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# TO ELECT OR NOT TO ELECT: A CASE STUDY OF JUDICIAL SELECTION IN NEW YORK CITY 1977–2002†

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Steven Zeidman\*

*This Article examines the process of judicial selection in New York State in light of the recent court decisions in White and Spargo, which have paved the way for increased campaign speech in judicial elections. Relying on empirical data to compare judicial elections and appointments in New York City between 1977 and 2002, the Article finds that elections produce a judiciary that is more beholden to interest groups than one generated through appointments. The consequence of this greater special interest involvement is an erosion of public trust and confidence in the judiciary. Moreover, while elections arguably have increased diversity in the New York City judiciary, elections have not achieved the same result at the state-wide level. The Article concludes that New York State should abandon judicial elections and implement a merit selection system with a diverse, non- or bipartisan nominating commission at its core.*

A majority of all cases in the United States are decided by judges whose continued tenure is contingent upon elections. This fact is attributable to another: most judgeships in the United States are elective offices. More than surprising, these two facts are curious, even anomalous, for judges are elected on a similar scale in no other constitutional democracy in the world.<sup>1</sup>

[I]n thirty-nine of our fifty states, judges must face the electorate in some form, either through competitive or retention elections. Of the nation's more than 1200 state appellate judges, 47% are appointed, 40% face partisan elections, and 13% face non-partisan elections. Of nearly 8500 state trial court judges in courts of general jurisdiction, just 24% are

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1. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 689 (1995). See also Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. M.S.U.–D.C.L. 849, 890 (“[N]o democracy except the United States elects judges.”).

appointed, with 43% facing partisan elections and 33% involved in non-partisan elections.<sup>2</sup>

The issue of judicial selection, long of academic interest, is receiving unprecedented national attention. In December 2000, seventeen state Chief Justices convened a National Summit on Improving Judicial Selection.<sup>3</sup> The summit, called to discuss ways to eliminate contentious campaign conduct during judicial elections, resulted in a "Call to Action," concluding, inter alia, that non-governmental monitoring groups should be established to encourage fair and ethical judicial campaigns.<sup>4</sup> The next month, the Conference of Chief Justices urged reform of judicial selection processes across the nation and implored bar associations to do more to encourage fair and informed judicial elections.<sup>5</sup> Several months later, Indiana Chief Justice Randall Shepard chaired the National Symposium on Judicial Campaign Conduct and the First Amendment: The Way Forward. The symposium, recommended in the aforementioned "Call to Action," was described as "a continuation of efforts by state judicial leaders and others to improve the process by which state judges are selected."<sup>6</sup>

This organized, nationwide focus on judicial elections has in turn generated an extraordinary amount of legal writing devoted to judicial selection issues<sup>7</sup> and has even spawned judicial selection

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2. Bradley A. Smith, *Symposium on Judicial Elections: Selecting Judges in the 21st Century*, 30 CAP. U. L. REV. 437, 437 (2002) ("A substantial majority of American judges are subject to some type of voter election, and have been for over a century."). See also Jonathan Lippman, *Electing Judges Should be More Dignified*, N.Y.L.J., Jan. 22, 2002, at B1 (observing that approximately 75% of New York's judges must stand for election at some point in their judicial careers).

3. The summit was conducted under the leadership of Texas Supreme Court Justice Thomas Phillips and the National Center for State Courts. It yielded several articles, published collectively in the *Loyola Law Review*. E.g., *National Summit on Improving Judicial Selection: Call to Action Statement of the National Summit on Improving Judicial Selection*, 34 LOY. L.A. L. REV. 1353 (2001) [hereinafter *Call to Action*].

4. *Id.* at 1356. The summit released a statement recommending that all states with elected judges consider reforms in the following areas: judicial election structure, campaign conduct, voter awareness, and campaign finance. *Id.*

5. See, e.g., Tony Mauro, *Justices Urge Overhaul of Judicial Races*, THE RECORDER, Jan. 26, 2001, at 1.

6. Symposium, *Judicial Campaign Conduct and the First Amendment, The Way Forward: Lessons from the National Symposium on Judicial Campaign Conduct and the First Amendment*, 35 IND. L. REV. 649, 650 (2002) ("Two problems shown to be acute in recent judicial elections motivated the gathering. First, several court decisions over the last decade have limited the scope of the ethical canons that have traditionally regulated judicial candidate conduct. Second, unprecedented levels of participation by non-candidates in judicial campaigns threaten the extent to which judicial elections are different from races for legislative and executive positions.").

7. See, e.g., Symposium, *The Ethics of Judicial Selection*, 43 S. TEX. L. REV. 1 (2001); Symposium on Judicial Elections: *Selecting Judges in the 21st Century*, 30 CAP. U. L. REV. 437 (2002);

bibliographies.<sup>8</sup> The mainstream news media have also generated a spate of judicial selection articles.<sup>9</sup> In March 2003, the American Bar Association (ABA) organized a colloquium to discuss the report and recommendations of its Commission on the 21st Century Judiciary,<sup>10</sup> and a few months later the ABA released the report, "Justice in Jeopardy," at the National Press Club.<sup>11</sup> On a local level, the New York County Lawyers' Association recently held a panel, "Two Paths, One Purpose: Appointment and Election—New York's Hybrid Method of Judicial Selection."<sup>12</sup>

New York State has been at the epicenter of this movement. In response to the "Call to Action," the state Administrative Board of the Courts<sup>13</sup> adopted a resolution urging local bar associations to create fair campaign practice committees to monitor compliance with the Code of Judicial Conduct.<sup>14</sup> In October 2001, the

*Selection of State Judges Symposium: Transcripts: Judicial Elections and Campaign Finance Reform*, 22 U. TOL. L. REV. 335 (2002); Symposium, *Introduction: Selecting Judges in Pennsylvania*, 106 DICK. L. REV. 679 (2002); *Judicial Selection Symposium*, 21 MISS. C.L. REV. 193 (2002); Symposium, *Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 1 (2003); Symposium, *Selection of State Appellate Judges*, 39 WILLAMETTE L. REV. 1251 (2003); Conference, *Judicial Selection and Evaluation*, 4 NEV. L.J. 35 (2003).

8. See, e.g., Amy B. Atchison et al., *Judicial Independence and Judicial Accountability: A Selected Bibliography*, 72 S. CAL. L. REV. 723, 723 (1999) ("This bibliography was prepared in conjunction with the Judicial Independence and Accountability Symposium held at the University of Southern California on November 20–21, 1998.").

9. See, e.g., Editorial, *Maryland's Bad Mix of Politics and Justice*, WASH. POST, Aug. 11, 2002, at B8; Thomas R. Phillips, *When Money Talks, The Judiciary Must Balk*, WASH. POST, Apr. 14, 2002, at B2; William Glaberson, *Lawyers' Study Says States Should Pay for Court Races*, N.Y. TIMES, July 23, 2001, at A10; William Glaberson, *States Take Steps to Rein In Excesses of Judicial Politicking*, N.Y. TIMES, June 15, 2001, at A1.

10. The Commission was formed in the summer of 2002 and was charged with analyzing the multifaceted problems facing state courts. The Commission's report lists twenty-three recommendations, and describes state judicial systems as being in serious jeopardy. In 1999, it adopted amendments to its Model Code of Judicial Conduct addressing contribution limits and disclosure standards for candidates in judicial campaigns. That same year, the ABA Standing Committee on Judicial Independence established the Commission on State Judicial Selection Standards. The ABA's House of Delegates approved the Commission's draft standards in 2000. See generally James J. Alfini & Jarrett Gable, *The Role of the Organized Bar in State Judicial Selection Reform: The Year 2000 Standards*, 106 DICK. L. REV. 683 (2002).

11. Press Release, ABA, American Bar Association To Release Landmark Report Charting New Course For State Judicial Selection (on file with author) (calling the report "the first attempt to break the deadlock in the debate over appointment versus election of state judges").

12. NEW YORK COUNTY LAWYERS' ASSOCIATION (May 1, 2003) (flyer on file with author).

13. The New York State Administrative Board of the Courts consists of the Chief Judge and the four Presiding Justices of the Appellate Division.

14. See, e.g., John Caher, *Rancorous Judicial Races Prompt Reform*, N.Y.L.J., June 5, 2001, at 1 (stating that the board also "approved an amendment to Sec. 1200.44 of the Disciplinary Rules to state that a lawyer running for judicial office must comply with the Chief

statewide Office of Court Administration solicited bar associations in each of the state's 62 counties to monitor local judicial campaigns for compliance with ethical rules.<sup>15</sup> Soon thereafter, court administrators and the organized bar embarked on a joint project to monitor compliance with ethics codes during judicial elections, and the New York State Bar Association agreed to take the lead role in coordinating a statewide effort among the local bars.<sup>16</sup> In her 2003 State of the Judiciary address, New York Chief Judge Judith S. Kaye announced the formation of the Commission to Promote Public Confidence in Judicial Elections.<sup>17</sup>

In New York City, a series of judicial scandals in Brooklyn has prompted great scrutiny into the role of political parties in judicial elections.<sup>18</sup> The Brooklyn District Attorney convened a grand jury to investigate allegations of corruption in the Democratic Party's selection process for Supreme Court candidates in Kings County.<sup>19</sup> The judicial selection reform movement has found champions in the New York City Council<sup>20</sup> and the State Assembly.<sup>21</sup> More re-

Administrator's Rules Governing Judicial Conduct (22 NYCRR) and Canon 5 of the Code of Judicial Conduct"); Lippman, *supra* note 2, at B1, B6.

15. See John Caher, *Judicial Reform Sought: State Joins National Push for Greater Civility in Campaigns for Bench*, N.Y.L.J., Oct. 16, 2001, at 1.

16. See SPECIAL COMMITTEE ON JUDICIAL CAMPAIGN CONDUCT, NEW YORK STATE BAR, *THE HIGH ROAD—RULES FOR CONDUCTING A JUDICIAL CAMPAIGN IN NEW YORK* (2001) (on file with author).

17. HON. JUDITH S. KAYE, *STATE OF THE JUDICIARY: CONFRONTING TODAY'S CHALLENGES* (2003). The Commission was charged with "promoting confidence in judicial elections in New York" and providing "a blueprint for preserving the dignity of judicial elections and promoting meaningful voter participation." Press Release, Commission to Promote Public Confidence in Judicial Elections (May 22, 2003) (on file with author).

18. See, e.g., Leslie Eaton, *Behind a Troubled Bench, an Arcane Way of Picking Judges*, N.Y. TIMES, June 30, 2003, at B1; Graham Rayman, *Politics and Brooklyn Bench: Judge Scandals Call Attention to Cozy Ties with Democrats*, NEWSDAY, May 12, 2003, at A03; Tom Robbins, *Judicial Fever in Brooklyn*, VILLAGE VOICE, May 6, 2003, at 24.

19. See, e.g., Nancie L. Katz, *Brooklyn DA Wants Democrats' Bank Records*, N.Y. DAILY NEWS, May 13, 2003, at 9.

20. See, e.g., Jonathan P. Hicks, *More Brooklyn Officials Calling for Changes in Selecting Judges*, N.Y. TIMES, May 7, 2003, at B3 (quoting Brooklyn City Council member James E. Davis, "[r]eforming the selection process for judicial candidates will go a long way in making that process fair and equitable and will help avoid even the appearance of impropriety").

21. N.Y. Assemblyman Roger L. Green introduced legislation, Bill AO5757:

This bill creates a new title II and title III of Article 13 of the election law to reform public financing of judicial elections, and establishes a New York State judicial election campaign fund. This bill also creates the temporary state commission to study the existing judicial electoral processes and make recommendations regarding the feasibility of changing the current process to a non-partisan candidate system for judges.

Press Release, Roger L. Green, N.Y. Assemblyman (May 2, 2003) (on file with author).

cently, the Mayor of New York City, Michael Bloomberg, ventured into the venerable Association of the Bar of the City of New York and suggested overhauling the way judges are chosen.<sup>22</sup>

A recent decision by the United States Supreme Court has heightened the importance and immediacy of these issues. The Supreme Court considered the constitutionality of Minnesota's "announce clause" rule, prohibiting judicial candidates from announcing their views on disputed legal or political issues.<sup>23</sup> In a 5-4 decision, the Court held that the rule was not narrowly tailored to serve a compelling state interest and therefore violated the First Amendment.<sup>24</sup>

More recently, the Federal District Court for the Northern District of New York struck down sections of New York's Code of Judicial Conduct as invalid prior restraints on constitutionally protected speech and ruled that other code sections were void for vagueness in *Spargo v. New York State Commission on Judicial Conduct*.<sup>25</sup> In *Spargo*, the candidate's political activities included campaigning for a part-time judicial position by distributing coupons for free donuts, coffee and gas, and giving out free pizzas and cider; speaking at a Conservative Party fundraiser; and, while acting as an observer of the Florida recount for the Bush campaign, participating

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22. See, e.g., Graham Rayman, *Mayor: Leaders Should Give Up Judge Selection*, NEWSDAY, May 29, 2003, at A28. The Mayor urged that appointive systems replace judicial elections. *Id.*

23. Republican Party of Minnesota v. White, 536 U.S. 765 (2002). Many states, and the federal judiciary, have similar rules. See Linda Greenhouse, *Supreme Court Weighs Rule Limiting Judicial Candidates' Speech*, N.Y. TIMES, Mar. 27, 2002, at A20 ("Most state supreme courts have adopted a version of the American Bar Association's model code governing judicial candidates' behavior, which is essentially the same as the Minnesota code."). Minnesota's announce clause is modeled after a 1972 canon of the ABA Model Code of Judicial Conduct. In 1990, concerns about the constitutionality of the announce clause prompted the ABA to replace it with a "commitment" clause, designed to bar "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." See, e.g., Marcia Coyle, *New Suits Foreseen on Judicial Elections*, NAT'L L.J., July 8, 2002, at A9.

24. See also *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) (finding Georgia's Code of Judicial Conduct to be overbroad with respect to judicial campaign speech).

25. 244 F. Supp. 2d 72 (N.D.N.Y. 2003). Judge David N. Hurd found that New York Code sections 100.1, 100.2(A), 100.5(A) (1) (c)-(g), and 100.5(A) (4) (a) were unconstitutional. The New York State Office of the Attorney General, counsel for the New York State Commission on Judicial Conduct, filed notice of appeal in the United States Court of Appeals for the Second Circuit. The Second Circuit subsequently stayed Judge Hurd's order, allowing the Commission to resume enforcement of the ethical rules that Judge Hurd had deemed unconstitutional. In December 2003, the Second Circuit overturned Judge Hurd's decision on procedural, federal abstention grounds. The Court made it clear that it was not ruling on the merits, stating, "we are sensitive to the importance of free speech issues raised on appeal and emphasize that our decision should not be read as revealing any view on the merits of plaintiffs' claims." *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65 (2d Cir. 2003), *petition for cert. filed*, 72 USLW 3600 (U.S. Mar. 05, 2004) (No. 03-1273).

in a loud demonstration against the recount process. While New York's Commission on Judicial Conduct found these activities ran afoul of New York's Code of Judicial Conduct provisions requiring judges and judicial candidates to avoid the appearance of impropriety and to uphold the integrity of the judiciary, Judge Hurd, without commenting on the propriety of Spargo's actions, struck down the code sections relied upon. Hurd's decision makes abundantly clear that *White* applies to more than just judicial electoral activity.

