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JUDICIAL POLITICS: MAKING THE CASE FOR MERIT SELECTION

Steven Zeidman*

I am delighted to be here. If you will bear with me, indulge me just a little bit of a personal reflection. Prior to coming to CUNY Law School, I was the Executive Director of The Fund for Modern Courts, a court reform, non-partisan, statewide organization.1 About five years ago, we were trying to figure out how to honor the memory of a former judge of the Court of Appeals, Hugh Jones.2 A group of us got together and thought: “Well, Hugh Jones was a real intellectual, in many ways a giant of the Court of Appeals—maybe we should create a lecture series with judges talking about issues affecting the judiciary.” We realized pretty soon that we needed some help to make this a reality. Albany Law School, through its then-Dean Thomas Sponsler, enthusiastically agreed to be a co-sponsor. Out of that collaboration was born the annual Judge Hugh R. Jones Memorial Lecture at Albany Law School. So, for me it is full circle and especially delightful to be here talking about issues affecting the judiciary. I thank the Albany Law Review for inviting me.

Judicial selection: it is a wonderful opportunity to talk in an academic setting about something that is far from academic. It certainly can be, but if right now you went into LexisNexis, Westlaw, Google, and the Index to Legal Periodicals, whatever works for you, and typed in “Judicial Selection Reform,” you would get buried in an avalanche of articles, probably from all fifty states.3

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Judicial selection is on the national radar screen. There is so much going on at so many levels. For me, the main issue—the issue that I care most about—is whether to elect or to appoint our judges. How do we want to create a judiciary? That is what I will address.

More specifically, where do our judges come from? Or, putting it more relevantly for those who aspire to the bench, how do you become a judge? I suggest to the students here that this is something you should be thinking about. If judges in your jurisdiction are elected, you should begin, quickly, becoming politically active. If judges are appointed, you should start to figure out how those systems operate. I suggest to those with judicial ambitions that it is far from too early for you to begin thinking about these issues.

So, where do we start? I think by asking: what kind of a judiciary do we want? And within that: what do we expect from the individuals who comprise this ideal judiciary? Certain things, I am sure, feel very obvious. Regardless of the system used to select judges, we can agree that our judges should be smart. That is easy enough to state in principle, but how do we measure intelligence? Law school grades? LSAT scores? SATs? How about an exam—a judge test or some kind of certification procedure? We could send judicial aspirants to pre-judge schools and see how they perform. The simple truth is that trying to measure intelligence is harder than it might, at first blush, appear. Think about other characteristics of the ideal judge, such as integrity and industriousness. How can we ascertain someone has the requisite amount of those attributes? That is part of the challenge, and I think that is why we have to figure out what the best system

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2 See, e.g., Luke Bierman, Beyond Merit Selection, 29 FORDHAM URB. L.J. 851, 869 (2002) (“[p]ropective judges in many other countries are trained for the demands and responsibilities of judging at an early point in their careers”).
is to try and get us there. Let me suggest that ultimately—and again, these may seem like trite phrases, but I want to try and make them more textured—ultimately, two scholars got it just right when they said that the goal, as we think about creating a judiciary, is to produce “a qualified, inclusive and independent judiciary.” Qualitative, inclusive, and independent. Which system, elective or appointive, do you think is more likely to yield a qualified, inclusive, and independent judiciary?

Let's start with the elective system. For many, political elections are hardly synonymous with independence. To them, the phrase "judicial elections" is anathema; it should not be in our legal system let alone our lexicon. You have heard today in great detail how judicial elections throughout this country have evolved. Twenty—maybe twenty-five—years ago, they did not resemble the worst sort of campaigns and elections that have become the norm for other elective positions, but more and more that is what they are becoming. The vitriolic name-calling, the attack ads, the million-dollar fundraising, the influence of special interest groups—all are rapidly making judicial elections indistinguishable from other campaigns. Hardly anyone thinks this is a good thing. And, of course, as you have heard, judicial political campaigns, even as they begin to resemble all these other campaigns, still have their own unique issues. Can and should judicial candidates be allowed to give opinions on legal issues, express how they would rule, or make promises? Should they be able to campaign and attempt to curry favor with the electorate like any other politician? These issues, unique to judicial elections, have to give us great pause. You have already heard today about how the Supreme Court interpreted Minnesota’s judicial campaign rules that restricted judicial candidates. We are still experiencing the aftermath of that decision, but I recommend that it is worth your time to go back and read the Court's opinion carefully. While the Court discusses whether judicial candidates can announce their positions on legal issues, and, as a result, views the case through the lens of judicial elections, by no means should you assume that the Court was somehow giving a stamp of approval, sanctioning, or welcoming

