’ compensation programs, and employer liability laws, among other labor reforms.  

Supporters of these laws responded in part by pressing for enactment of various court-constraining measures. Most notably, because Theodore Roosevelt made it a centerpiece of a widely circulated speech delivered to the Ohio Constitutional Convention of 1912, reformers sought to allow voters to recall judicial decisions by forcing a popular referendum on court decisions invalidating state statutes. But Colorado was the only state to adopt the recall of judicial decisions through a 1912 amendment that was overturned by the state supreme court within a decade and before it could be put to use.  

Supermajority requirements for the exercise of judicial review enjoyed somewhat more support and were adopted in Ohio in 1912, North Dakota in 1919, and Nebraska in 1920, although the Ohio provision was eventually repealed in 1968. Popular recall of judges, as distinct from recall of judicial decisions, garnered even more support and was adopted in six states in the Progressive Era, beginning with Oregon in 1908 and spreading to California and Arizona in 1911, Colorado and Nevada in 1912, and North Dakota in 1920. Another five states later adopted the recall procedure and did not exclude judges from its operation, bringing to eleven the number of states that currently have such provisions.

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40. Id.

42. Shugerman, supra note 1, at 160 (“Progressives also proposed other checks on the judiciary, such as judicial recall, overriding court decisions by popular vote, and limiting the power of judicial review.”).


44. Dinan, supra note 43, at 135.
45. Id. at 134.
46. Id. at 135, 342 n.171.
At the same time that some states were adopting court-constraining provisions—and Shugerman emphasizes the failure to gain more support and the decision by some backers to retreat from early expressions of support—states began turning away from partisan judicial elections and adopting nonpartisan judicial ballots. In part, Shugerman explains, this was because “[a] new perspective on partisanship developed: Partisan elections created a judiciary that was more easily captured by ideology and special interests.” North Dakota was the first state to adopt nonpartisan judicial elections in 1910, followed by Ohio and California in 1911 and six other states during the remainder of the decade, and another ten states in subsequent decades. In some states, such as Ohio, judicial candidates continued to compete for nominations in party primaries but then appeared on a nonpartisan general election ballot. In most nonpartisan election states, judicial candidates compete without a party label throughout the process.

III. The Rise and Spread of the Merit System

Although the merit system had its origin in the Progressive Era in proposals circulated by the American Judicature Society (AJS), no state adopted this plan in any form until the 1930s. In a pair of chapters addressing adoption of the merit plan in California (in modified form) in 1934 and Missouri in 1940 and then its spread to other states in the 1950s–1970s, Shugerman is primarily concerned with resolving “one of the strangest puzzles in the history of judicial reform.” As he notes, “It is exceedingly rare for states to abandon direct democracy,” as voters frequently did in approving merit appointment plans during this period. It is also surprising that “[m]erit plans started in western and midwestern states, and spread first through rural, populist areas” and that they were adopted “during populist reactions to an appointed U.S. Supreme Court and the elite legal establishment” especially during “the backlash against the Warren Court in the 1960s and early 1970s.”

Shugerman considers the role of individuals, interests, and ideas in the rise and spread of the merit system. Key parts were played in early-adopting states by individuals such as Earl Warren—who drafted a merit-selection plan for California as a member of the California Committee on the Better
Administration of Law— and Rush Hudson Limbaugh (grandfather of the syndicated talk-radio host), in his capacity as a founder of the Missouri Institute for the Administration of Justice, a main proponent of the merit plan in that state. Business groups and urban leaders were primary supporters, along with the bar association, whereas labor unions were leading critics. But, Shugerman argues, “the key is the relative balance between emerging business strength versus emerging labor unions and urbanization. True, the merit states tended to be rural, but among rural states, they were urbanizing and industrializing.” In this regard, “California and Missouri in the 1930s are examples of states where the climate was just right: business had grown powerful enough to support merit, but unions and urban ethnic blocs had not yet grown strong enough to resist.” Supporters argued that merit selection “would make judges more efficient, because it would spare them the draining distraction of raising money and campaigning”; but they also “linked this issue to crime control: less party politicking meant more focus on the crime crisis.” And, “[i]n both California and Missouri, anticrime propaganda played a surprising role in winning over the public.”