Confusion reigns in the aftermath of *White* and *Spargo*. What are the rules regarding what judges can do or say?<sup>26</sup> As Gerald Stern, former Counsel to New York's Commission on Judicial Conduct, noted, "I am getting calls from lawyers on behalf of political clubs and parties asking if judges are now free to say whatever they want. . . . I can't even field all the calls; there are so many. The ramifications here are extraordinary and unprecedented."<sup>27</sup> Amid the confusion, one thing seems clear—more open political activity and speech during judicial campaigns is on the horizon.<sup>28</sup>

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26. In an effort to provide guidance to the judiciary, the New York Advisory Committee on Judicial Ethics quickly promulgated an opinion on the impact of *Spargo*. The opinion advises judges to adhere to the extant rules of the Code on Judicial Conduct until the matter is finally resolved in the appellate courts. See John Caher, *OCA to Judges: Keep Following Stricken Rules*, N.Y.L.J., Mar. 24, 2003, at 1.

27. John Caher, *'Spargo' Decision Leaves Confusion in its Wake—Scope of Judges' Activity in Election Remains Unsettled*, N.Y.L.J., Feb. 28, 2003, at 5. See also, John Caher, *Judicial Conduct Commission Under Fire*, N.Y.L.J., May 8, 2003, at 1 ("[F]ew judicial decisions have had as much immediate and widespread impact as U.S. District Judge David N. Hurd's ruling in [*Spargo*].").

28. More questions about the scope of permissible judicial activity arise as other judges in New York attack unfavorable findings by the New York Commission on Judicial Conduct. As stated by the lawyer for one of those judges, "We believe the *Spargo* case evidences the clear trend in the law, especially since the landmark *White* decision last summer, toward open political activity and open speech in judicial campaigns." Caher, *supra* note 27, at 5 (quoting Timothy P. Murphy, co-counsel with the law firm representing Judge William J. Watson). An attorney who has represented a number of judges before the Commission on Judicial Conduct stated that he has "been contacted by more than two dozen jurists since the *Spargo* decision was released. . . ." Caher, *supra* note 26, at 1.

Prior to *Spargo*, the New York State Commission on Judicial Conduct sought to remove Lockport City Judge William Watson for remarks made during his campaign. The Commission had also censured Nassau County Supreme Court Judge Ira Raab for, *inter alia*, engaging in political activity. *Spargo* provided new and powerful ammunition for both judges as they argued their cases against the Commission in the Court of Appeals. While the Commission recommended that Judge Watson be removed from the bench for making improper campaign comments, the Court of Appeals instead decided that censure was the appropriate sanction. In the Matter of Watson, 100 N.Y.2d 290 (2003). The Commission eventually closed its case against Judge Raab as part of an agreement that he would resign from the bench. Shortly after *Spargo*, Columbia County Supreme Court Judge John Connor went to District Court, before the same judge, David Hurd, who decided *Spargo*, to seek a preliminary injunction to stop the Commission from pursuing allegations against him. Judge Hurd ruled preliminarily that the Commission could proceed against Judge Connor

The rulings in *White* and *Spargo* should not be read as endorsements of judicial elections. Though they focus, naturally, on judicial campaigns, elections, and political activities, lurking just barely beneath the surface is the question of whether election or appointment is the best method by which to select judges. The *White* and *Spargo* Courts took a deferential approach, suggesting that if states continue the unseemly practice of electing judges, they will have to live with the consequences.<sup>29</sup>

Given *White's* limits on the ability of the States to control some aspects of judicial elections, should the States elect to live with the consequences of judicial elections? Some are focusing on reforming the judicial elective process. The American Bar Association, historically a staunch supporter of merit selection, recently again waded into the world of judicial elections. The ABA Commission on the 21st Century Judiciary, while still voicing a preference for the nomination and appointment method, recommended a series of election reforms.<sup>30</sup> Faced with the

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with all charges save those he struck down in *Spargo*. Supreme Court Justice John LaCava, no doubt emboldened by the holdings in *Spargo* and *White*, brought a case in the Southern District of New York seeking to have his 1999 admonition for improper political statements vacated. Judge Colleen McMahon subsequently ruled that she lacked jurisdiction to hear the case. *LaCava v. N.Y. State Comm'n on Judicial Conduct*, No. 03 Civ. 2040 (CM) (Dec. 11, 2003) (Lexis 24089). It appears that these cases may represent the tip of the iceberg.

29. See, e.g., Adam Liptak, *Judges Mix with Politics*, N.Y. TIMES, Feb. 22, 2003, at B1 ("Judge Hurd seemed to be holding his nose as he ruled. He said he had no opinion on whether Justice Spargo's conduct 'would bring disrespect to the judiciary.' . . . [I]f New York . . . persists in electing at least some of its judges, he implied, it will have to live with the consequences."). Liptak noted Justice Scalia's comment during the oral argument in *White*: "Maybe you shouldn't have judicial elections," Justice Scalia mused last spring at the argument of the *White* case. "It may be a very bad idea. But as long as you have it, I don't see the interest in keeping the electorate from being informed." *Id.* Justice O'Connor expressed similar ambivalence in her concurring opinion in *White*: "Minnesota has chosen to select its judges through contested popular elections. If the state has a problem with judicial impartiality, it is largely one the state brought on itself by continuing the practice of popularly electing judges." *Id.* See also Coyle, *supra* note 23 (quoting Georgetown University Law Professor John Echevarria, "[Justice O'Connor] said electing judges is a fundamentally misguided idea"); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 71 (2003) ("[A]s the dust settles on the decision in *White*, the Court's bottom line becomes clear: if you don't like what judicial campaign speech does to the impartiality of elected judges, your solution is not to curtail campaign speech. It is to end judicial elections"). Many others have recognized the Pandora's box opened by *White*. See, e.g., Leigh Jones, *Judge Fights Censure Citing 'Spargo,' Ira Raab Takes Challenge to Court of Appeals*, N.Y. TIMES, Mar. 11, 2003, at 16 (quoting an attorney for a judge fighting his case against the Commission on Judicial Conduct, "if New York is going to require judges to run in elections, then they have to give judges the First Amendment rights that go along with that role").

30. Preliminary Report, ABA Commission on the 21st Century Judiciary, Executive Summary ("[O]n judicial selection, the Commission states its preference for nomination by a credible, deliberative body and appointment by the Governor.") But those states that continue to elect judges should move to nonpartisan races, or have judges serve one



prospects of judicial campaigns run amok and judicial activity going unchecked, more are suggesting that State judges be appointed by a merit selection system.<sup>31</sup>

This Article examines and compares the two primary judicial selection methods—elections and merit appointment. In Part I, the Article details the extant methods, with a particular focus on New York State. In Part II, the Article relies on empirical data to compare the judges produced by election as opposed to merit selection in New York City for the period 1977 through 2002. Specifically, the Article attempts to ascertain which judges were more likely to be disciplined for judicial misconduct and which selection method yielded a more diverse judiciary. Statewide data for the elected judiciary is examined to complement the diversity analysis. Part II also examines the degree of citizen participation in judicial elections by analyzing the numbers and percentages of citizens who voted for judicial candidates in New York City. Finally, Part III outlines a model system of merit selection.

## I. METHODS OF JUDICIAL SELECTION

While federal judges are appointed by the President of the United States with the advice and consent of the Senate,<sup>32</sup> state judges are selected via various elective and appointive systems.<sup>33</sup>

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long term. *Id.* See also Alfini & Gable, *supra* note 10; Caher, *supra* note 15 (quoting ABA then-president-elect A.P. Carlton, “[i]n those states where we are not going to get merit selection, we have to figure out how to have judicial elections which will result in the selection of a judge who is looked upon as impartial”).

31. 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, 312 (2002) (opining in a pre-*White* article, “Should the court strike down Minnesota’s restrictions on the speech of judicial candidates, some previous advocates of judicial ‘elections’ may find that they cannot stomach true, free judicial elections on par with the competitiveness, rhetoric, attacks, partisanship, and promises of other political campaigns”); Tony Mauro, *Rulings in Contentions Cases Mark End of High Court Term*, AM. LAW. MEDIA, (“[The Court’s decision in *White*] is definitely going to make judicial elections worse than they are now” (quoting Professor Roy Schotland of Georgetown University Law Center)). For more regarding merit selection, see *infra* notes 36–38 and accompanying text.

32. U.S. CONST. art. II, § 2.

33. See, e.g., PATRICK M. MCFADDEN, AM. JUDICATURE SOC., ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 5–6 (1990) (“Several states incorporate features from more than one system, and many employ several systems at once. Different levels of a state’s judiciary are likely to be selected in different ways—supreme court justices under one system, for example, and trial court judges in another. Some states vary their systems geographically, using one system for some counties or districts and another system for others. And perhaps most important, many states use one method to make initial appointments, another to determine continuance in office, and yet a third to fill vacancies

State judicial elective systems are of two basic types: partisan and nonpartisan. Partisan judicial elections contain the same basic ingredients as any other type of election. Candidates may first have to run in a primary to earn a party nomination. In the succeeding general election, each candidate's party affiliation is displayed on the ballot.<sup>34</sup>

In nonpartisan elections, "names of judicial candidates . . . appear on the ballot without party labels. There may be a primary election, followed by a general election, but in no instance is an individual directly identified with a political party."<sup>35</sup>

Appointive systems exist in various forms. Legislative appointment, whereby the state legislature controls judicial appointments, is extremely rare. Executive appointment, whereby an elected official, typically the Governor, wields unfettered power with no formal input from any source, is also rare. In the more common executive appointment scheme, the Governor is given the power to fill vacancies on an interim basis for unexpired terms.

Most appointive systems are adaptations of what is known as merit selection. Merit selection plans typically include an independent nominating commission that reviews and evaluates the qualifications of candidates for vacancies and submits a list of a prescribed number of nominees to the chief executive (i.e., Governor or Mayor). The chief executive then selects the nominee from the list provided by the nominating commission. The requirement that the appointment be made from the short list provided to the appointing authority is a distinguishing feature of a bona fide merit selection system.

A merit selection system is different from a basic "screening" system. In a "screening" system, the screening commission merely determines whether candidates are "qualified" or "approved," and

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caused by the retirement, incapacity or death of an incumbent."); Martha W. Barnett, *The 1997-98 Florida Constitution Revision Commission: Judicial Election or Merit Selection*, 52 FLA. L. REV. 411, 412 (2000) ("A variety of methods are used to select state judges, ranging from partisan elections to merit selection and retention. Each state has its own unique system.").

34. See, e.g., PATRICIA A. GARCIA, ROADMAPS: JUDICIAL SELECTION 8 (1998) ("In a partisan election, judicial candidates usually run initially in a party primary to gain nomination. Subsequently, voters participate in a general election, in which a candidate's party affiliation is indicated on the ballot."); KILPATRICK STOCKTON LLP, THE SELECTION OF STATE COURT JUDGES: REVIEW OF PRIMARY METHODS AND PRINCIPAL IMPLICATIONS, Dec. 12, 2001, at 15 ("In a partisan election system, judicial candidates and sitting judges who desire an additional term campaign for election or reelection, as the case may be, similar to any other political candidate. There are some differences from non-judicial elections in many states, and there are variations among the states that still employ the partisan elections method, but the basic method is popular voting between competing candidates, with party affiliation prominently displayed on the ballot.").

35. Garcia, *supra* note 34, at 8.

the appointing authority is then free to choose from the entire list of qualified candidates. Screening commissions remove the unqualified candidates, while nominating commissions present only the most qualified ones. Some plans require that the legislature confirm the candidate selected by the appointing authority.

At the end of the judge's term there is a retention election or a reappointment process aided increasingly by "judicial performance review/evaluation" devices to assist the nominating committee and the appointing authority.<sup>36</sup> Retention elections are often used in full-scale merit selection systems. Retention elections were designed as a way to make judges accountable to the citizenry by allowing a popular vote on the performance of a judge selected via a merit system.<sup>37</sup> In these elections, there is no opponent and voters are asked solely to vote "yes" or "no" whether the incumbent judge should remain on the bench. Once again, the presence of "judicial performance review/evaluation" devices and/or "voters' guides"<sup>38</sup> to assist the voters are becoming more common.

### A. Judicial Selection in New York State

Judicial selection in New York State is a hodgepodge of elections and appointments.<sup>39</sup> Most judges in the state are elected.<sup>40</sup> Supreme Court elections are especially unusual.<sup>41</sup> Party leaders organize petitions to nominate their delegates to a judicial nominating convention. The delegates, who usually run unopposed, are elected at a primary in September.<sup>42</sup> Shortly thereafter at the nominating convention, the delegates typically ratify the party's

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36. See, e.g., A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643 (1998) (observing that judicial performance reviews, described as a growing trend, were intended for the self-improvement of the judge, as well as to educate the electorate about the judge). For more regarding judicial performance evaluation, see *infra* note 73.

37. See, e.g., Larry Aspin, *Trends in Judicial Retention Elections, 1964-1998*, 83 JUDICATURE 79 (1999); Hon. B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429 (2001).

38. See, e.g., SARA MATHIAS, AM. JUDICATURE SOC., *ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS* 18 (1990); Cynthia Canary, *Know Before You Go: A Case for Publicly Funded Voters' Guides*, 64 OHIO ST. L.J. 81 (2003).

39. See *infra* p. 802 (chart of New York State judicial selection methods).

40. See *supra* note 2.

41. See, e.g., Eaton, *supra* note 18. The New York State Supreme Court is actually the state's highest level trial court. The state's highest court is the Court of Appeals.

42. See N.Y. ELEC. LAW §§ 6-124, 6-126. In fact, the New York City Board of Elections does not even regularly keep records of the delegates' names. See Eaton, *supra* note 18.

chosen slate of judicial candidates, and those are the names that appear on the ballot at the general election.<sup>43</sup>

For courts of limited jurisdiction, New York uses a primary process where candidates run in partisan primaries to get their party's nomination. Candidates must obtain a specified number of petition signatures in order to appear on the ballot for the primary.<sup>44</sup>

The judicial appointment process in New York State also takes various forms. Judges of the Court of Appeals and the New York City Family and Criminal Courts are nominated by nominating commissions. The Commission on Judicial Nomination, created pursuant to constitutional amendment in 1977, recommends a list of candidates to the Governor for vacancies on the Court of Appeals.<sup>45</sup> The Mayor's Advisory Committee on the Judiciary, created by Mayoral Executive Order in 1978, recommends a list of candidates to the Mayor for vacancies on the New York City Family and Criminal Courts.<sup>46</sup>

Screening commissions assist the Governor in appointing judges to the Appellate Division,<sup>47</sup> the Court of Claims, and to fill interim vacancies on the Family Court (outside New York City), Surrogate's Court, and County Court. Judges of the Appellate Division are selected by the Governor from among the Supreme Court Justices of the State deemed qualified by the Governor's Judicial Screening Committee for the particular Judicial Department.<sup>48</sup> Judges of the Court of Claims<sup>49</sup> are appointed by the Governor following recommendations made by the Governor's Statewide Judicial Screening Committee. Finally, gubernatorial interim appointments to the Family Court (outside New York City), Surrogate's Court, and County

43. In New York County, the Democratic Party uses a screening panel that reports up to three names for every Supreme Court vacancy, and consideration is restricted to those names. In March 2004, the Brennan Center for Justice of New York University School of Law filed a lawsuit in federal court alleging that the New York State system of electing state Supreme Court justices is unconstitutional. *See, e.g.,* Anthony M. DeStefano, *Federal Lawsuit: Judicial Election Reform Sought*, NEWSDAY, March 19, 2004, at A22.