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8 See Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (holding unconstitutional a state canon prohibiting judicial candidates "from announcing their views on disputed legal and political issues").
judicial elections. Far from it. I might be reading into it a little too much because it tends to comport with the way I think about judicial elections, but it seems to me as you read the case and you read the concurring opinions, the Court almost is saying: "Listen, you made your bed, now sleep in it. If you want to elect judges, you have to deal with the consequences." That, to me, is the undercurrent and raises the issue: do we have to live with the consequences? That is the issue we face today.

Apparently, in New York State—and I am sure I am being wildly optimistic—but I do not think that we do have to live with the consequences. Why do I say that? It was similar anti-judicial election sentiment about twenty-five years ago that led to a fundamental change in the way we select judges to our Court of Appeals. Change happened. To all the naysayers, I repeat: it happened. We changed the way, in our lifetime, that we select judges to the Court of Appeals. New York switched from elections to an appointive system. Is the appointive system ideal? Hardly. More important to ask is whether it is superior to elections. No doubt. In fact, not coincidentally, shortly after switching from elections to appointments we saw the first woman, Judith Kaye, join the Court of Appeals. This was hardly a coincidence, and I will come back to the issue of diversity, or inclusiveness, momentarily.

Back to elections. I am putting to the side, because so many people have talked about them so eloquently, the general applicability of elections to judicial candidates and whether judges are different—have different functions—than other popularly elected officials. I am also putting aside how we feel about having judges face re-election campaigns after ruling on controversial cases. And, parenthetically, a word about so-called retention

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9 See id. at 788–90 (O’Connor, J., concurring) (cautioning about the various pitfalls associated with judicial elections).
10 See Zeidman, supra note 7, at 797 & n.29.
11 N.Y. CONST. art. VI, § 2(e) (amended 1977); see also George Bundy Smith, Choosing Judges for a State’s Highest Court, 48 SYRACUSE L. REV. 1493, 1493–94 (1998).
13 See, e.g., Mark A. Behrens & Cary Silverman, The Case for Adopting Appointive Judicial Selection Systems for State Court Judges, 11 CORNELL J.L. & PUB. POL’Y 273, 287 (2002) (“Members of the judicial branch . . . are not direct representatives of the people, but are expected to act as impartial arbiters of cases and controversies.”).
elections. There has been so much—too much—focus on the initial election. I ask you to look inside yourself and imagine you are a judge and have before you a case of great importance and contentiousness—one that is dividing the people in your community. Pick whatever issue you want, but make it particularly difficult, and you know that in six months you are up for re-election. Will that affect how you rule? There are certain truths we just have to confront. These are some of the realities within which this whole discussion takes place, yet I even want to put those problems of elections to the side. I also want to put to the side the fact that every judge in our federal judiciary is appointed. I have yet to hear anyone clamoring for the right to elect judges to the federal bench. Putting all of that to the side, even the underlying rationale for judicial elections is flawed. Now, maybe you knew nothing about these issues prior to coming here today, but you did know one thing: why people suggest we should elect judges. You know the answer to that. Because—I think someone earlier mentioned the lessons of third grade civics classes—it goes to the heart of democracy and accountability: the input of the citizenry. On its face it is very hard to argue with. It certainly sounds very un-American, if nothing else, to say: “Who cares about the citizenry and civic participation?” Here is the problem. To inform this particular issue in the debate, to insert empirical data into the equation, I examined twenty-five years of judicial elections and appointments in New York City. I was most interested in trying to get my arms around voting behavior in New York City. Citizens have this wonderful opportunity, this right, to impact the judiciary. What do they do with it? And that is empirical; it is something you can get your hands on. The bottom line is that voters in New York City—and I think this is true throughout the country—know virtually nothing about their judicial candidates. How do we know that? We know that by numerous exit surveys that have been conducted over the years, but beyond that, not surprisingly, they simply do not vote. In the 2002 New York City elections, the average percentage of registered voters who pulled a lever for a judicial candidate was

16 Zeidman, supra note 7, at 818–19.
17 See generally Zeidman, supra note 7.
18 Id. at 822.
19 Id.
typically between fifteen and twenty percent.\textsuperscript{20} Hardly the embodiment of civic participation and influence. The fact is that no one is voting for their judges. We just have to acknowledge that. Nobody is voting, and I do not think the New York City picture is unique.

