

Judicial Independence, But From What?

Author : Stuart Banner

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Jed Handelsman Shugerman, [*The People's Courts: Pursuing Judicial Independence in America*](#) (Harvard University Press, 2012).

I think history is most fun to read when it upsets the conventional understanding of something in the present day. That's a hard trick to pull off. Most conventional understandings are pretty close to the truth – otherwise they would have been abandoned already. And if you want to buck the conventional wisdom about something in the present, you're more likely to succeed simply by explaining why it's wrong in the present rather than by detailing its past. It takes an unusual combination of insight and luck to find a topic you can make readers see completely differently by writing its history.

Before I read Jed Shugerman's *The People's Courts*, I would never have guessed that judicial elections were that kind of topic. Like most lawyers, I suppose, I thought judicial elections were a little silly at best, and sometimes downright pernicious. How are voters supposed to know who the good judges are? And worse, how can elected judges prevent politics from leaking into their decisions? The last thing we want is for a judge to be keeping an eye on his reelection when he's deciding, say, whether a notorious murderer's rights have been violated, or whether a popular new law is unconstitutional. If you've ever been in a state with contested judicial elections and seen the TV commercials in which the candidates all claim to be the toughest on crime, you start to worry about the intrusion of politics. I imagine that's the conventional understanding of judicial elections. It was certainly mine.

No other country has this system, so why do we? To the extent there is a conventional historical account, it is that judicial elections were a product of Jacksonian democracy. The idea was to reduce the independence of judges, to bring them closer to the will of the people, to shift power from insulated elites to accountable citizens. That's a plausible enough story. I believed it.

In *The People's Courts*, Shugerman shows that this isn't true at all. It's more nearly the opposite. Most states moved to judicial elections in the mid-19th century to get politics *out* of judging, not in. The problem that elections were intended to solve was the danger of political pressure from the governors and legislatures who appointed judges. Americans wanted their judges to be independent – independent from the other two branches of government. Judicial elections are not the only way that politics can influence the judiciary. When judges are appointed by politicians, political pressures can be just as strong. "With direct popular elections, we watch the sausage-making," Shugerman explains in his introduction. "With appointments, the sausage-making is out of sight, out of mind." (P. 5) One of the great virtues of the book is how Shugerman demonstrates that in the mid-19th century it was the other sort of sausage-making that people were mostly worried about.

Shugerman then goes on to show that these new judicial elections worked just as they were intended. Judges actually did become more independent when they were elected, as measured by the frequency with which they struck down legislation as unconstitutional. That's a result completely different from the one we would expect if the Jacksonian democracy story were true, but it's a result that makes perfect sense if the purpose of electing judges was to insulate them from behind-the-scenes political pressure.

Once you understand the history of judicial elections this way, it's hard not to see them differently in the present, and Shugerman turns to this issue at the end of the book. No matter how judges are selected, he points out, politics will creep in one way or the other. Anything we do to shift judges away from one kind of politics will only bring them closer

to another kind. We can't talk intelligently about how to pick our judges without acknowledging these inevitable tradeoffs.

There's a lot more to *The People's Courts* than this. The book is a complete history of judicial selection methods in the United States, from the 18th century through the big-money judicial campaigns of our own time. That's a really valuable contribution in its own right; indeed, it's surprising that no one has written a book like this before. But the best part is the chapters on the origin of judicial elections.

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