44. N.Y. ELEC. LAW §§ 6-118, 6-136, 6-160. The political parties in some counties have set up screening panels. The New York County Democratic Party uses a screening panel for Civil Court vacancies, though direct ballot access is available and candidates who were not reported out by the Party have run and won the Democratic nomination.

45. N.Y. CONST. art. 6, § 2.

46. New York Mayor's Exec. Order No. 8, Mar. 4, 2002 (on file with the University of Michigan Journal of Law Reform) (reestablishing the Mayor's Advisory Committee on the Judiciary). The Mayor also has the authority to appoint judges on an interim basis, as needed, to the New York City Civil Court.

47. The jurisdiction of the Appellate Division is outlined in N.Y. C.P.L.R. 57; N.Y. CONST. art. 6, § 5; N.Y. FAM. CT. ACT § 111; N.Y. CT. CL. ACT § 24.

48. N.Y. CONST. art. 6, § 4(c).

49. N.Y. CT. CL. ACT.

Court are made following recommendations by the Governor's County Judicial Screening Committee for the particular county.<sup>50</sup>

### NEW YORK STATE: JUDICIAL SELECTION BY COURT

COURT OF APPEALS				
Candidates nominated by Commission on Judicial Nomination				
Governor Appoints				
Confirmed by Senate				
APPELLATE DIVISION				
Appointed by Governor				
SUPREME COURT	COUNTY COURT	FAMILY COURT	SURROGATE'S COURT	COURT OF CLAIMS
Elected	Elected	Outside NYC: Elected  NYC: Mayor Appoints (See NYC Criminal Court)	Elected	Appointed by Governor
NYC CIVIL COURT	NYC CRIMINAL COURT	CITY COURT	DISTRICT COURT	TOWN & VILLAGE JUSTICE COURTS
Elected	Candidates nominated by Mayor's Advisory Comm. on the Judiciary  Mayor Appoints	Elected	Elected	Elected

50. See Governor's Exec. Order No. 10.1 (establishing judicial screening committees to assist the Governor with appointments to the Appellate Division, Court of Claims, and, on an interim basis, to the Family Court (outside New York City), Surrogate's Court, and County Court).

## II. COMPARISON OF ELECTED AND APPOINTED JUDGES IN NEW YORK CITY

Beyond the selection process used, and its impact on accountability, independence, and public trust and confidence in the judiciary, the question becomes whether there is a difference in the nature or quality of the yield by election versus merit selection. Supporters of an elected judiciary often try to steer the debate into this area. This shift in focus serves to deflect the process issue and the multitude of complaints about the role of politics, and makes for a harder challenge for merit selection devotees—to prove that the judges yielded by merit selection are better, let alone different, than those yielded by election. That challenge begs the question of how best to compare the judges produced by election and merit-selection. Is there agreement as to the attributes and background characteristics that a judge should possess? If so, then how to evaluate and assess whether someone has the requisite qualifications? The other point of comparison concerns conduct once on the bench. How best to measure judicial performance? What are the yardsticks by which we can, or should, evaluate judicial behavior, and how best to conduct that assessment?

In 1992, the Fund for Modern Courts published a report on the New York City judiciary, *Characteristics of Elected Versus Merit-Selected New York City Judges, 1977–1992*, by M. L. Henry, Jr. In that report, Henry compared elected and merit-selected judges on the basis of “ascriptive attributes” and “personal characteristics.”<sup>51</sup> Henry analyzed the 369 judges selected (181 elected and 188 merit-selected) to the three entry-level New York City trial courts (Family, Criminal, and Civil) from 1977 through 1992.<sup>52</sup> The variables Henry

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51. M. L. Henry, Jr., *The Fund for Modern Courts, in CHARACTERISTICS OF ELECTED VERSUS MERIT-SELECTED NEW YORK CITY JUDGES, 1977–1992*, at 2 (1992).

52. In New York City, the Mayor’s Committee on the Judiciary recommends judges for the Family and Criminal Courts, and the Mayor makes his/her selection from that list. The Committee was created by Executive Order in 1978 by then-Mayor Edward I. Koch. Mayors Dinkins, Giuliani and Bloomberg all have continued the Order, albeit with some revisions. The Committee consists of nineteen members. The Mayor selects nine, and receives nominations for the remaining ten places: four from the Chief Judge of the Court of Appeals, two each by the Presiding Justices of the Appellate Division for the First and Second Departments, and one each by the Deans of two New York City law schools. The Mayor’s approval is necessary for those nominees to become members of the Committee. The Order provides that the Mayor must fill judicial vacancies from a list of candidates submitted by the Committee. New York City Civil Court judges are elected through a primary process. To enter a party primary, a candidate must obtain a specified number of signatures from

examined were age, gender, minority status, undergraduate and legal education, prior career experience, party affiliation, elevation to higher judicial office, and disciplinary incidents. Henry concluded that “merit selection produces a younger, more representative, better educated, highly qualified and more politically diverse judiciary.”<sup>53</sup> Five years later, Modern Courts again undertook a comparison of elected and merit-selected judges in New York City, this time for the period 1992–1997.<sup>54</sup> The study focused on gender, minority status, and party affiliation, and concluded that “both the elective system and the appointive system in New York City afforded women and minorities a greater opportunity to become Family, Criminal and Civil Court judges than was the case during the fifteen year period from 1977 to 1991.”<sup>55</sup> The report also noted that “women and minorities reached the bench in somewhat greater numbers via the elective system than via appointment during the [period from 1992–1997].”<sup>56</sup>

It has been ten years since the Henry report and a quarter century from the first year he analyzed. Judicial elections are presently under a microscope as observers, policy makers, and the media grapple with increasingly contentious and costly judicial campaigns and the meaning of *White* and *Spargo*.<sup>57</sup> The time is ripe to collect and analyze data to help inform the election versus merit selection debate.

Again, the key question is how best to evaluate the impact that the method of selection has on the nature and quality of the judiciary. The place to begin is by articulating the goal of judicial selection. A pair of commentators recently suggested that the objective is to create a “qualified, inclusive and independent

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members of that party. If the candidate receives a majority of the votes cast at the primary, his or her name will appear on the ballot at the general election.

The qualifications and eligibility requirements for judges of the Family, Criminal, and Civil Courts of New York City are identical. A candidate must be a lawyer admitted to the Bar of New York State for a minimum of ten years; be under the age of seventy; and be a resident of New York City. N.Y. CONST. art. VI, §§ 13, 15, 20, 25; N.Y. FAM. CT. ACT § 124; N.Y. CRIM. CT. ACT § 22; N.Y. CITY CIV. CT. ACT § 102-a. The term of office is also the same (ten years).

53. Henry, *supra* note 51, at 16.

54. GARY S. BROWN, *THE FUND FOR MODERN COURTS, NEW YORK CITY BENCH BECOMING INCREASINGLY DIVERSE* (1998).

55. *Id.* at 5.

56. *Id.*

57. See Michael E. Solimine, *The False Promise of Judicial Elections in Ohio*, 30 CAP. L. REV. 559, 559 (2002) (“The popular press seems to be paying increasing attention to [judicial elections].”).

judiciary.”<sup>58</sup> So, the task is to compare elected versus merit-selected judges on those variables.<sup>59</sup> Which method is more likely to produce a “qualified, inclusive, and independent judiciary”?

### A. Qualifications

1. *At Time of Appointment*—Do different selection processes yield judges with different qualifications? How can we evaluate whether a judge is qualified?<sup>60</sup> How can we evaluate whether someone possesses an amalgam of the presumably necessary personal attributes like judicial temperament, integrity, intellect, and industriousness? Assuming *arguendo* that there is agreement as to the necessary, let alone ideal, characteristics of a judge,<sup>61</sup> how does one evaluate whether someone possesses them, given that any such evaluation will be primarily subjective?<sup>62</sup> One approach to

58. See Alfini & Gable, *supra* note 10, at 693. The authors also note that the phrase “qualified, inclusive, and independent judiciary” is used throughout the American Bar Association’s Year 2000 Standards. *Id.*

59. Another scholar suggests comparing merit-selected judges with elected judges on three dimensions: gender and racial diversity; background characteristics; and behavior on the bench. See Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729 (2002).

60. The American Bar Association’s Commission on the 21st Century Judiciary recently recommended pre-judicial training or certification programs for attorneys who aspire to the bench. See *supra* note 30.

61. Typical criteria include “integrity and moral courage, legal ability and experience, intelligence and wisdom, and a determination of whether the candidate would be deliberate and fair-minded in reaching decisions, whether the candidate would be prompt and industrious in performing judicial duties, whether the candidate’s personal habits and outside activities are compatible with judicial office, and whether the candidate would be courteous and considerate on the bench.” Jona Goldschmidt, *Selection and Retention of Judges: Is Florida’s Present System Still the Best Compromise?*, 49 U. MIAMI L. REV. 1, 29 (1994). The criteria suggested by the American Bar Association are integrity, legal knowledge and ability, professional experience, judicial temperament, diligence, health, financial responsibility, and public service. See JAMES D. CAMERON, ABA JUDICIAL ADMINISTRATION DIVISION, GUIDELINES FOR REVIEWING QUALIFICATIONS OF CANDIDATES FOR STATE JUDICIAL OFFICE, Preface (1983). See also MARLA N. GREENSTEIN, AM. JUDICATURE SOC., HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS 58 (1985) (listing, *inter alia*, the following evaluative criteria: impartiality, industry, integrity, professional skills, community contacts, social awareness).

62. Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207, 253 (1987) (“There are no ready-made measures to quantify judicial temperament, impartiality, intelligence, tact, and the other qualities that constitute judicial excellence.”) (citing Mary L. Volcansek, *The Effects of Judicial-Selection Reform: What We Know and What We Do Not*, in THE ANALYSIS OF JUDICIAL REFORM 80 (P. Dubois ed., 1982) (“[C]omparing the quality of judicial personnel . . . is most difficult in the absence of objective, quantifiable attributes of the good judge. Typically,



objectifying the evaluation of qualifications is to analyze and compare certain identifiable and quantifiable "background characteristics."<sup>63</sup> This approach involves looking at each judge when s/he was appointed. What was his/her educational background,<sup>64</sup> prior experience, or age? Does s/he bring to the bench the value of diversity?<sup>65</sup> Most studies comparing the inherent qualifications of elected and merit-selected judges have found few discernable differences.<sup>66</sup>

2. *Performance on the Bench*—Another approach to assessing qualifications is to examine "behavior on the bench."<sup>67</sup> Here, the focus is on qualifications as exhibited by the way judges perform on the bench, as opposed to qualifications at the time of appointment. Essentially, we move from a prospective to an evaluative

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definitions of the good judge rely on subjective factors such as personal integrity, intelligence, legal ability, and judicial temperament. These are difficult characteristics to measure within the current methodological framework of the social sciences.")).

63. Luke Bierman, *Beyond Merit Selection*, 29 *FORDHAM URB. L. J.* 851, 860 (2002) ("Merit selection in and of itself does not generate judges with significantly different characteristics than those judges selected by other means.").

64. See, e.g., Victor E. Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make? Selection Procedure in State Courts of Last Resort*, 5 *JUST. SYS. J.* 25, 32 (1979) ("[N]o method of selection consistently selects vastly more qualified judges where quality is measured by formal education."). But see Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 *JUDICATURE* 228, 231 (1987) (noting that merit-selected judges are slightly more likely to have attended prestigious law schools); Goldschmidt, *supra* note 61, at 43 ("[I]t appears that merit selection tends to produce more judges with a prestigious law background."); Henry, *supra* note 51.

65. For discussion and analysis of diversity and the New York State bench, see *infra* notes 79–112 and accompanying text.

66. See, e.g., Snyder, *supra* note 62, at 253–54 ("Those investigators who have attempted to compare the quality of appointed and elected judges have found no significant differences between them."); Goldschmidt, *supra* note 61 (noting the lack of hard evidence that merit selection yields better judges); Beverly B. Cook, *Should We Change Our Method of Selecting Judges?*, 20 *JUDGES J.* 20, 22 (Fall 1981) ("[Judges] who are appointed rather than elected do not differ in their political beliefs, intelligence, temperament, or conception of the judicial role."); Larry L. Berg et al., *The Consequences of Judicial Reform: A Comparative Analysis of the California and Iowa Appellate Court Systems*, 28 *W. POL. Q.* 263 (1975) (finding little support for the proposition that merit selected judges were more qualified than other judges); Flango & Ducat, *supra* note 64 (noting that very few differences between judges could be attributed to the way in which they were selected); Reddick, *supra* note 59, at 744 ("[T]here are no significant, systematic differences between merit-selected judges and other judges."); STUART NAGEL, *COMPARING ELECTED AND APPOINTED JUDICIAL SYSTEMS* (1973). But see RICHARD A. WATSON & RÖNDAL G. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR* 283 (1969) (observing that members of the bar rated appointed judges better than elected judges, and suggesting that merit plans "tend to eliminate the selection of very poor judges").

67. See Reddick, *supra* note 59. It is noteworthy that, "[h]istorically, there has been much less emphasis placed on a judge's actual performance on the bench after selection." Pelander, *supra* note 36, at 645.

assessment. Do selected or elected judges perform better?<sup>68</sup> How best to evaluate judicial performance? Once again, just as it is necessary to try to ascertain whether a potential judge has the requisite personal qualities, such as integrity and intelligence, so, too, is it necessary to try to assess whether a sitting judge has exhibited those attributes.<sup>69</sup> One can also attempt to examine judges' performance on the bench on the basis of somewhat more objective measures such as the quantity and quality of their published decisions, their rate of reversals from higher courts, their ability to organize and control their docket (commonly referred to as "case management"), and/or allegations of judicial misconduct.<sup>70</sup> Quite apart from the subjective evaluation of which type of judge performs better, we might ask whether they perform differently. Do they, for example, decide cases differently? To date, the studies have produced equivocal results.<sup>71</sup>

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68. Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 33 (1995) ("Existing empirical work suggests that the method of selection has little, if anything, to do with the overall quality of judges. However, some evidence supports the claim that judges chosen by some type of 'merit' system may perform more competently those functions generally considered the core of a judges responsibility than do judges chosen by other means.").