The result? Certainly in New York City, the result is that judicial elections, for all practical purposes, vest judicial selection with political party leaders. Once you get the party's nomination, believe me, you are in.\textsuperscript{21} Whether it is because no one is running against you or because you have been cross-endorsed by agreement of party bosses, the simple fact is that the party nomination is tantamount to victory. One result is the theme pervading the public opinion surveys we have been hearing about. It may sound hyperbolic, but there is, in fact, a crisis of confidence in the justice system. Some of the survey questions go to this very point: that people feel like the judiciary and the way judges are picked are unduly influenced by political party leaders and bosses.\textsuperscript{22} And again, focusing on New York City, for those of you who are following what has been going on in Brooklyn, we have seen widespread allegations of pernicious and longstanding political party domination and corruption of judicial elections.\textsuperscript{23} It may be that we are just seeing the tip of the iceberg.

What is the better system? Appointment by what is called merit selection. Dr. Cheek said he is not here on the panel as an advocate. I think that is what I was supposed to be, an advocate. I willingly take on that role. Merit selection, I think, makes much more sense. What do I mean by merit selection? In a very quick

\textsuperscript{20} Id. at 823–25.

\textsuperscript{21} "I'm against elected judges because the way you get elected judges is the way they do it in the Bronx. You get three political leaders together, boom, they pick a guy and he's the judge, he's elected." New York State Commission on Government Integrity, \textit{Restoring the Public Trust: A Blueprint for Government Integrity}, 18 FORDHAM URB. L.J. 173, 185 (1990) (quoting then-New York State Governor Mario Cuomo).


\textsuperscript{23} \textit{See}, e.g., John Caher, \textit{Assembly Acts on Reform of Judicial Screening Process, Fund Raising}, N.Y.L.J., June 16, 2004, at 1 (tracking the progress of legislation aimed at restoring confidence in the judiciary after scandals involving Brooklyn judges); Leslie Eaton, \textit{Behind a Troubled Bench, an Arcane Way of Picking Judges}, N.Y. TIMES, June 30, 2003, at B1 (detailing the scandals involving Brooklyn judges, and the "cronyism and political connections" on which judicial selection in New York City is based); David Hafetz, \textit{Bill Would Extend Campaign Finance Laws to Judge Candidates}, N.Y. SUN, June 10, 2004, at 3 (reporting that city lawmakers responded to allegations of corruption in the judiciary in Brooklyn by proposing legislation that would limit party participation in judicial selection).
snapshot, it is a diverse—in every way imaginable—nominating commission that solicits and interviews applicants and produces a list of approved candidates to the Executive from which the Executive must select. So, if we were a nominating commission and we were told there was a vacancy on a particular court, we would solicit people to apply, conduct interviews, vet the candidates, call references, et cetera. We would be doing all that we could to learn about them. At the end of the process, we would submit a prescribed number of candidates to the appointing authority (i.e., Governor or Mayor), with the proviso that the appointment must come from the list we provided. That, in a nutshell, is the sort of merit system that I am advocating.

To be fair, especially for those of you who are not steeped in this issue, this is what might be described as tilting at windmills. Merit selection is not on the immediate horizon. It is no small feat to get elected legislatures to support appointed judiciaries, especially when elected judgeships are one of the last great bastions of political patronage. The American Bar Association, historically such a staunch supporter of merit selection, recently has made statements like: “Well, we don’t know that merit selection is coming anytime soon, so in the meantime let’s figure out ways to improve elections.” In New York State, we have had the comprehensive work and report of the Feerick Commission, which was created by Chief Judge Judith Kaye. The Feerick Commission focused on ways to improve judicial elections. That, for sure, is commendable, but it is certainly ironic that the Chair, John Feerick, has for years been one of the most ardent and eloquent supporters of merit selection. While there is a sense that merit selection might not happen anytime soon and that, therefore, judicial elections need to be cleaned up, I suggest to you that what this debate really is about

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24 See Zeidman, supra note 7, at 831–32 (outlining a proposed merit selection procedure).