Although California in 1934 was the first state to adopt a version of this system, the plan has often been called the Missouri Plan because Missouri voters in 1940 were the first to adopt it in the form it has generally taken in other states. The California approach authorized the governor to make an initial nomination that had to be approved by a commission. But in Missouri and other states, the merit commission took the first step of identifying a slate of nominees—often three candidates—from which the governor made an appointment. Although no states adopted the merit plan for another decade after Missouri, Alabama voters approved an amendment in 1950 instituting the merit plan for the city of Birmingham. Then, in drafting an inaugural constitution, delegates to the Alaska Constitutional Convention of 1955–1956 adopted a merit plan for all state judges. By the end of the 1970s, over twenty states had adopted the merit selection/popular retention plan or either merit selection or retention elections.

57. Id. at 184–88.
58. Id. at 199–200.
59. Id. at 197.
60. Id. at 179.
61. Id. at 180.
62. Id. at 189.
63. Id. at 207.
64. Id. at 197.
65. Id.
66. Id. at 202.
67. Id. at 218, 222.
68. Id. at 224–26.
69. Id. at 286–87.
In setting out his explanation for the spread of the merit system—and focusing especially on the plan’s popularity in “rural-but-industrializing states” and the importance of “opportunistic leadership”—Shugerman challenges several explanations that have gained currency in recent decades. Philip Dubois focused in a 1990 article on “the political mobilization campaign[s] sponsored by the American Judicature Society . . . and a coalition of judicial reform groups.”70 Meanwhile, Hanssen’s 2004 article advanced a party risk-aversion theory.71 According to this model, states in which one party enjoyed a large legislative majority were less apt to change their selection system, whether to the merit plan or another plan, whereas states in which one party risked losing its majority were more willing to make a change.72 Shugerman finds “little evidence that the AJS strategized and initiated this campaign from above more than the local bar, local civic leaders, and local business organized their campaigns on the ground.”73 And although he finds some support for the party risk-aversion account in California,74 Missouri,75 and “in a handful of states in the late 1960s, the evidence mostly points away from this factor, because most of these states adopted merit while one party dominated the state legislature.”76

IV. Pursuing Judicial Independence or Balancing Independence and Accountability?

Other scholars have examined the development of state judicial selection systems, but primarily with an eye toward explaining adoption of a particular system and with the findings generally reported in law review articles or historical journals. The People’s Courts is the first book to investigate the full history of state judicial selection, and it far surpasses prior studies in the wealth of evidence and detail. Shugerman conducts a painstaking analysis of state constitutional convention records. He makes extensive use of contemporaneous newspaper articles and other periodicals. He draws on and engages a wide range of legal, historical, and political science scholarship. And he gives due attention to interests, individuals, and ideas, as well as the contingent nature of various outcomes.

Above all, though, Shugerman is concerned with advancing an argument about the importance of judicial independence throughout the

70. Id. at 238.
71. Dubois, supra note 8, at 40.
72. See Hanssen, supra note 8, at 431 (outlining Hanssen’s model).
73. Id. at 467–68.
74. SHUGERMAN, supra note 1, at 209.
75. Id. at 190–91.
76. Id. at 204.
77. Id. at 209.
history of state judicial selection continuing to the present. In this regard, Shugerman’s account differs from conventional approaches that frame the history of state judicial selection as influenced by the competing goals of independence and accountability, with a concern for independence predominating among certain reformers in certain eras and an aspiration for accountability prevailing among other groups at other times. One need only compare Shugerman’s title, The People’s Courts: Pursuing Judicial Independence in America, with other studies, including Paul Carrington’s article, Judicial Independence and Democratic Accountability in Highest State Courts, and G. Alan Tarr’s book, Without Fear or Favor: Judicial Independence and Judicial Accountability in the States, published shortly after Shugerman’s book.

