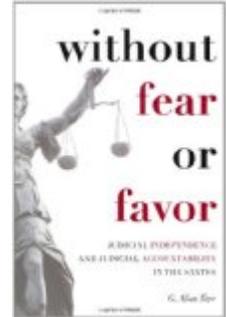


**G. Alan Tarr.** *Without Fear or Favor: Judicial Independence and Judicial Accountability in the States.* Stanford: Stanford University Press, 2012. 269 pp. \$27.95, paper, ISBN 978-0-8047-6040-9.



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The state of Mississippi paved the way in 1832 with the adoption of a new constitution that switched from the gubernatorial appointment to the popular election of state judges. The new constitution reflected the democratic sensibilities of the rapidly growing frontier state, subjecting most executive officers as well as the judges to election by the “qualified voters.” Other states did not rush to follow the lead of Mississippi. New York State proved more influential when its constitutional convention of 1846 adopted judicial elections. Most of the other states quickly followed. The Progressive Era saw the rise of Missouri’s system of merit selection, but some form of judicial popular election remains common for selecting state judges.

In recent years, the mode of selecting judges has been the subject of renewed controversy. Many on the left have contended that justice is for sale to the highest bidder as business interests seek to influence judicial elections. Many on the right worry that nonelectoral selection methods favor liberal interests in the organized bar and

encourage judicial activism. Retired U.S. Supreme Court justice Sandra Day O’Connor, with experience as both an elected and an appointed state judge, has added her voice to the chorus calling for reform. But over time, the relationship between political interests and methods of judicial selection has proven to be quite fluid, and support for any particular reform effort has often been transitory.

Alan Tarr’s new book is timely. One of our leading experts on state courts and state constitutionalism, Tarr here tries to bring the perspective of a social scientist to bear on this polarizing debate. *Without Fear or Favor* takes up the persistent tension between the desire for judicial independence and the desire for judicial accountability. Thomas Jefferson indicated the problem early on, suggesting to one correspondent that a “judge independent of a king or executive alone is a good thing,” but judges in a republic should not be independent of the “will of the nation” (p. 15). Americans expect that judges should be able stand firm against constitutional violations and

adhere to the rule of law in rendering decisions without regard to party, but that they should also be accountable for mistakes or abuse of power and responsive to popular views on contested political issues. Unhappiness with the judiciary may be inevitable.

Tarr recognizes that the dilemma has been persistent and may be unsolvable, but that does not mean that common arguments are always well considered. Tarr aims to provide a “dispassionate discussion of judicial independence and accountability,” and by doing so to at least elevate the state of the debate (p. 3). This sort of approach is unlikely to settle the dispute, but Tarr is ultimately able to offer some relatively modest suggestions that might help improve the image and performance of the state courts.

Tarr begins with a review of the history of the debates surrounding state courts and the associated waves of reform. These early chapters do not provide a detailed history of the state judiciary and the uneasy relationship between the people and their courts. Jed Shugerman’s fine study, *The People’s Courts* (2012), provides a recent history of those issues. Tarr’s consideration of this history is more focused. In the early Republic, he observes, debates over judicial independence and accountability were rampant, but even so the concerns of that era are not those that rile us today. Those early judges struggled just to establish important prerogatives such as the power of judicial review and to establish their independence from meddling legislatures (independence from executives came more easily). From the Jacksonians through the Progressives, the state courts continued to be buffeted by political storms, but the terms of the debate had shifted. And again, Tarr highlights the ways in which those earlier debates sound familiar and yet played out differently than what we see in contemporary politics. Placing judges on an electoral footing was often urged as a means for creating more independent and effective courts. Only in the twentieth century did the

debate settle into a more familiar pattern of arguments, though the Left and the Right have reversed their positions over the past century, with the Right now putting its faith in popular elections and the Left adopting a more technocratic posture. Tarr wraps up this historical survey with a brief recounting of the “new style” judicial campaigns of the modern era. Judicial elections in particular have been transformed by larger campaign coffers, greater interest group participation, and deepening partisanship, intensifying debates over how judges are chosen.

Having set the table, Tarr then spends two chapters analyzing particular concerns about the current state of the judiciary. He frames his analysis against two foils, the “Bashers” and the “Defenders.” The Bashers are popular critics of state judges and their supposed ideologically driven interference with democratic politics and favor reform to bring greater judicial “accountability.” The Defenders are popular supporters of state judges and proponents of measures to enhance judicial “independence” to preserve the rule of law. These contrasting positions are foils for Tarr, but they are not straw men. Tarr is careful to identify real positions currently being offered in the political debate. His targets, however, are generally popular writers and activists rather than his fellow scholars. Those participants in the public debate may be somewhat soft targets, but Tarr’s ultimate goal is to bring the light of scholarship to a heated and polarized debate.

The first of these more substantive chapters takes an analytical approach. The focus is on how we should conceptualize the competing values of judicial independence and accountability. Tarr finds both the Bashers and the Defenders to be too simplistic in how they understand the workings of courts and the process of interpreting and applying the law. Happily, Tarr is not just complicating the discussion. Instead, he shows that a scalpel is sometimes more helpful than a hatchet. The flaws in common arguments are laid bare,

and a more refined view of the judiciary is developed. Ultimately, Tarr emphasizes that disagreement over the interpretation of the law is more likely to reflect the difficulty of the task than bad faith on the part of judges, but the hard-won lessons of the legal realists also suggest that judges are inevitably engaged in deeply political tasks and as a consequence should not be too insulated from public accountability.

The second of these substantive chapters evaluating the contending positions on judicial elections takes a more empirical approach. If the previous chapter took particular aim at the Bashers, this chapter concerns itself mostly with the Defenders. Tarr marshals the rapidly expanding empirical literature on judicial elections and the elected judiciary to demonstrate that the evidence that partisan judicial elections cause serious difficulties for judicial quality or legitimacy is quite thin. While there may be some potential negative consequences to judicial elections, alternative mechanisms of judicial selection do not have strong or obvious comparative advantages to elections. The empirical work on these questions is still very much in development, but Tarr does an able job of drawing conclusions for the public debate given the current state of the literature.

The book concludes with some consideration of reform proposals. The proposals mooted here are relatively modest and are offered somewhat tentatively. In particular, Tarr suggests the potential of a single nonrenewable term for state supreme court judges and a greater appreciation of the ways in which statutes and constitutional amendments can be effectively used to bring the substance of the law in line with popular preferences. Focusing on such measures may obviate the need for more radical changes in how state courts are currently structured.

Tarr presents his arguments clearly and efficiently. He moves briskly through the main considerations that should inform our thinking about judicial elections. He leans on careful analysis and

a scrupulous assessment of the evidence to address important points of public concern. *Without Fear or Favor* is readily accessible to students and should lay the foundation for a more robust discussion of state courts and how best to balance judicial independence and accountability.

If there is additional discussion of this review, you may access it through the network, at <https://networks.h-net.org/h-law>

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