26 Chief Judge Kaye took the occasion of her 2003 State of the Judiciary address to announce the formation of the Commission to Promote Public Confidence in Judicial Elections, chaired by John D. Feerick, former Dean of Fordham University School of Law. See John Caher, Kaye Vows to Pursue Reform Even if Forced to Go it Alone: Commission Will Explore Judicial Campaign Funding, Ethics, N.Y.L.J., Jan. 14, 2003, at 1.

27 In 1987, John Feerick was appointed to chair the Commission on Government Integrity. See GOVERNMENT ETHICS REFORM FOR THE 1990S: THE COLLECTED REPORTS OF THE NEW YORK STATE COMMISSION ON GOVERNMENT INTEGRITY 3 (Bruce A. Green ed., 1991). The Commission recommended, inter alia, a switch from judicial elections to judicial appointments. Id. at 299–301.
is, again: how do we want to select judges? What system would we implement if we were starting with a clean slate? While tinkering with elections through reforms, such as public financing and campaign contribution limits, will improve the campaign process, it will by no means address the myriad problems associated with judicial elections. Instead, we should think large and try and devise the best system possible. If we approach the issue that way, with that goal, I am confident we will end up with merit selection.

The merit selection process is less political and therefore more independent than elections. Again, it is not a perfect system, but it is for sure less political. Here is a fact: anybody can apply to a merit selection system. Anybody. I witnessed that firsthand when I had the privilege of serving on one of these nominating commissions in New York City. People who had practiced law for twenty years but who had no political background could, and did, apply. They were considered and several of them were appointed. On the other hand, if you have been practicing for twenty years, but have no political party backing or experience, you are wasting your time if you consider trying to enter the judicial election fray. I think that is just a fact.

Moving away from the process questions, let me spend just two or three minutes on the yield. Which system produces a more qualified and inclusive judiciary? It is very difficult to measure, but I think this is where social science can help. Which process do you think yields a better judiciary? Just asking the question sends up red flags. Nobody wants to debate that. In fact, those who support elections are quick to aver that elected judges are "just as good" as appointed judges. Yet, we have not defined what that means. "Just as good" meaning they have just as much integrity? How do you measure a quality like integrity? As I searched for ways to obtain data, I settled on two measures: misconduct and diversity. They have their own flaws, their own issues, but they paint a clear and telling picture. Those are variables capable of being measured

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30 The author served as a member of New York City Mayor Rudolph Giuliani's Advisory Committee on the Judiciary from 1993 to 1996.
empirically. We can debate the meaning of the numbers, but you can get your hands on them. So, again, looking at twenty-five years of judicial elections and appointment in New York City, I looked at the number of judges who were sanctioned for judicial misconduct. I then charted it out to compare the proportion of appointed judges versus elected judges. In over twenty-five years, it is remarkably consistent that in New York City the elected judiciary has the dubious distinction of far surpassing the appointed judiciary on the variable of judicial misconduct.\(^{31}\)

The next variable I looked at was diversity. As you look at a statewide snapshot—and frankly, now I wish I had something to post on the board—it is remarkable. When you look throughout New York State today—not twenty-five years ago—our elected judiciary is overwhelmingly white males.\(^{32}\) There are elected courts in this state, such as the 108 judges of the County Court, that are virtually entirely white.\(^{33}\) So, I suggest to you that a merit selection system better promotes diversity. And recall the variables that I began with: qualified, inclusive and independent. On all these scores, all of them, merit selection is far superior.

A caveat to the issue of diversity, which I would be remiss if I did not mention, is, ironically, one source of opposition to merit selection is the Black and Latino Caucus of the state legislature. Why? There are actually two traditional arguments. One is: “You are changing the rules of the game when we are in a position, finally, to vote in more people of color. We finally have some amount of political strength and we intend to exercise it.” The other argument is that merit selection is an elitist old boy’s network that serves to perpetuate the status quo. What those concerns highlight is that any merit selection system is only as good as its nominating commission, which must be diverse itself—and I mean “diverse” defined in multiple ways—and must have as a priority the goal of diversifying the judiciary.

In conclusion, on both process and yield measures, merit selection is superior to judicial elections. I will leave for another day a discussion of what it would take for merit selection to become the norm, and what an ideal merit selection system would look like. Thank you.

\(^{31}\) Zeidman, supra note 7, at 808–10.

\(^{32}\) Id. at 816–17 (indicating that white judges constitute more than eighty percent of the state judiciary).

\(^{33}\) Id.