At times, Shugerman suggests he is not seeking to supplant the standard analytical framework, with its emphasis on independence and accountability, but rather aims to demonstrate that the appeal of judicial independence has gone unappreciated in earlier historical accounts that equated support for elections with an aspiration for accountability. Along these lines, he writes, “It may not be surprising that the American public has valued judicial accountability. But it is intriguing that the American public has a long history of valuing judicial independence at the same time. The modern models of judicial selection reflect both values.” Similarly, he concludes, One might have thought that judicial accountability is an inevitable and overwhelming force in a democracy, because public opinion, the parties, and elected officials would not allow the judiciary—“the least dangerous branch”—to obstruct their interests or clash with their values. However, it turns out that the value of judicial independence has been a surprisingly robust, resilient, and popular value from the colonial era to the present.

Understood in this fashion, Shugerman’s book is a useful corrective to a “simplistic” tendency “to link elections to judicial accountability and appointments to judicial independence.” Building on several prior studies

78. Id. at 268. Shugerman notes at the outset that his book “argues that the story of judicial elections is also the story of the ongoing American pursuit of judicial independence.” Id. at 5.

79. See Paul D. Carrington, Judicial Independence and Democratic Accountability in Highest State Courts, 61 LAW & CONTEMP. PROBS. 79, 80 (1998) (arguing that “courts, to merit their independence, must be faithful to democratic law” and noting his concern with attending to “the issues of the highest courts’ independence and accountability”).


81. Id. at 268.

82. Id. at 6.

83. Id. at 268.

84. See Carrington, supra note 79, at 89 (arguing that an elected judiciary was advocated “in part to secure judicial independence from irresponsible governors and legislators”); Hanssen, supra note 8, at 440–41 (recounting an early nineteenth-century commitment to “increasing the independence of state judges” by giving judges a “power base of their own, through popular elections”).
and providing far more detail than has yet been assembled, Shugerman is especially convincing in showing that mid-nineteenth-century supporters of judicial elections “emphasized the abstract principles of judicial independence in their arguments for judicial elections. Reformers defined judicial independence as insulation from a certain kind of insider politics: the partisan patronage politics of appointments. Open partisan politics out-of-doors was their solution, not the problem.” Additionally, and though it is less surprising, he shows that advocates of merit selection “relied heavily on the rhetoric of judicial independence to legitimate their reform efforts.” At a point in time when “partisan elections” and “open campaigning” had come to be viewed as problematic in the mid-twentieth century, “[a] new brand of insider politics was the solution: professional ‘merit’ nominating commissions run by bar leaders and committee members. The indignity of open campaigning was supposed to be replaced by the dignity of uncontrollable retention elections without campaigning.

In other respects, Shugerman aims to go beyond showing that judicial independence has been an important aspiration alongside of judicial accountability and merely correcting any misapprehension that judicial elections were supported primarily as a means toward accountability. As illustrated by the book’s subtitle, he seeks to place the concern with judicial independence at the forefront of this history. Toward this end, he argues that over the history of judicial selection reforms and campaigns, these campaigns more often than not have reflected a commitment to general judicial independence, not just relative independence and judicial accountability. The leaders of the reform efforts and the voting public have endorsed the separation of judges from regular politics, even if politics in some form cannot be eliminated.

As he writes in the conclusion, in a particularly strong version of this argument: “The consistent concept over time has been that judges are fundamentally unlike other political officers, and they should be separated from politics in order to act as judges.”

Moreover, Shugerman is concerned not only with placing judicial independence at the forefront of historical accounts; he also argues, based in part on the historical record and in part on a consideration of recent developments, that judicial independence ought to be viewed as the primary concern in contemporary judicial selection debates. As he indicates in the introduction, in detailing the benefits of “[t]his tour of American legal and

85. At times, he also provides particular correctives to details in these other studies. E.g., SHUGERMAN, supra note 1, at 326 n.45.
86. Id. at 6.
87. Id.
88. Id. at 6–7.
89. Id. at 256.
90. Id. at 269.
political history,” “[t]he lessons of this history may help us find a plausible path back to judicial independence.”91 Likewise, in the conclusion he writes, “If we have learned from history, it is also a new opportunity for redeclaring judicial independence.”92