69. The 1994 amendment to the American Judicature Society Model Provisions recommended that merit plans include Commissions on Judicial Performance to evaluate judicial behavior on the bench. The Commissions, through a variety of devices, are to evaluate whether a judge has exhibited, *inter alia*, integrity, impartiality, temperament, legal knowledge, communication skills, and effectiveness in working with other participants in the court. See AMERICAN JUDICATURE SOCIETY, IMPLEMENTING A RETENTION EVALUATION PROGRAM: MODEL LEGISLATION (OR COURT RULES), MODEL PROVISIONS, PART 4 (1994). See also Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L.A. L. REV. 1375 (2001).

70. In a recent article, former Judge Penny White discusses the use of Judicial Performance Evaluations as a tool to improve the quality of justice and to inform the public about the judiciary. Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053, 1066 (2002). Judge White suggests using evaluation methods such as surveys and questionnaires, courtroom observations, videotaped proceedings, background investigations, interviews, analysis of caseload management data, disciplinary records, and health records. The factors to analyze in determining a judge's performance on the bench include integrity, freedom from impropriety and the appearance of impropriety, knowledge and understanding of the law, fairness, preparedness and punctuality, diligence, communication skills, managerial skills, and public and professional service. *Id.* at 1071-72. See also Andersen, *supra* note 69 (discussing judicial evaluation and the use of surveys (i.e., of jurors, litigants, witnesses, court staff, police and probation officers, and social service personnel), as well as non-survey sources of information (i.e., interviewing the judge, and reviewing the judge's disciplinary record, caseload management, and record of attending continuing legal education programs)); Alfani & Gable, *supra* note 10, at 704 (suggesting that judicial performance be evaluated with respect to preparation, attentiveness, and control over judicial proceedings; judicial management skills; courtesy to litigants, counsel and court personnel; public disciplinary sanctions; and quality of judicial opinions).

71. See, e.g., Solimine, *supra* note 57, at n.13 ("There is a considerable academic literature discussing how jurists picked by different systems among the American states decide arguably similar cases differently." (citing Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively:*

One more concrete way to measure “qualifications” is to analyze incidents of judicial discipline. As one commentator noted, “Merit selection proponents are convinced that the appointment process yields better qualified judges. By way of proof, they claim that discipline for judicial misconduct almost invariably involves elected, not appointed judges.”<sup>72</sup>

a. *Judicial Misconduct*—Henry’s 1977–1992 study examined “public sanctions” for New York City Civil Court judges (elected) and New York City Criminal and Family Court judges (appointed). The New York State Commission on Judicial Conduct (CJC) is charged with investigating and adjudicating allegations of judicial misconduct.<sup>73</sup> If the CJC sustains the charges, it can choose to impose one of three forms of public discipline: admonishment, censure, or removal.<sup>74</sup> Henry found a higher incidence of judicial discipline meted out against elected judges.

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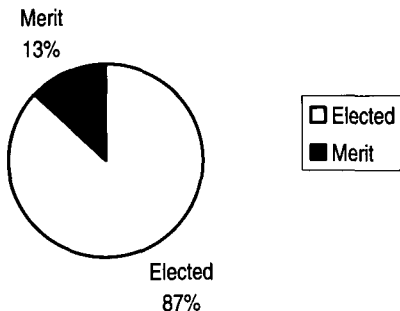
*The View from the American States*, 48 POL. RES. Q. 5 (1995)); Richard L. Hasen, “High Court Wrongly Elected”: A Public Choice Model of Judging and Its Implications for the Voting Rights Act, 75 N.C. L. REV. 1305 (1997)); Gerald S. Gryski et. al., *Models of State High Court Decisionmaking in Sex Discrimination Cases*, 48 J. POL. 143 (1986); Owen G. Abbe & Paul S. Herrnson, *How Judicial Election Campaigns Have Changed*, 85 JUDICATURE 286, 295 (2002) (“Judicial decision-making research shows that in controversial cases, such as those involving capital punishment, elections motivate justices to vote strategically in order to minimize electoral risks.” (citing Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 428 (1992)); Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485 (1995); Paul Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. POL. 1206 (1997); Stephen Bright & Pat Keenan, *Judges and the Politics of Death*, 75 B.U. L. REV. 759, 793 (1995) (finding that judges were more likely to uphold the death penalty in the period just prior to judicial elections); Ronald Schneider & Ralph Maughan, *Does the Appointment of Judges Lead to a More Conservative Bench? The Case of California*, 5 JUST. SYS. J. 45, 54–55 (1979) (finding slight evidence that appointed judges are more liberal than elected judges); F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election versus Appointment of State Judges*, 28 J. LEGAL STUD. 205 (1999). *But see* Nagel, *supra* note 66 (finding no meaningful differences in behavioral tendencies); Allen Lanstra, Jr., *Does Judicial Selection Method Affect Volatility?: A Comparative Study of Precedent Adherence in Elected State Supreme Courts and Appointed State Supreme Courts*, 31 SW. U. L. REV. 35 (2001) (finding no appreciable differences between elected and appointed judges’ adherence to stare decisis); Snyder, *supra* note 62, at 259 (“Studies of judicial decision have discerned no significant differences between judges chosen by appointment and those chosen by election.”); Burton M. Atkins & Henry R. Glick, *Formal Judicial Recruitment and State Supreme Court Decisions*, 2 AM. POL. Q. 427 (1974); Flango & Ducat, *supra* note 64, at 39; Goldschmidt, *supra* note 61, at 44 (noting that studies fail to provide evidence of a correlation between selection method and decisionmaking).

72. Judith L. Maute, *Selecting Justice in State Courts; The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1225–26 (2000) (citing an October 11, 1999 telephone conversation with Harold Conyers, Oklahoma State Court Administrator).

73. N.Y. CONSOL. LAWS ch. 30, art. 2-A.

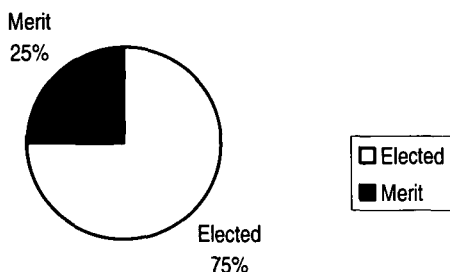
74. “The New York State Commission on Judicial Conduct is the disciplinary agency designated by the State Constitution to review complaints of misconduct against judges of the State Unified Court System.” New York State Commission on Judicial Conduct, 2002 Annual Report. “The Commission has the authority to receive and review written complaints of misconduct against judges, initiate complaints on its own motion, conduct investigations, file

NYC ELECTED V. MERIT SELECTED JUDGES  
 DISCIPLINED FOR MISCONDUCT 1977-1992  
 (n=9)



A review of CJC data for 1992-2002 reveals that elected judges again far surpass their appointed colleagues in incidents of judicial discipline.

NYC ELECTED V. MERIT SELECTED JUDGES  
 DISCIPLINED FOR MISCONDUCT 1992-2002  
 (n=16)



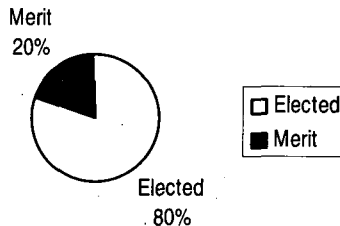

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Formal Written Complaints and conduct formal hearings thereon, subpoena witnesses and documents, and make appropriate determinations as to dismissing complaints or disciplining judges within the state unified court system. The authority is derived from Article 6, Section 22, of the Constitution of the State of New York, and Article 2-A of the Judiciary Law of the State of New York." *Id.*

. . . .

An examination of “private discipline” for the same ten-year period reveals similar findings. The CJC issues “letters of caution” when it determines that misconduct is established but is not of the sort that warrants public discipline.<sup>75</sup> There were sixteen letters of caution sent to New York City judges in the period 1992–2002. Twelve, or 75%, were sent to Civil Court judges. The overall twenty-five-year picture reveals that elected judges were substantially more likely to be disciplined for judicial misconduct than their appointed counterparts.<sup>76</sup> These findings are consistent with the results of similar studies in other jurisdictions.<sup>77</sup> To many, these results will come as no surprise given that in one of the seminal studies of judicial selection, researchers found that merit selection yielded fewer “very poor” judges.<sup>78</sup> From that finding, one can extrapolate that “very poor” judges may well be more likely to be the subjects of judicial discipline.

NYC ELECTED V. MERIT SELECTED JUDGES  
DISCIPLINED FOR MISCONDUCT 1977–2002  
(n=25)



75. “A *Letter of Caution* is a . . . communication to a judge upon conclusion of a formal disciplinary proceeding and a finding that the judge’s misconduct is established. . . . Where the Commission determines that a judge’s conduct does not warrant public discipline, it will issue a cautionary letter, privately calling the judge’s attention to ethical violations that should be avoided in the future.” *Id.* at 19.

76. In raw numbers, from 1977–2002, 268 judges were appointed and 314 were elected.

77. See, e.g., Barnett, *supra* note 33, at 423 (observing that elected judges comprised the overwhelming majority of judges disciplined by the Florida Judicial Qualifications Commission).

78. Watson & Downing, *supra* note 66, at 283.

### B. Inclusiveness

While diversity also relates to whether a judge is “qualified,” it encompasses directly what the variable of “inclusiveness” is intended to measure. Which system does more to promote a diverse judiciary? We begin with the proposition that the judiciary should be diverse.<sup>79</sup> As stated succinctly by H. T. Smith, then-President of the National Bar Association, “Judicial diversity is more important today than ever.”<sup>80</sup> Several studies have shown that merit selection may increase the diversity of the bench.<sup>81</sup> What about the New York

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79. See, e.g., Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997); Archibald R. Murray, *The Road to the Judiciary: Navigating the Judicial Selection Process*, 57 ALB. L. REV. 973, 974 (1994) (citing New York State Chief Judge Judith S. Kaye highlighting the importance of diversity within the judiciary); Luke Bierman, *Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*, 60 ALB. L. REV. 339 (1996) (alluding to the many pronouncements by New York Governor Mario M. Cuomo about his objectives to enhance the diversity of the Court of Appeals); Nancy J. King, *Batson for the Bench? Regulating the Peremptory Challenges of Judges*, 73 CHI.-KENT L. REV. 509 (1998) (referring to a finding in 5 Report of the New York State Judicial Commission on Minorities: Appendix—Staff Reports and Working Papers 28 (1991) that 53% of white judges and 99% of minority judges stated that diversity was an important factor with respect to judicial selection). The ABA Commission on the 21st Century Judiciary recently issued a series of recommendations, including that steps be taken to increase the number of minority judges to mirror more accurately their percentage of the population. See *supra* note 30. See also Patricia Manson, *Judiciary Pushed to ‘Brink of Crisis,’* CHI. DAILY L. BULL., Mar. 14, 2003, at 1.

80. H. T. Smith, *Toward a More Diverse Judiciary*, ABA JOURNAL (July 1995). See also Carol DeMare, *Bar Looks for Diversity on Bench*, THE TIMES UNION, Aug. 29, 2002, at B3, (“[i]f we are to bolster public trust and confidence in the justice system, then those who use the courts need to be able to look up at the bench and see a judiciary that reflects gender diversity and the wonderful mosaic of ethnic and racial groups that exist in the urban centers, suburbs, and villages of New York.”) (quoting New York State Bar Association President Lorraine Power Tharp); Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Benches, 1985 and 1999*, 85 JUDICATURE 84, 85 (2001) (arguing that diversity on the bench maintains and increases the legitimacy of the nation’s judicial tribunals).

81. Lawrence H. Averill, Jr., *The Arkansas Courts: Observations on the Wyoming Experience with Merit Selection of Judges: A Model for Arkansas*, 17 U. ARK. LITTLE ROCK L. REV. 281 (1995) (advocating merit selection as the best way to enhance judicial diversity); Barnett, *supra* note 33, at 419 (“Merit selection and retention . . . are viewed as a better way to facilitate the addition of minorities and women to the bench.”); Bierman, *supra* note 63, at 856 (“Merit selection may also increase diversity on the bench . . . Merit selection, focusing more on qualifications than on political alliances, would permit nontraditional candidates for the bench to stand on their own achievements.”); GOVERNMENT ETHICS REFORM FOR THE 1990s, THE COLLECTED REPORTS OF THE NEW YORK STATE COMMISSION ON GOVERNMENT INTEGRITY, at 296 n.70 (Bruce A. Green ed., 1991) [hereinafter GOVERNMENT ETHICS REFORM] (“[T]o the extent statistical evidence exists, it supports the proposition that, in New York and across the nation, appointive processes attract a more diverse pool of judicial candidates than do elective processes.” (citing witness testimony at public hearings)); Garcia, *supra* note 34, at 16; Goldschmidt, *supra* note 61, at 41 (“[W]hen coupled with the trend to require that nominating commissions take diversity on the bench into account

City judiciary? Henry compared the diversity of the judiciary produced via appointment (Family and Criminal Courts) with that produced by election (Civil Court). The tables below include Henry's data from 1977–1991, new data for 1992–2002, and the full twenty-five year picture from 1977–2002.

DIVERSITY AND THE APPOINTED & ELECTED NEW YORK CITY  
JUDICIARY (NEW YORK CIVIL COURT, CRIMINAL  
COURT & FAMILY COURT)

1977–1991

Appointed New York City Family & Criminal Court Judges (188)		Elected New York City Civil Court Judges (181)	
Men	130 (69%)	Men	134 (74%)
Women	58 (31%)	Women	47 (26%)
Appointed New York City Family & Criminal Court Judges (188)		Elected New York City Civil Court Judges (181)	
African American	28 (15%)	African American	29 (16%)
Latino	12 (6%)	Latino	5 (3%)
Asian	1 (.5%)	Asian	2 (1%)
Overall	41 (22%)	Overall	36 (20%)

1992–2002

Appointed New York City Family & Criminal Court Judges (80)		Elected New York City Civil Court Judges (133)	
Men	47 (59%)	Men	66 (50%)
Women	33 (41%)	Women	67 (50%)
Appointed New York City Family & Criminal Court Judges (80)		Elected New York City Civil Court Judges (133)	
African American	11 (14%)	African American	32 (24%)
Latino	10 (13%)	Latino	20 (15%)
Asian	3 (4%)	Asian	1 (.1%)
		Other	1 (.1%)
Overall	24 (30%)	Overall	54 (41%)

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when making their nominations, it is likely that far greater numbers of minority and women judges will take the bench under a merit plan than ever before.”); Madison B. McClellan, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection Methods in Florida*, 43 FLA. L. REV. 529, 550 (1986);. *But see* Maute, *supra* note 72 (stating that data on the diversity effects of merit selection is equivocal).