In this regard, questions necessarily arise as to how to assess the prominence of independence throughout the development of judicial selection and, even more important, in contemporary debates. Regarding the historical record, Progressive Era debates and developments pose the biggest challenge to this analytical framework in light of the sweeping calls in that period for holding judges more accountable, whether through recall of judges, recall of judicial decisions, supermajority requirements for judicial review, or reliance on constitutional amendments to overturn court decisions. In considering these developments, Shugerman argues that “[t]he critical point here is that the idea of judicial independence retained its sway even among the progressives who were so frustrated by it,”93 as illustrated by several reformers who “retreated from these attacks out of a fear of backlash.”94 Additionally, he contends that these innovations can be best explained as upholding a concept of “independent judges, dependent judiciary,” in that “they curtailed judicial supremacy, but not judicial independence. They could overturn the judges’ decisions without turning the judges out of office.”95

Shugerman is on solid ground in emphasizing the limited success of Progressive Era campaigns to enact court-constraining devices. Recall of judicial decisions passed in a single state and was soon invalidated.96 Supermajority requirements for judicial review were adopted in only three states and later repealed in one of them.97 Moreover, and in line with Shugerman’s account about the primacy of judicial independence even during this period, one can plausibly view enactment of these devices as well as the reliance on flexible state constitutional amendment processes to overturn errant court decisions as consistent with an aspiration for judicial independence, insofar as they did not involve removing judges from office.

Recall of judges, adopted in six states during the Progressive Era and in another five states during the remainder of the twentieth century,98 presents a greater challenge for this framework, since this device was intended to remove judges from office and not simply to overturn errant decisions. A key question at Progressive Era state constitutional conventions where

91. Id. at 12.
92. Id. at 273.
93. Id. at 163.
94. Id.
95. Id. at 165.
96. Id. at 165.
97. Id. at 166.
98. Recall of State Officials, supra note 47.
reformers proposed instituting the recall was whether to exempt judges from its coverage. In fact, some convention delegates supported excluding judges from recall procedures on the ground that this would impair their impartiality. Along these lines, eight of the nineteen states that currently permit voter recall of some state-level officials have explicitly declined to apply this device to judges. However, eleven states, including Arizona, California, Colorado, Nevada, North Dakota, and Oregon in the Progressive Era, were intent on treating judges the same as other officials by subjecting them to removal from office through voter recall.

More important than whether pursuit of judicial independence best captures the full scope of Progressive Era developments is whether this is the most helpful guide to contemporary debates. Certainly, judicial independence is a predominant concern for one group of contemporary reformers, many of whom support the merit plan largely because it is seen as better securing independence than alternative models. Shugerman fits squarely in this tradition insofar as he argues that “[i]n this particular moment in American history, the two biggest threats to judicial independence are money and job insecurity” and concludes, “Of the most realistic models, merit selection (circa 2000–2009) turns out to address both the problems of money and job security.” To be sure, he acknowledges various failings of the merit system and is particularly concerned about the 2010 defeat in retention elections of “three Iowa judges who had ruled in favor of gay marriage.” Nevertheless, he concludes, “The merit system’s most concrete advantages are that it shifts the balance to judicial independence from the influence of party politics and money and that it has produced more job security for its judges.” Shugerman does go on to argue that merit selection “offers a balance between judicial accountability and independence” and suggests several modest reforms to the merit plan that deserve consideration “[w]hether one prefers accountability or

100. Recall of State Officials, supra note 47 (identifying Alaska, Idaho, Kansas, Louisiana, Michigan, and Washington as excluding judges from the operation of the recall, along with Rhode Island, where the recall only applies to selected state officials and Illinois, where the recall only applies to the governor).
101. See the statements of Thomas Feeney and Michael Cunniff in support of subjecting judges to recall elections during the debates in the Arizona Constitutional Convention of 1910. DINAN, supra note 43, at 129.
102. See generally TARR, supra note 80 (analyzing reformers who value judicial independence and believe merit selection best achieves it).
103. SHUGERMAN, supra note 1, at 256–57.
104. Id. at 257.
105. Id. at 258.
106. Id. at 257.
107. Id. at 266.
independence."\textsuperscript{108} But his primary concern is securing judicial independence and his main ground for supporting the merit system is that it provides “more reason to expect a degree of protection from the influence of money and partisan competition.”\textsuperscript{109}