1977–2002

Appointed New York City Family & Criminal Court Judges (268)		Elected New York City Civil Court Judges (314)	
Men	177 (66%)	Men	200 (64%)
Women	91 (34%)	Women	114 (36%)
Appointed New York City Family & Criminal Court Judges (268)		Elected New York City Civil Court Judges (314)	
African American	39 (15%)	African American	61 (19%)
Latino	22 (8%)	Latino	25 (8%)
Asian	4 (1.5%)	Asian	3 (1%)
		Other	1 (.3%)
Overall	65 (24%)	Overall	90 (29%)

An examination of the past quarter century of judicial selection in New York City (1977–2002) reveals that election and appointment yielded comparable numbers of women judges (36% and 34%). Elections produced a more racially diverse judiciary (29% versus 24%), with the difference being the greater number of elected African American judges (19% versus 15%).

More telling, though, are the numbers for the immediate past decade. While the number of appointed judges who were women increased from 31%, during the period 1977–1991, to 41%, during 1992–2002, women comprised 50% of the elected judges, a number more nearly resembling the percentage of women in the New York City population.<sup>82</sup> The racial diversity data paints a similar picture. While the appointed judiciary increased from 22% to 30% people of color, the elected judiciary increased from 20% to 41%. Once again, the most significant difference is with respect to African Americans. While the number of African American appointed judges remained constant from 1977–1991 and 1992–2002 (15% and 14%), the number of elected African Americans rose from 16% to 24%.

It remains the case that New York City's judiciary does not mirror the population it serves. Although the 41% elected judges of color is significantly higher than the 30% appointed judges, it certainly does not reflect the New York City population, which, according to the most recent census, is estimated to be 64%

82. According to the United States Census 2000, 53% of New York City residents are women.



people of color.<sup>83</sup> Most striking is the absence of Asian judges, elected or appointed, on the New York City bench. While Asians make up 10% of New York City's population,<sup>84</sup> only three of the 314 judges elected to the bench in the past twenty-five years, and only four of the 268 appointed judges, were Asian. On the face of it, it appears that elections promote a more diverse judiciary. Yet, putting on hold the myriad problems associated with elections generally,<sup>85</sup> the diversity variable must be more fully analyzed. What is the picture for the entire state?

A review of statewide data reveals that, outside of New York City,<sup>86</sup> the New York judiciary profoundly lacks diversity.<sup>87</sup> According to data from the New York State Office of Court Administration (OCA) for August 2002, the state's 1,233 judges are 87% white and 13% minority.<sup>88</sup> Yet, the United States 2000 Census reports that minorities comprise 37% of the New York State population (African American 16%, Latino 15%, and Asian 6%). The OCA data further reflects that 26% of the state's judges are women.<sup>89</sup> The United States Census 2000 reports that women comprise 52% of the New York State population.

83. United States Census 2000.

84. *Id.*

85. See *infra* notes 160–171 and accompanying text for discussion of the problems endemic to judicial elections.

86. Many have noted that the extent to which the New York State judiciary is at all diverse is almost entirely a function of the New York City judiciary. See, e.g., DeMare, *supra* note 80, at B3 (“[The] majority of women and minority judges are found in New York City.”); Tom Perrotta, *Inequalities for Women Judges Outside City Remain, Report Says*, N.Y.L.J., July 29, 2002, at 1.

87. See, e.g., Murray, *supra* note 79, at 987 (“As of January 29, 1992, New York State did not have a female judge in the 4th, 6th or 7th Judicial Districts, encompassing almost thirty counties. It has changed. We now have one woman in the 3rd Judicial District. We now have one woman in the 5th Judicial District.”); Perrotta, *supra* note 86 (“Though the role of women in the courts has increased markedly in the last 15 years, there are still glaring inequalities, such as the lack of women judges outside of New York City, according to a new report by the New York State Committee on Women in the Courts.”). Regarding the lack of Latino representation on the bench, see, for example, Tom Perrotta, *Study: New York is Among Worst in Appointing Hispanics to Bench*, N.Y.L.J., March 19, 2002, at 1; Tom Perrotta, *Second Department Gets First Hispanic*, N.Y.L.J., June 12, 2002, at 1. A gubernatorial task force concluded in 1992 that New York's judicial election process resulted in the election of disproportionately few minority judges. See, e.g., Gary Spencer, *Judicial Election Reforms Urged; Governor's Task Force Seeks to Add More Minorities, Women*, N.Y.L.J., February 13, 1992, at 1. More than a decade later, the lack of women and minority judges compelled the New York State Bar Association to create the Task Force on Increasing Diversity in the Judiciary. See DeMare, *supra* note 80.

88. NEW YORK STATE OFFICE OF COURT ADMINISTRATION, MINORITY PARTICIPATION AMONG MEMBERS OF THE JUDICIAL WORKFORCE (1996–2002) [hereinafter MINORITY PARTICIPATION] (on file with author).

89. If New York City Civil, Criminal, and Family Courts are removed from the equation, the percentage of women judges drops to 20%. *Id.*

As recently as 1992, the Governor's Task Force on Judicial Diversity found that only 12% of state Supreme Court justices were women and that there was not a single woman Supreme Court justice in four of the state's twelve judicial districts.<sup>90</sup> The Task Force also observed a complete absence of judges of color in many counties that had large African American, Latino, and Asian populations.<sup>91</sup>

A decade later the judiciary is in some respects more closely beginning to resemble the population it serves, but there is still a long way to go. A recent study by the Puerto Rican Legal Defense and Education Fund revealed that "New York State had the lowest percentage of Hispanic state court judges—1.6 percent—among states with the 10 largest Hispanic populations as of 2000."<sup>92</sup>

The situation with respect to women judges is similar—it has improved but does not nearly mirror the percentage of women in the population. A 2002 report, "Women in the Courts: A Work in Progress," by the New York State Committee on Women in the Courts, found widespread lack of female representation on the bench. More specifically, the report found no women elected to the state Supreme Court in the 4th judicial district from 1998–2001, only one woman currently elected to the state Supreme Court in the 3d judicial district, and only three women among the thirty-two Supreme Court justices in the 9th judicial district.<sup>93</sup> In August 2002, the New York State Bar Association created the Task Force on Increasing Diversity in the Judiciary to improve gender, racial, and ethnic diversity on the bench at all levels. The Task Force was formed, in part, to address the chronic underrepresentation of women and minorities on the state Supreme Court,<sup>94</sup> Surrogate's Court, Family Court, and County Court.<sup>95</sup> Even more

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90. See Spencer, *supra* note 87.

91. *Id.* (referring to Richmond, Orange, Monroe and Erie counties).

92. Perrotta, *supra* note 87. See also, Carlos G. Ortiz, *Put More Hispanics on Appellate Court*, N.Y.L.J., April 26, 2001, at 2 (noting that Hispanics number almost three million people in New York State, approximately 15% of the population, yet none of the fifty-seven judges of the Appellate Division, and only two of the more than sixty Court of Claims judges, were Hispanic). In March 2002, Governor Pataki appointed a Latino to the Appellate Division, First Department, and in June 2002, he appointed the first Latino judge to the Appellate Division, Second Department. *Id.*

93. See Perrotta, *supra*, note 86.

94. At the time the formation of the Task Force was announced, minorities comprised 14% of the 315 state Supreme Court justices, and women made up 17%.

95. At that time, "only 18% of the state's Surrogate's Court judges, approximately one-third of Family Court judges outside the city of New York, and 9 percent of all County Court judges [were] women." *NY State Bar Association Forms Task Force to Study Diversity on the Bench*, DAILY RECORD, September 3, 2002.

recently, New York State Bar Association President Lorraine Power Tharp noted that while the situation had improved, “there were still 28 (of 62) counties that had no women judges.”<sup>96</sup>

The Franklin H. Williams Judicial Commission on Minorities (Commission) was created in 1988, in part “to review the selection processes for elected and appointed Judges to determine which processes resulted in greater minority representation on the bench.”<sup>97</sup> The Commission’s 2000 Annual Report contains statewide data concerning minority representation on the bench.

New York’s Supreme Court is the state’s highest level trial court. Only justices of the Supreme Court are eligible for appointment to the Appellate Division.<sup>98</sup> Of the state’s 344 Supreme Court justices, 291 (84.6%) are white and 52 (15.1%) are minority.<sup>99</sup> If New York City Supreme Court justices are removed from the equation, the white majority becomes 87.5%.<sup>100</sup> The most recent census reports that minorities comprise 37% of New York State’s population (16% Black; 15% Latino; and 6% Asian). The numbers are even starker for Surrogate’s Court.<sup>101</sup> All 22 of the state’s elected Surrogates are white.

An examination of other statewide elected judicial offices reveals an even deeper racial divide. The following elected courts all exist outside New York City. The data plainly reveals an astonishing lack of minority presence on the bench.

COURT	TOTAL JUDGES	WHITE	MINORITY	MISSING DATA
County Court <sup>102</sup>	108	102 (94.4%)	0	6

96. Nora Jones, ‘How to Become a Judge’ Focus of All Day Event, DAILY RECORD, January 22, 2003.

97. THE FRANKLIN H. WILLIAMS JUDICIAL COMMISSION ON MINORITIES, ANNUAL REPORT 3 (2000).

98. N.Y. Const. Art. 6, § 4(c).

99. The Commission on Minorities report states that it was “missing data” for one judge. FRANKLIN N. WILLIAMS JUDICIAL COMMISSION ON MINORITIES, *supra* note 97, at 1.

100. In 2002, the New York City Supreme Court consisted of 48 judges, of whom 31 were white (66%) and 16 were minority (34%) (one judge was listed as “race/ethnicity unknown”). Of the 16 minority judges, 11 were African American and 5 were Latino. Once again the lack of Asian judges in New York City, as well as in New York State, is striking. See MINORITY PARTICIPATION, *supra* note 88.

101. Surrogate’s Court handles matters involving the affairs of decedents, including the probate of wills and the administration of estates. See N.Y. Consol. Laws ch. 30, arts. 6, 6A; N.Y. Sur. Ct. Procedure Act § 201 (3).

102. Includes judges who sit only in County Court and judges who combine service on the County Court with service on the Family and/or Surrogate’s Court. The County Court exists in all counties outside New York City. The Court has original jurisdiction for criminal and civil cases (up to \$25,000). See N.Y. Consol. Laws ch. 30, arts. 6A, 7.

COURT	TOTAL JUDGES	WHITE	MINORITY	MISSING DATA
District Court <sup>103</sup>	44	38 (86.4%)	2 (4.5%)	4
City Court <sup>104</sup>	154	140 (90.9%)	1 (1%)	13
Family Court <sup>105</sup>	64	56 (87.5%)	2 (3.1%)	6

The evidence is abundantly clear. When examined on a state-wide basis, elections produce a disproportionately white judiciary. Yet merit selection is opposed by many minority organizations.<sup>106</sup> The primary objection is that merit selection cedes power to elitist white male lawyers to appoint other elitist white male lawyers to the bench.<sup>107</sup> Many hold out the predominantly white federal bench as an example of what is wrong with appointive judicial systems.<sup>108</sup> In New York State, one can cite to the composition of the Court of Claims and Appellate Division, as well as those judges appointed as Acting Supreme Court justices, as evidence that appointed judiciaries fail to promote diversity.<sup>109</sup> Yet, none of those

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103. The District Court exists in Nassau County and the western part of Suffolk County. The Court has original jurisdiction for criminal (misdemeanors and lesser offenses) and civil (up to \$15,000) cases. *See* UNIFORM DISTRICT CT. ACT.

104. Includes City Court judges, Acting City Court Judges, and Chief Judges of the City Courts. The City Court exists in 61 cities outside New York City. The Court has original jurisdiction for criminal (misdemeanors and lesser offenses) and civil (up to \$15,000) cases. *See id.*

105. Outside of New York City, judges of the Family Court are elected. *See* FAMILY CT. ACT.

106. *See, e.g.,* Garcia, *supra* note 34, at 15 ("Traditionally, one of the most vocal segments of the population questioning or even opposing use of a merit selection process have been minority organizations. Representatives of minorities and women have expressed concerns that a merit selection system may exclude those groups from the bench, or diminish their chances of filling those seats."); Barnett, *supra* note 33, at 419 ("Merit selection and retention, however, are viewed as a better way to facilitate the addition of minorities and women to the bench. Yet, minority organizations have often opposed the creation of such systems."); Malia Reddick, *Judicial Reform in New York: From Elections to Merit Selection* 14 (2003) (unpublished draft, on file with author) (noting the NAACP's opposition to merit selection during New York's court reform efforts of the late 1970s over concerns that merit selection would lead to fewer minority judges).

107. *See, e.g.,* William C. Thompson, Perspective, *Open Letter to the Black & Puerto Rican Caucus: The Fraud of 'Merit Selection'*, N.Y.L.J., June 24, 1993, at 2.

108. *See, e.g.,* Tom McCann, *Cook County Makes Real Strides in Diversifying Bench*, CHI. LAW., July 2003, at 14 (observing that the federal judiciary is only 7.5% African American and 3.2% Hispanic); Editorial, *More Black Magistrates*, ST. LOUIS POST-DISPATCH, July 15, 2002, at B6 (noting that fewer than 5% of federal magistrate judges are African American).

109. Under Article 6, § 26 of the State Constitution, the Office of Court Administration is empowered to designate certain classes of judges as Acting Supreme Court Justices. Of the 137 Acting Supreme Court justices in New York City, only 16 (11.7%) are minority. *See*

appointments are made pursuant to a true merit selection system. The Governor utilizes a screening commission with respect to the Court of Claims and the Appellate Division,<sup>110</sup> and judges are designated as Acting Supreme Court justices pursuant to the Office of Court Administration and the Chief Administrative Judge.<sup>111</sup> These are not ideal merit selection processes because they lack diverse nominating commissions, charged with finding a diverse slate of candidates, and the appointing authorities are not limited to making a selection from the list produced by the committee.<sup>112</sup> While it appears at first glance that elections may be the path to a diverse judiciary, the evidence shows that elections held outside of New York City do not yield a diverse pool of judges. In any event, elections still carry the trappings of political campaigns: party politics, fundraising, and other associated evils.

### C. Independence

Focusing next on the “independent” variable, that is, which selection method produces a more independent judiciary, returns us to the “process” question. An independent judiciary is the “citadel of the public justice and the public security,”<sup>113</sup> and one way to further judicial independence is to remove politics from the equation to the greatest extent possible.<sup>114</sup> How to measure judicial independence? It is generally accepted that, by and large, merit selection is aimed at enhancing judicial independence, while elections are geared toward promoting judicial accountability.<sup>115</sup>

1. *Voting Behavior*—If elections do not yield greater diversity or more qualified judges, why continue to elect? It is an especially timely question in light of *White* and the prospect of judicial elections and political activity run amok. The primary reason proffered

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MINORITY PARTICIPATION, *supra* note 88. See also, Juan Gonzalez, *A Supreme Example of Ethnic Bias*, DAILY NEWS, Jan. 14, 2000, at A3.

110. For a discussion of screening versus nominating commissions, see *supra* text at pp. 9–10.

111. See N.Y. CONST. Art. 6, § 26.

112. For more regarding a model merit selection process, see *infra* notes 194–205 and accompanying text.

113. THE FEDERALIST NO: 78 (Alexander Hamilton).

114. “The most appealing characteristic of . . . a merit selection plan is that politics are almost completely removed from the judicial selection process.” Glenn C. Noe, *Alabama Judicial Selection Reform: A Skunk in Tort Hell*, 28 CUMB. L. REV. 215, 241 (1998).