Although a predominant concern with judicial independence certainly describes one strand of the contemporary judicial selection debate, it does not capture the aspirations of other scholars and public officials who are more concerned with judicial accountability and are currently urging adoption of alternatives to the merit system so as to secure greater accountability. Shugerman takes brief note of this competing perspective as it is represented in the academy when, citing to a recent book by Chris Bonneau and Melinda Gann Hall,\textsuperscript{110} he writes that some scholars “believe judges should play by the same rules as other politicians” and “generally are skeptical of arguments for judicial independence from public opinion,”\textsuperscript{111} and when he notes that “[s]ome regard hotly competitive retention elections as a hallmark of judicial accountability and public engagement.”\textsuperscript{112}

A predominant concern for judicial accountability is not only found in certain quarters of the current scholarly debate, but is also shared by a sizable number of public officials who have pressed in recent years for eliminating the merit system and adopting various alternatives, whether partisan elections or gubernatorial appointment and legislative confirmation. Again, Shugerman takes brief note of these recent reform efforts, mentioning the role of “corporate interests” in “campaigning to scrap the merit plan and go back to partisan elections,”\textsuperscript{113} most notably in the birthplace of the Missouri Plan,\textsuperscript{114} and labeling these efforts “simply part of a larger pattern: economic interests find ways of playing by the existing rules of judicial selection to win, and when they stop winning, they campaign to change the rules.”\textsuperscript{115} But given that Shugerman in other sections of the book considers the role of interests as well as ideas in animating proposed changes in judicial selection, it would seem especially important to consider the ideas undergirding recent campaigns to eliminate the merit system.

\textsuperscript{108} Id. at 259. He notes that “retention elections allow for more adjustment of reelection thresholds”; “the nominating commissions can be adjusted to produce more accountability or more independence”; “judges’ term lengths can be made longer or shorter”; “recusal rules can address the influence of money on the courts”; and “there are other mechanisms for checking the courts” such as relying on flexible state constitutional amendment processes to override decisions without voting judges out of office. Id. at 259–60, 264.

\textsuperscript{109} Id. at 266.

\textsuperscript{110} CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009).

\textsuperscript{111} SHUGERMAN, supra note 1, at 256.

\textsuperscript{112} Id. at 258.

\textsuperscript{113} Id. at 256.

\textsuperscript{114} Id.

\textsuperscript{115} Id.
In general, these campaigns are motivated by concerns for securing accountability, in line with the views expressed by Tennessee Governor Don Sundquist after the defeat of Tennessee Supreme Court Justice Penny White in a 1996 retention election on account of her opinion in a death-penalty case: “Should a judge look over his shoulder to the next election in determining how to rule on a case? I hope so. I hope so.”\textsuperscript{116} In the belief that merit commissions and retention elections do not go far enough in securing accountability, especially in light of statistics showing that only 1\%–2\% of judges are unseated in these elections—the 1986 defeat of three California judges, 1996 defeat of Tennessee Judge White, and 2010 defeat of three Iowa judges are notable exceptions\textsuperscript{117}—reformers have pushed for adoption of alternative approaches, most notably in Missouri, Tennessee, Kansas, Oklahoma, and Arizona.\textsuperscript{118}

Focusing on the as-yet unsuccessful efforts by Better Courts for Missouri to replace the merit-selection system in that state, the group’s executive director James Harris in 2009, in announcing an initiative campaign to adopt partisan elections (an alternative proposal would have instituted gubernatorial appointment/senate confirmation), argued that popular elections would “make Missouri courts more responsive to the needs of the average Missourian.”\textsuperscript{119} Noting that elections are already used to select many Missouri judges but not appellate judges and not local judges in some counties, Harris contended that “[j]udicial elections have the chance to turn this around by bringing openness and accountability to Missouri’s judiciary.”\textsuperscript{120} Although Harris also defended this reform as a means of reducing the influence of “trial lawyers and special interest groups that dominate the current process and often have vested interests in the outcomes of judicial rulings,”\textsuperscript{121} in what could be viewed as a concern with securing independence from these interests, a leading concern, which was at least as important and perhaps more important than achieving independence, was securing greater accountability.