115. Barnett, *supra* note 33, at 413 (“Appointive-based methods are seen as fostering more judicial independence, while elections are credited with holding a judiciary more accountable to the electorate.”).

in support of judicial elections is democracy—give the citizens a voice and make the judiciary accountable to them. Supposedly, judicial elections, like any other elections, foster democratic values as citizen input leads to an accountable, responsive, and representative judiciary. The judiciary, however, is different from the executive or legislative branches; the need for judicial independence trumps other considerations. “[J]udges are not representatives. Their job is to interpret the law and the Constitution.”<sup>116</sup> “Members of the judicial branch . . . are not direct representatives of the people, but are expected to act as impartial arbiters of cases and controversies.”<sup>117</sup>

The democracy rationale for judicial elections is weakened by an examination of actual voting practice in judicial elections. “Among the goals of a rational system of judicial elections (indeed, of elections for any public office) would be to have the highest possible participation of the voting public, to give those voters a choice for any particular elective position, and to make it competitive.”<sup>118</sup> Those who support judicial elections on the accountability, democracy basis would no doubt agree that voting makes sense only when voters have knowledge about the candidates, voters have choices, and voters participate. Judicial elections are lacking on all these measures.<sup>119</sup>

*a. Knowledge*—To get out their message, to educate the electorate, judges must campaign. In order to campaign, they need money, lots of money. As one judicial selection scholar observed, “The cost of [judicial] campaigns has been doubling almost every biennium so that judicial candidates in several states are regularly spending millions.”<sup>120</sup> To get money, they must raise funds. Fundraising itself threatens judicial independence.<sup>121</sup> Judges may well become beholden to the interest groups and individuals who

116. J. Andrew Crompton, *Pennsylvanians Should Adopt a Merit Selection System for State Appellate Court Judges*, 106 DICK. L. REV. 755, 757 (2002) (quoting then Pennsylvania Governor Tom Ridge, who now serves as the United States Secretary of Homeland Security).

117. Behrens & Silverman, *supra* note 31, at 287.

118. Solimine, *supra* note 57, at 560.

119. Geyh, *supra* note 29, at 76 (“[J]udicial elections promote accountability so poorly that the minimal gains they engender on that score are offset by the losses to independence they cause.”).

120. Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROB. 79, 112 (1998). See also William Glaberson, *supra* note 9 (explaining that the campaign for the Ohio Supreme Court cost an estimated \$9 million, and the race for three Supreme Court seats in Michigan topped \$16 million).

121. See Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583 (2002) (finding that judges on Alabama’s Supreme Court voted in accordance with the views of their campaign contributors).

contribute to their campaigns.<sup>122</sup> Those who contribute—lawyers and special interest groups—often have a stake in cases and issues that the prospective judge must later decide.<sup>123</sup> More and more, special interest groups pour large sums of money into judicial campaigns, to elect judges who will decide cases favorably to their economic interests.<sup>124</sup> Even if this was not a widespread phenomenon, the mere appearance of such impropriety has a corrosive effect on public trust and confidence in the courts.<sup>125</sup>

The codes of judicial conduct have prevented judges from saying anything that might provide information for a voter to utilize when making a voting decision. In particular, candidates were prohibited from stating their views on disputed legal or political issues. Although these rules left voters with little to go on when casting votes for judges, they were motivated by the principle that judges should decide cases based upon the facts presented to them, as opposed to based on predispositions or preconceived

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122. GOVERNMENT ETHICS REFORM, *supra* note 81, at 287 (“Another threat to judicial independence is posed by the imperative to raise money in election races, which may compel judges to depend upon outside contributors.”); Carrington, *supra* note 120 (suggesting the likelihood that large campaign contributors expect some sort of quid pro quo from the judge once on the bench).

123. See, e.g., Barnett, *supra* note 33, at 417–18 (“More often, however, attorneys and law firms are the ones that contribute to judicial elections.”); Behrens & Silverman, *supra* note 31, at 279 (“A large portion of donations to judicial campaigns is contributed by parties and lawyers with cases before the court.”); Susan E. Liontas, *Judicial Elections Have No Winners*, 20 STET. L. REV. 309, 311–14 (1990); Peter A. Joy, *A Professionalism Creed for Judges: Leading By Example*, 52 S.C. L. REV. 667, 673 (2001).

124. See, e.g., Lawrence Baum, *Judicial Elections and Judicial Independence, The Voter's Perspective*, 64 OHIO ST. L.J. 13, 32 (2003) (noting that interest groups with economic stakes in the courts' decisions are the primary source of the growth in judicial campaign spending); Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1398–1400 (2001); Maute, *supra* note 72, at 1205. See also Sean Reilly, *Doin' the Bench Shuffle*, ABA J., Nov. 1999, at 26 (detailing how business leaders in Alabama and Texas financed efforts to recruit and elect judges they perceived as “sympathetic”).

125. See NATIONAL CONFERENCE ON PUBLIC TRUST AND CONFIDENCE IN THE JUSTICE SYSTEM, May 1999, available at [http://www.ncsconline.org/WC/Publications/Res\\_AmtPTC\\_PublicView CrtsPub.pdf](http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicView CrtsPub.pdf) (on file with the University of Michigan Journal of Law Reform) [hereinafter PUBLIC TRUST AND CONFIDENCE SURVEY] 78% agreed with a statement saying that elected judges are influenced by having to raise campaign funds. The survey was designed by the National Center for State Courts and funded by the Hearst Corp. The poll was conducted by Indiana Public Opinion Lab at Indiana University based on interviews with 1,200 randomly selected adults. *Id.* See also Tillman J. Finley, Note, *Judicial Selection in Alaska: Justifications and Proposed Courses of Reform*, 20 ALASKA L. REV. 49, 58 (2003); Geyh, *supra* note 29, at 54 (regarding polls in Ohio, Texas, and Pennsylvania showing that the public believes judges' decisions are influenced by campaign contributions); Behrens & Silverman, *supra* note 31, at 275–76 (“[S]urveys consistently show that an overwhelming majority of the public believe that many state courts are influenced by money and politics.”); 76% of voters believe that campaign contributions have some influence on judges' decisions. JUSTICE AT STAKE CAMPAIGN, NATIONAL SURVEY OF AMERICAN VOTERS AND STATE JUDGES, October 2001–January 2002.

ideas.<sup>126</sup> After *White*, to the extent that judicial candidates can “announce” their views, the goals of nonpartisanship and impartiality are threatened. The tone of judicial campaigns is getting nastier as well.<sup>127</sup> Unseemly campaign conduct is becoming the norm as judicial elections become fraught with all the trappings of any modern day campaign/election.

Given the limits on what judicial candidates can say,<sup>128</sup> voters know virtually nothing about the candidates,<sup>129</sup> and end up, if they even bother to pull a lever, merely voting for a party label, familiar name, or ethnicity.<sup>130</sup> The bottom line is that most voters do not even know the candidates’ names, let alone their backgrounds.<sup>131</sup>

*b. Choice*—The “choice,” such as it is, is made not in the voting booth, but in the nomination or primary process.<sup>132</sup> Party bosses and/or party loyalists determine the “choice” for each party, and more often than not, that is the end of it. The predominant party

126. Behrens & Silverman, *supra* note 31.

127. See, e.g., Baum, *supra* note 124, at 34 (“[U]ndoubtedly the decision will increase the frequency with which candidates state explicitly how they stand on issues. In the process, it will facilitate issue-based attacks on incumbents by challengers.”); Carrington, *supra* note 120, at 112 (regarding the use of “spot advertising on commercial television prepared by highly paid craftsmen skilled in the art of disparaging public persons”).

128. These limits are changing, though likely for the worse in the aftermath of the Supreme Court’s decision in *White*. See generally Katherine Moerke, *Must More Speech be the Solution to Harmful Speech? Judicial Elections After Republican Party of Minnesota v. White*, 48 S.D. L. REV. 262 (2003); Cathy R. Silak & Aaron C. Charrier, *The Future of Judicial Elections: A Campaign Conduct Commission Proposal*, 39 IDAHO L. REV. 357 (2003); Leigh A. Leonard, Note, *In the Aftermath of Republican Party v. White, State Judicial Candidates are Uncertain as to What Remains Protected*, 53 CATH. U.L. REV. 267 (2003).

129. See, e.g., Solimine, *supra* note 57, at 562 (“[M]any studies over the years demonstrate one commonality: no matter what form of judicial election, most voters in most elections are largely uninformed about the persons running for these offices.”); McFadden, *supra* note 33, at 10 (“Public opinion surveys have shown that voters possess little specific knowledge about judicial candidates and campaign issues.” (citing Johnson et al., *Salience of Judicial Candidates and Elections*, 59 Soc. Sci. Q. 371 (1978))); Goldschmidt, *supra* note 61, at 13–14 (“[I]t is common knowledge that the public is uninformed about judicial candidates.”). Not only do voters know very little about the judicial candidates, they usually are even unaware of who is running. See, e.g., Crompton, *supra* note 116, at 756 (“[P]olls strongly suggest that most voters have little idea who is running for statewide judgeships.”).

130. See, e.g., Goldschmidt, *supra* note 61, at 14.

131. See, e.g., Baum, *supra* note 124, at 20 (“[S]urveys often show that high proportions of voters cannot recall the names of judicial candidates around the time of the election.”); Roy Schotland, *Elective Judges’ Campaign Financing: Are State Judges’ Robes the Emperor’s Clothes of American Democracy?*, 2 J. L. & POL. 57, 86–87 (1985). Voters in judicial elections cannot remember the name of the person they voted for, even shortly after the election. See, e.g., *How Much Do Voters Know or Care About Judicial Candidates?*, 38 JUDICATURE 141 (1955); Charles A. Johnson et al., *The Salience of Judicial Candidates and Elections*, 59 Soc. Sci. Q. 371 (1978).

132. See, e.g., Goldschmidt, *supra* note 61, at 49 (“Judges are usually not really elected, but are designated by the leaders of the party political machine dominant in the district.”).



wins the election.<sup>133</sup> Party leaders, not the voting public, make the choice, and they base their choices on inappropriate considerations (i.e., personal service to a politically important local club or to the county organization), as opposed to qualifications.<sup>134</sup> The power to influence who ends up on the ballot provides party leaders with ample opportunities for political patronage. The key, as noted by New York State's Chief Administrative Judge, is to get an elected legislature to support an appointed judiciary.<sup>135</sup>

Typically, candidates run in unopposed, uncontested races. Even where there is some possibility of a "race," the prevalence of "cross-endorsements" rears its head.<sup>136</sup> As noted at the conclusion of a lengthy study of judicial selection in New York, "We must stop perpetuating the myth that judicial elections have anything to do with democratic choice. They do not and they cannot."<sup>137</sup>

*c. Participation*—Voters don't know anything about their judicial candidates, and not surprisingly, they don't vote.<sup>138</sup> In fact, voter interest, as well as knowledge, is low.<sup>139</sup> A large percentage of citizens who vote for the candidates at the top of the ballot (i.e., President, Governor, etc.) decline to cast a vote for any of the other races; this effect is known as "roll-off."<sup>140</sup> The roll-off effect is

133. "I'm against elected judges because the way you get elected 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." RESTORING THE PUBLIC TRUST: A BLUEPRINT FOR GOVERNMENT INTEGRITY, Vol. 1, 13 (Dec. 1988) [hereinafter RESTORING THE PUBLIC TRUST] (quoting New York State Governor Mario Cuomo); Robert J. McCarthy, *Suit Calls Judicial Selection Process a 'Sham'*, BUFFALO NEWS, March 19, 2004 at C1 ("[V]oters irrespective of party affiliation simply have no say in the choice for those nominated for the Office of Justice of the State Supreme Court . . . and since the choice is made for them by political leaders, the voters are unjustly disenfranchised.") (quoting Kings County District Attorney Charles J. Hynes)).

134. See GOVERNMENT ETHICS REFORM, *supra* note 81, at 288.

135. Bernard Stamler, *Bench-Pressing, Judges Can Control Your Life. Are They Up to the Job?*, N.Y. TIMES, July 12, 1998, at A14 ("[I]t is difficult if not impossible to get an elected legislature to make selection of judges appointive." (quoting New York State Chief Administrative Judge Jonathan Lippman)).

136. See, e.g., Solimine, *supra* note 57; Editorial, N.Y. TIMES, September 7, 2002, at A14 ("Of the 18 Civil Court judgeships up for election in New York City this November, only six are being contested in next week's Democratic primary. As a practical matter, that means the remaining dozen seats will be filled by men and women deeply beholden to the party pols who gave them a berth on the democratic line and a virtually uncontested ride into office.").

137. RESTORING THE PUBLIC TRUST, *supra* note 133, at 16.

138. See, e.g., Maute, *supra* note 72, at 1220 ("[I]t is not surprising that many voters felt uninformed and incapable of making responsible voting decisions. This undoubtedly helps explain why, in a general election, a large number of voters do not vote on judicial candidates.").

139. Behrens & Silverman, *supra* note 31, at 290 ("Voter turnout repeatedly demonstrates the public's lack of interest in judicial elections.").

140. See, e.g., Solimine, *supra* note 57, at 563-64; Dann & Hansen, *supra* note 37, at 1430 n.10 (citing William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections*

substantial in judicial elections; voter participation in judicial elections is infinitesimal.<sup>141</sup> In 2002, there were elections for countywide Civil Court judgeships in the following New York City counties: New York County (Manhattan), Bronx County, Queens County, and Kings County (Brooklyn).

In New York County, there was one open judicial slot, and only one candidate appeared on the ballot.<sup>142</sup> There are approximately 1,537,195 people who live in New York County, 1,281,455 of whom are eighteen years of age or older (and therefore potentially eligible to vote).<sup>143</sup> There are 1,010,007 registered voters in New York County (approximately 79% of the eligible population).<sup>144</sup> There were 353,092 valid votes for Governor cast in New York County in 2002 (35% of the registered voters; 28% of those eligible to vote). There were 186,659 valid votes cast for Civil Court judge in Manhattan (19% of the registered voters; 15% of those eligible to vote). Did the lack of a "race" cause, or attribute to, the low voter turnout/roll-off? Compare the data for other counties where there was more than one candidate.

In Bronx County, there was one open judicial slot, and three candidates appeared on the ballot. There are approximately 1,332,650 people who live in Bronx County, 939,436 of whom are eighteen years of age or older (and therefore potentially eligible to vote).<sup>145</sup> There are 663,867 registered voters in Bronx County (approximately 71% of the eligible population).<sup>146</sup> There were 189,974 valid votes for Governor cast in Bronx County in 2002 (29% of the registered voters; 20% of those eligible to vote). There were 119,564 valid votes cast for Civil Court judge in the Bronx (18% of the registered voters; 13% of those eligible to vote). The winner received 96,457 votes; 15% of the registered voters.<sup>147</sup>

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*Have Told Us*, 70 JUDICATURE 340, 346-47 (1987)); Andersen, *supra* note 69, at 1377 n.12; McFadden, *supra* note 33, at 10 (citing Philip L. Dubois, *Voter Turnout in State Judicial Elections: An Analysis of the Tail on the Electoral Kite*, 41 J. POL. 865, 865 (1979)) ("The level of voter participation in judicial elections lags far behind participation in elections, for most executive and legislative posts."); Baum, *supra* note 124, at 19 ("Roll off is an enduring reality in judicial elections.")

141. See GOVERNMENT ETHICS REFORM, *supra* note 81, at 290.

142. For a discussion about the prevalence of uncontested judicial elections, see *supra* notes 136-137 and accompanying text.

143. See U.S. Census 2000.

144. New York State Board of Elections, November 8, 2002.

145. See U.S. Census 2000.

146. New York State Board of Elections, November 8, 2002.

147. George Villegas (D,L), the winner, received 96,457 votes. Michael Calandra (R) received 20,798 votes, and Michael Gask (C) received 2309 votes. *Id.*

In Queens County, there was one open judicial slot, and two candidates appeared on the ballot. There are approximately 2,229,379 people who live in Queens County, 1,721,611 of whom are eighteen years of age or older (and therefore potentially eligible to vote).<sup>148</sup> There are 1,038,926 registered voters in Queens County (approximately 60% of the eligible population).<sup>149</sup> There were 345,718 valid votes for Governor cast in Queens County in 2002 (33% of the registered voters; 20% of those eligible to vote). There were 232,880 valid votes cast for Civil Court judge in Queens (22% of the registered voters; 14% of those eligible to vote). The winner received 162,422 votes; 16% of the registered voters.<sup>150</sup>

In Kings County, there were three open slots, and seven candidates appeared on the ballot. There are approximately 2,465,326 people who live in Kings County, 1,805,709 of whom are eighteen years of age or older (and therefore potentially eligible to vote).<sup>151</sup> There are 1,271,743 registered voters in Kings County (approximately 70% of the eligible population).<sup>152</sup> There were 398,536 valid votes for Governor cast in Kings County in 2002 (31% of the registered voters; 22% of those eligible to vote). There were 746,909 valid votes cast for the three Civil Court judgeships in Brooklyn. The winners received 200,710, 187,786, and 180,110 votes respectively; representing 16%, 15%, and 14% of the registered voters.<sup>153</sup> Since each voter was permitted to vote for up to three candidates to fill the three open slots, it is impossible to discern precisely how many individuals voted for a judge. In 1982, the Fund for Modern Courts published a study of judicial elections in New York State for the years 1978, 1979 and 1980.<sup>154</sup> Recognizing that the “calculation of voter participation in districts with multiple vacancies . . . posed a special problem,”<sup>155</sup> the report’s author determined that voter participation in those situations could be best derived by “dividing the number of votes cast by the number of vacancies in order to

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148. U.S. Census 2000.

149. New York State Board of Elections, November 8, 2002.

150. Diccía Pineda-Kirwan (D,C,L), the winner, received 162,422 votes. Francis K. Kenna (R) received 70,458 votes. *Id.*

151. U.S. Census 2000.

152. New York State Board of Elections, November 6, 2002.

153. The winners were Margarita Lopez Torres (D,G,Wf) (200,710 votes), Delores J. Thomas (D) (187,786 votes), and Robin S. Garson (D) (180,110 votes). Mario Romano received 65,545 votes, James P. McCall received 53,807 votes, John Demic received 53,495 votes, and Marcia J. Sikowitz received 5,456 votes. *Id.*

154. THE FUND FOR MODERN COURTS, JUDICIAL ELECTIONS IN NEW YORK (1982) (on file with author).

155. *Id.* at 34.

determine the number of 'whole ballots' cast."<sup>156</sup> Using that formula, approximately 20% of the registered voters cast votes for Civil Court judge in Brooklyn.

COUNTY	% REGISTERED VOTERS	% REGISTERED VOTERS WHO VOTED FOR GOVERNOR	% REGISTERED VOTERS WHO VOTED FOR JUDGE	% REGISTERED VOTERS WHO VOTED FOR WINNING JUDGE
New York	79%	35%	19%	XX <sup>157</sup>
Bronx	71%	29%	18%	15%
Queens	60%	33%	22%	16%
Kings	70%	31%	20%	16%; 15%; 14%

The Fund for Modern Courts previously analyzed judicial elections for 1981–83.<sup>158</sup> A comparison of the 2002 voting data with that from 1982 reveals a precipitous decline in the percentage of registered voters in New York City who voted for Governor, as well as a significant decline in the number who voted for a judge.<sup>159</sup> New York County is a case in point:

YEAR	% REGISTERED VOTERS WHO VOTED FOR GOVERNOR	% REGISTERED VOTERS WHO VOTED FOR JUDGE
1982	66%	28%
2002	35%	19%

2. *Additional Problems with Judicial Elections*—The party system exposes judges to political pressures on the bench, for example, when deciding politically sensitive cases.<sup>160</sup> Certainly, the public believes that judges' decisions are affected by politics.<sup>161</sup>

156. *Id.*

157. There was only one candidate in the race.

158. THE FUND FOR MODERN COURTS, JUDICIAL ELECTIONS IN NEW YORK (1984) (on file with author).

159. See Daisy Hernandez, *The 2002 Elections: Turnout; After Reading the Polls, Avoiding the Polling Place*, N.Y. TIMES, Nov. 7, 2002, at B15 ("New York City registered what may be a record low in voter turnout on Tuesday, with an estimated 34.2 percent of registered voters casting their ballots.")

160. See, e.g., GOVERNMENT ETHICS REFORM, *supra* note 81, at 286–87.

161. 81% say they believe judges' decisions are influenced by political considerations. See PUBLIC TRUST AND CONFIDENCE SURVEY, *supra* note 125.

Additionally, “[c]andidates who are elected along party lines may also feel the need to be responsive to the party establishment in order to obtain and retain their position.”<sup>162</sup> The recent plight of New York City Civil Court Judge Margarita Lopez Torres is a prime example. By all accounts she was an exemplary judge—hardworking, fair, and diligent—but she apparently was denied the party’s renomination because she declined to hire a law clerk referred by party leaders.<sup>163</sup>

Many qualified, excellent potential candidates do not pursue elected judgeships because they are not politically connected, politically savvy, or interested in campaigning.<sup>164</sup> The qualities of a good campaigner may be very different from those of a good judge.<sup>165</sup> On the other hand, a well-qualified attorney can surface in the New York City merit appointment process merely by having appropriate experience—all it takes is an application.<sup>166</sup> That same attorney, even if s/he can steel him/herself for a campaign and all the trappings, cannot rise through the party apparatus without political connections.

The conflict between party politics, judicial independence, and non-partisanship is inherent in the partisan nature of political activity and political elections.<sup>167</sup> As one commentator noted, “Overall, the role of the judiciary is fundamentally at odds with the

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162. Behrens & Silverman, *supra* note 31, at 278, 281 (“After election, the judge may feel indebted to the party for his or her election and remain reliant on the party for reelection.”). GOVERNMENT ETHICS REFORM, *supra* note 81, at 282 (“One of the most striking problems with elective systems is that demonstrably well-qualified judges can be denied renomination at the end of their terms because of the whims of political leaders.”).

163. See, e.g., Tom Robbins, *Brooklyn’s Judicial Loyalty Oath*, VILLAGE VOICE, Aug. 13, 2002, at 26 (explaining that sitting judge elected with party support denied party re-endorsement for failing to hire politically connected law secretary). See also Cyrus R. Vance, Remarks at New York State Conference on Improving Judicial Selection, May 6, 1988 (“In addition to putting less than the most highly qualified individuals on the bench, the political bosses have also used the partisan election system to fire good judges because they failed to please.”) (on file with the author).

164. See, e.g., Goldschmidt, *supra* note 61, at 14 (“Elections also discourage many well-qualified people from seeking judicial office.”); Behrens & Silverman, *supra* note 31, at 286 (“The mere requirement of participating in a contested judicial election and the necessity of raising large amounts of cash may cause qualified candidates to opt out.”); Crompton, *supra* note 116, at 765.

165. See, e.g., Barnett, *supra* note 33, at 418 (“[T]he attributes required of a good politician in a contested election may be very different from those required of an impartial judge.”).

166. That sentiment grows out of the author’s experience as a member of New York City Mayor Rudolph Giuliani’s Advisory Committee on the Judiciary from 1993 to 1996. See AMERICAN JUDICATURE SOCIETY, MERIT SELECTION: THE BEST WAY TO CHOOSE THE BEST JUDGES, available at [http://www.ajs.org/selection/ms\\_descrip.pdf](http://www.ajs.org/selection/ms_descrip.pdf) (on file with the University of Michigan Journal of Law Reform) (emphasizing professional qualifications instead of political credentials) [hereinafter BEST WAY].

167. GOVERNMENT ETHICS REFORM, *supra* note 81, at 293.

practical implications of elective politics.”<sup>168</sup> Political parties are geared to reward loyalty, not merit, and to discourage, not encourage, independence. Political parties are more interested in obtaining power than promoting justice.<sup>169</sup> Even if the system was indeed genuinely democratic, the elective system threatens judicial independence—judges become too concerned with the popular “will” and the impact of their rulings on re-election.<sup>170</sup> As a scholar noted, “To the extent majoritarian pressures influence judicial decisions because of judges’ electoral calculations, elective judiciaries seem, at least at first glance, irreconcilable with one of the fundamental principles underlying constitutionalism.”<sup>171</sup>

The recognition that judicial elections are fraught with problems has led to numerous proposals for reform. One common suggestion is public financing of judicial elections.<sup>172</sup> These programs “often depend upon the willingness of taxpayers to check a box on their tax form to contribute to the public financing fund, and upon providing judicial candidates an incentive to accept a small amount of public money in exchange for agreeing to campaign spending limitations.”<sup>173</sup> Public financing is also inadequate to deal with the rising costs of judicial campaigns that may run into the millions.<sup>174</sup> In fact, the amount of funding by taxpayer contributions has been steadily declining.<sup>175</sup> Additionally, public financing has no impact on independent spending by special interest groups and

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168. Behrens & Silverman, *supra* note 31, at 277, 287. (“The heart of the problem with judicial elections is that the popular election of judges is fundamentally at odds with the concept of an impartial judiciary.”).

169. GOVERNMENT ETHICS REFORM, *supra* note 81, at 293.

170. See, e.g., Behrens & Silverman, *supra* note 31, at 277 (“[E]lections threaten judicial independence by pressuring judges to follow the will of the majority, which may run counter to the rule of law.”); Goldschmidt, *supra* note 61, at 14 (“Elections . . . compromise the independence of the judiciary . . .”).

171. Croley, *supra* note 1, at 696–97.

172. See, e.g., Schotland, *supra* note 1, at 892 n.225 (“Public funding seems especially suitable, for several reasons, for judicial elections.”); *Call to Action*, *supra* note 3, at 1358; ABA STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS REPORT 29 (July 23, 2001); Leander Shaw, Jr., *Florida’s Judicial Merit Selection and Retention System: The Better Alternative*, 20 FLA. ST. U. L. REV. 283, 286 (1992) (“Perhaps public financing of judicial campaigns is an idea whose time has come.”). See generally Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467 (2001).

173. Behrens & Silverman, *supra* note 31, at 296–97. See also Deborah Goldberg, *Public Funding of Judicial Elections: The Role of Judges and the Rules of Campaign Finance*, 64 OHIO ST. L.J. 95, 111 (2003) (noting that existing public financing options for other political branches may not work well for the judiciary, and that public funding is a viable solution “only if the vast majority of candidates for the bench participate in the program”).

174. See, e.g., Behrens & Silverman, *supra* note 31, at 297.

175. See, e.g., Mathias, *supra* note 38, at 46.

might serve to increase their impact on judicial elections.<sup>176</sup> Finally, some are concerned that public financing encourages “marginally committed or qualified candidates to run at public expense.”<sup>177</sup>

Judicial election reformers also suggest that campaign contribution limits may ameliorate some of the problems associated with judicial elections.<sup>178</sup> But contribution limits add pressure on judicial candidates to solicit from individual attorneys who appear before them, require judicial candidates to spend more time raising money, and give more power to those wealthy enough to finance their own campaigns.<sup>179</sup>

Others posit that nonpartisan elections will help remove the influence of party leaders on judicial elections.<sup>180</sup> The switch to nonpartisan elections, however, has seemingly had no impact on the increasingly huge amounts of money spent on judicial campaigns, and it is apparent that political parties will continue to impact the campaign whether or not listed on the ballot.<sup>181</sup> Still others have suggested that party labels provide voters with at least some information regarding the candidates.<sup>182</sup>

In general, tinkering with, or “reforming,” judicial elections is not the answer; it is ultimately a futile endeavor. The problems regarding the public’s trust and confidence in elected courts will remain, as will the many other problems endemic to elections.<sup>183</sup> In

176. Behrens & Silverman, *supra* note 31, at 297; Finley, *supra* note 125, at 69; Geyh, *supra* note 172, at 1479–80.

177. Mathias, *supra* note 38, at 46.

178. See, e.g., *Call to Action*, *supra* note 3, at 1358; Press Release, ABA, American Bar Association Changes Model Judicial Ethics Rules to Reform Campaign Funding (Aug. 24, 1999) (regarding the ABA House of Delegates amending the Code of Judicial Conduct to limit judicial campaign contributions); Roy Schotland, *Perspectives on Judicial Independence: Proposed Legislation on Judicial Election Campaign Finance*, 64 OHIO ST. L. J. 127 (2003) (urging adoption of aggregated contribution limits).

179. Behrens & Silverman, *supra* note 31, at 297.

180. See, e.g., Samuel Latham Grimes, *Without Favor, Denial, or Delay: Will North Carolina Finally Adopt the Merit Selection of Judges?*, 76 N.C. L. REV. 2266, 2299 (1998) (“[T]he switch to nonpartisan elections could help combat the growing political nature of judgeships by reducing the role of partisanship in judicial elections.”); Noe, *supra* note 114, at 240 (explaining that nonpartisan elections would be “a positive step toward removing politics from judicial campaigns”); *Call to Action*, *supra* note 3, at 1355.

181. See, e.g., Behrens & Silverman, *supra* note 31, at 298; GOVERNMENT ETHICS REFORM, *supra* note 81, at 293; Finley, *supra* note 125, at 69; Averill, *supra* note 81, at 322 (“[N]onpartisan elections are often so in name only . . .”).

182. See, e.g., Behrens & Silverman, *supra* note 31, at 298; Averill, *supra* note 81, at 322 (explaining that party labels provide at least some reference points); Maute, *supra* note 72, at 1204. For details regarding voters’ lack of knowledge about judicial candidates, see *supra* notes 120–131 and accompanying text.