It is true that recent campaigns to scrap the merit system have enjoyed limited success,\textsuperscript{122} making it difficult to assess the precise extent to which they present a challenge to Shugerman’s claim about the popularity of judicial independence. But especially in the aftermath of Republican gains in

\textsuperscript{116} Id. at 3.
\textsuperscript{117} Id. at 254–55.
\textsuperscript{118} See History of Reform Efforts: Unsuccessful Reform Efforts, AM. JUDICATURE SOC’Y, http://www.judicialselection.us/judicial_selection/reform_efforts/failed_reform_efforts.cfm?state (detailing unsuccessful judicial reform efforts that have taken place throughout the United States).
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} See History of Reform Efforts: Unsuccessful Reform Efforts, supra note 118 (listing failed attempts in several states to replace their judicial merit-selection systems).
2010 state elections, measures eliminating the merit system have enjoyed some success in state legislative chambers,\textsuperscript{123} most notably in Tennessee, where the legislature in 2012 approved a constitutional amendment eliminating the merit commission and moving to gubernatorial selection/senate confirmation, and, if approved by a subsequent legislature in a second vote, it will be submitted to voters in 2014.\textsuperscript{124} The results of this popular referendum, as well as other referendums to eliminate merit selection that may appear on other state ballots in coming years, will provide an important gauge of voters’ current support for accountability.

It is also worth emphasizing that voters have shown no support in recent years for expanding merit selection. Voters rejected by wide margins measures to expand existing merit plans in Florida in 2000 and South Dakota in 2004, as Shugerman notes.\textsuperscript{125} And in the most recent referendum of this sort, Nevada voters in 2010 rejected by a 58–42 margin, for the third time in the last four decades,\textsuperscript{126} a merit-selection amendment backed by former U.S. Supreme Court Justice Sandra Day O’Connor and defended throughout the campaign as a means of securing greater judicial independence.\textsuperscript{127} At the least, evidence from the outcomes of popular referendums is mixed regarding the continued popularity of judicial independence and voters’ desire to separate judges from politics.

The key point is that regardless of the appeal of judicial independence in prior eras and the way that earlier generations supported judicial elections as a means of securing independence, it is not clear that the contemporary period is best characterized by the pursuit of judicial independence or that recent movements to scrap merit selection and reintroduce partisan elections are motivated by a primary concern with securing independence. As a guide to the full range of views animating contemporary reform debates, one might more profitably turn to conventional accounts that emphasize the competing goals of judicial independence and accountability and the shifting, as well as

\begin{itemize}
  \item \textsuperscript{123} See Bill Raftery, Merit Selection: Comprehensive State-by-State Review of Efforts to Modify or End Existing Systems, Gavel to Gavel (Apr. 10, 2012), http://gaveltogavel.us/site/2012/04/10/merit-selection-comprehensive-state-by-state-review-of-efforts-to-modify-or-end-existing-systems/ (examining efforts in 2012 to modify or end existing merit-selection systems as created by constitutional provision or statute).
  \item \textsuperscript{125} SHUGERMAN, supra note 1, at 364–65 n.90.
  \item \textsuperscript{126} Judicial Selection in the States: Nevada, AM. JUDICATURE SOC’Y, http://www.judicialselection.us/judicial_selection/index.cfm?state=NV.
  \item \textsuperscript{127} For example, see her comments quoted in Buck Wargo, Former U.S. Supreme Court Justice Says Appointed Judges Better for Business, LAS VEGAS SUN, Sept. 22, 2010, http://www.lasvegassun.com/news/2010/sep/22/former-us-supreme-court-justice-says-appointed-jud/.\end{itemize}
varied, support for these aspirations. Nevertheless, as a detailed treatment of
the individuals, interests, and ideas responsible for judicial selection reform
at key moments in American history, The People’s Courts far surpasses prior
accounts.