183. See, e.g., Reddick, *supra* note 106, at 6 (“[R]eforms, such as public financing of elections, campaign contribution limits, and moving from partisan to nonpartisan elections, have all proven to have fundamental flaws in their ability to make a judiciary appear independent and impartial.”); Behrens & Silverman, *supra* note 31, at 276 (“Campaign finance

addition, the present post-*White* landscape, and the prospect of increasingly contentious judicial campaigns, dictate that we cease and desist from electing judges.

### III. MODEL MERIT SELECTION PROCESS

Many believe that the best, or only, way to promote an independent judiciary is to abandon judicial elections.<sup>184</sup> Interestingly, while some recoil from the prospect of switching from elective to appointive systems, the idea of changing from appointive to elective processes, for example by electing federal judges, seems “unthinkable.”<sup>185</sup> In fact, the elimination of politics from the process and the preservation of judicial independence were among the reasons why New York State changed to a merit selection process for the judges on the Court of Appeals, its highest court.<sup>186</sup> Commentators have suggested that “momentum is building in this country for adoption of appointive judicial selection systems.”<sup>187</sup> In fact, there is longstanding, extensive, and widespread support for merit selection in New York State.<sup>188</sup> The

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reform and tinkering with judicial codes of conduct to regulate speech in judicial campaigns do not offer a comprehensive solution to the systemic problems inherent in judicial elections. Such changes not only face significant constitutional hurdles, but also come with their own set of problems.”); Schotland, *supra* note 178 (“[S]ome people dismiss these kinds of advances as ‘bandaids.’”).

184. See, e.g., *Judicial Selection White Papers: The Case for Judicial Appointments*, 22 U. Tol. L. Rev. 353, 355 (2002) (arguing that if one accepts the need for an independent judiciary, then the best selection method is appointment, not election); Hanssen, *supra* note 71.

185. Croley, *supra* note 1, at 696.

186. George Bundy Smith, *Choosing Judges for a State’s Highest Court*, 48 SYR. L. REV. 1493 (1998). Not coincidentally, in short order, the court added its first woman and became increasingly diverse. *Id.*

187. Behrens & Silverman, *supra* note 31, at 276; Nicole C. Allbritain, *Noble Lies and the First Amendment: A Symposium on the Death of Discourse, Comment, One Step Closer to Merit-Based Judicial Selection: Ohio’s New Limitations on Judicial Campaign Contributions and Expenditures*, 64 U. CIN. L. REV. 1323, 1330 (1996) (“[M]any states are in the process of revising their judicial systems to include merit selection.”); GOVERNMENT ETHICS REFORM, *supra* note 81, at n.69 (“The nationwide trend is unmistakably toward appointive systems.”); Goldschmidt, *supra* note 61, at 2 (arguing that the merit plan has gained widespread acceptance); *But see Selection of State Judges Symposium, Transcripts, Judicial Elections and Campaign Finance Reform*, 22 U. Tol. L. Rev. 335, 340 (2002) (quoting panelist Roy Schotland, “We are not going to get rid of judicial elections.”); Geyh, *supra* note 29, at 56 (stating that the merit selection movement is moribund).

188. See, e.g., THE NEW YORK STATE COMMISSION ON GOVERNMENT INTEGRITY (1991); THE STATE-CITY COMMISSION ON INTEGRITY IN GOVERNMENT (1986). Gary Spencer, *State Bar Backs Bench Merit Selection*, N.Y.L.J., Apr. 6, 1993, at 1 (“Hoping to improve the quality of . . . judges . . . the New York State Bar Association . . . endorsed a new merit selection plan



Fund for Modern Courts surveyed candidates for the New York State legislature in 2002 regarding several court reform issues.<sup>189</sup> 56% of the respondents favored merit selection for the judiciary, while only 34% favored judicial elections.<sup>190</sup> This represented increased support for merit selection from that reflected in Modern Courts's 2000 survey of legislative candidates.<sup>191</sup> A majority of respondents also agreed that merit selection was more likely to promote judicial independence and impartiality.<sup>192</sup> Modern

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for trial court judgeships."); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (ABCNY), *Report of the Special Committee on the Constitutional Convention: Selection of Judges*, Mar. 1967, at 1 ("The Association of the Bar of the City of New York has, for nearly a decade, supported efforts to change the present elective system.") The report goes on to cite the efforts of the bar association, dating back to 1873, to discontinue the elective system. *Id.* Evan Davis, *President's Column* 44TH STREET NOTES, Apr. 2002 ("For many years the Association of the Bar of the City of New York has opposed the election of judges."). Mario M. Cuomo, *Some Thoughts on Judicial Independence*, 72 N.Y.U. L. REV. 298, 304 (1997) (explaining that merit selection "is our highest form of judicial selection. It focuses on qualifications, not connections; on intelligence, not ideology. The Court of Appeals is chosen that way. I would prefer if all our judges were chosen that way."); Governor Hugh Carey was a primary force in the switch from election to merit selection for judges on the Court of Appeals, and supported merit selection for all of New York's judges. *See, e.g.*, Linda Greenhouse, N.Y. TIMES, May 4, 1976, at A1 (reporting that Governor Carey proposed that all judges of the unified court system be appointed along merit selection lines); Richard J. Meislin, *A Tough '81 Session Looming in Albany*, N.Y. TIMES, Jan. 5, 1981, at A1 ("Mr. Carey is also expected to repeat his call for . . . appointment, rather than election, of many judges."). Press Release, Sol Wachtler, State of the Judiciary (Apr. 22, 1985) ("I believe that the merit selection process which, before the end of this month, will have been responsible for selecting the entire judicial complement of our Court of Appeals, is the best method of selecting judges."); Charles J. Breitler, *Improving Our New York Courts*, 46 N.Y. ST. BAR J. 232 (June 1974) ("The elective process, instituted to make government responsive to the People, to influence the enactment of laws and the support of programs in accordance with the popular will, is inappropriate to selection for judicial office."). *See, e.g.*, Richard Perez-Pena, *Chief Judge Names Administrator for Courts*, N.Y. TIMES, May 27, 1993, at B6 ("Justice Milonas . . . proposed that the election of judges be eliminated."). The current Chief Administrator, Matthew T. Crosson, supported "replacing judicial elections with an appointive merit selection system." *Id.* The media has also expressed substantial support for merit selection. *See, e.g.*, Editorial, N.Y. TIMES, May 1, 2003, at A34 ("[T]he clear answer is to take judges out of the elective process altogether and have them appointed through a strict screening procedure based on merit"); Editorial, N.Y. TIMES, Sept. 7, 2002, at A14 (suggesting ways to improve judicial elections but asserting the long-term goal of replacing elections with a merit selection system); Editorial, N.Y. TIMES, Mar. 30, 2002, at A14 ("[S]tates should consider switching from elections to merit selection."); Editorial, N.Y. TIMES, Nov. 11, 1996, at A14 (imploping the Governor to "press the State Legislature to change to a nonpartisan system of merit selection").

189. The survey asked questions regarding judicial selection, court restructuring, the so-called Rockefeller drug laws, cameras in the courts, and the fees paid to counsel assigned to represent the indigent in Criminal and Family Courts.

190. The candidates were asked, "Do you support the appointment of judges from a list of well-qualified candidates screened by a bipartisan nominating committee, as opposed to the election of judges in partisan campaigns?"

191. In 2000, 49% favored merit selection.

192. Respondents were asked, "Which method of judicial selection do you believe best preserves the independent and impartial administration of justice?"

Courts's 2001 survey of all candidates for Mayor of New York City found unanimous support for merit selection.<sup>193</sup>

What, then, should a model merit selection process look like? What are the component parts of an ideal system of merit selection? At the outset, it is necessary to grapple with the means employed to enact the system. In general terms, changes in a state's system of judicial selection can be achieved through Executive Order, statute, or constitutional amendment. A more permanent change would be the result of a constitutional amendment. Such an amendment would also provide more credibility and legitimacy to the reform. Executive Orders or statutes can too easily be rescinded by the next chief executive or legislature.

Perhaps the key to any merit selection system is the Nominating Commission. There are two primary issues concerning the Nominating Commission—composition and duties. The Commission members must be appointed on a nonpartisan, or bipartisan, basis, from numerous sources and by multiple authorities.<sup>194</sup> They should serve staggered terms of service with term limits to prevent individuals or small groups from becoming too influential or entrenched. To address minority concerns about merit selection, and to ensure that the Commission will recommend the best possible judicial candidates, it is especially critical that Commission members truly reflect diversity.<sup>195</sup> In much the same way that a diverse bench is imbued with greater legitimacy by virtue of more accurately resembling the population it serves, so too will the Nominating Commission benefit from diversity. A diverse Nominating Commission will not necessarily recommend a

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193. Survey results on file with author.

194. See, e.g., Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence and Competence*, 14 GEO. J. LEGAL ETHICS 667, 673 (2001) (arguing that the nominating commission must be nonpartisan and free from political pressure). It is similarly imperative that the ultimate nominating authority not have the power to select a majority of the commission's members.

195. See, e.g., Webster, *supra* note 68, at 32 ("To have any hope of achieving its asserted goals, such a [merit selection] plan must be based upon provisions which ensure a truly independent, impartial, and diverse commission, with the power and resources to investigate thoroughly those who come before it as candidates."). In 1994, the American Judicature Society, the foremost civic organization devoted to replacing judicial elections with merit selection, amended its Model Judicial Selection Provisions to provide that "[a]ll appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the gender, ethnic and racial diversity of the jurisdiction." AMERICAN JUDICATURE SOCIETY, MODEL JUDICIAL SELECTION PROVISIONS (1984, revised 1994) [hereinafter MODEL PROVISIONS]; Goldschmidt, *supra* note 61, at 67 ("There is a nationwide trend to address the lack of diversity on the bench by explicitly adding racial and gender diversity as a criterion for the selection of both nominating commissioners and judicial appointees.").

diverse slate of candidates. Yet, the more the Commission has people with different backgrounds, experiences, and points of view, the more likely it is to produce a representative and high quality judiciary. Similarly, to address the criticism that merit selection is lawyer-driven and elitist, the Commission should have a significant non-lawyer presence. Indeed, some have suggested making laypersons a supermajority.<sup>196</sup> Other important issues relating to the composition of the Commission include the size of the Commission and the number of Commissions to establish in a particular jurisdiction.

The Commission's duties should include identifying, recruiting, interviewing, evaluating, and, ultimately, recommending candidates to the appointing authority. A stated goal must be to promote diversity on the bench. The Commission should submit a list of between two and five nominees per vacancy to the appointing authority, and s/he must make the appointment from that list within a prescribed time period.<sup>197</sup> The list of nominees should be made public to encourage public comment prior to the appointment. It is imperative that the Commission's independence from the appointing authority be preserved and protected.

Finally, the designated executive, also guided by a diversity mandate, must make his/her appointment from the Commission's list within the specified time frame.<sup>198</sup>

Retention elections have been a part of many merit selection systems.<sup>199</sup> These entail an uncontested election where the sole question put to the voters is whether the judge should remain in office. The election should take place after the judge has been in office long enough for voters to assess actual performance. State-

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196. See, e.g., Kelley Armitage, *Denial Ain't Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 CAP. U. L. REV. 625, 655-56 (2002) (decriing the domination of nominating commissions by lawyers, and urging that lay members comprise a supermajority of all commissions).

197. See MODEL PROVISIONS, *supra* note 195. The goal is to give the appointing authority a real choice while also limiting his/her appointing power. *Id.*

198. Many merit selection systems also include some sort of legislative confirmation.

199. Pelander, *supra* note 36, at 647 ("Retention elections are an integral aspect of merit selection."); Armitage, *supra* note 196, at 649 ("When wedded to retention elections, merit selection 'was a practical compromise between the goals of judicial independence and public accountability. The combined system of initial merit selection and subsequent retention elections was designed to obtain quality judges, maintain their independence by insulating them from political influences, and provide public accountability through a mechanism for removal of judges.'" (quoting Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 306-7 (1994) (citations omitted))).

sponsored and funded judicial performance evaluations/reviews and/or voters' guides should be used to educate the voters.<sup>200</sup>

The motivation for retention elections is to confront the criticism that merit selection is antithetical to judicial accountability, democracy, and the public's right to be heard.<sup>201</sup> But many argue that the threat retention elections pose to judicial independence outweighs any purported benefit.<sup>202</sup> Scholars have detailed the price paid by sitting judges in retention elections when they were characterized as "soft on crime."<sup>203</sup> Retention elections also open the door for other sorts of organized anti-incumbent campaigning as, for example, when business interests unite to remove a judge.<sup>204</sup> In short, retention elections are becoming increasingly expensive and nasty, thereby putting greater demands on sitting judges' time.<sup>205</sup> In lieu of a retention election, states should employ a reappointment process that begins as a judge's term nears completion. The Nominating Commission, aided by judicial performance evaluations/reviews, recommends to the appointing authority whether or not to reappoint.

Why merit selection? While it is impossible to entirely remove politics from the equation, merit systems remove political

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200. For more regarding judicial performance evaluation devices, see *supra* notes 69–70. For more regarding voters' guides, see *supra* note 38.

201. See, e.g., Dann & Hansen, *supra* note 37; Pelander, *supra* note 36. Others see retention elections as a sop to those who insist that elections must somehow play a role in judicial elections. See, e.g., Geyh, *supra* note 29, at 55 (arguing that retention elections are "a concession to the entrenched political necessity of preserving judicial elections in some form").

202. See, e.g., Shapiro, *supra* note 194, at 672.

203. See, e.g., Carrington *supra* note 120, at 110 (discussing how incumbent Judge Penny White of Tennessee lost her retention election because a campaign against her focused on one decision overturning a death sentence). Carrington observes that generally a judge's criminal law and capital punishment decisions will serve as "lightning rods" in a retention election. *Id.* Carrington also notes that the Governor of Tennessee at the time thought *White* sent an appropriate message to judges that when deciding cases they should look over their shoulders to see how their decisions will play at the polls. *Id.* See also Stephen B. Bright, *Judicial Review and Judicial Independence: Can Judicial Independence be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817 (1998).

204. See, e.g., Schotland, *supra* note 1, at 866–67 ("Since at least the early 1990s, Alabama, which for better or worse has led the nation in punitive damages awards, has seen constant hot contests between Democratic candidates supported by plaintiffs' trial lawyers and Republican candidates supported by business interests. . . . For a while, Texas Supreme Court elections were a battleground between liberal Democrats supported largely by plaintiffs' trial lawyers and Republicans and conservative Democrats supported by business interests.").

205. Even though there is no opponent, retention elections have still proven to be costly, and are getting costlier as judges strive to protect themselves from interest groups who target them for decisions they oppose. Finley, *supra* note 125, at 61.

considerations from judicial selection as much as possible.<sup>206</sup> Merit selection is not a panacea. But it is undeniably less overtly political and better suited to preserve the integrity of,<sup>207</sup> and to increase public trust and confidence in, the judiciary.<sup>208</sup> It is a process issue. As noted in one study, “A properly designed appointive system will take power out of the hands of unaccountable party bosses and give it to elected public officials accountable to the voters for their decisions.”<sup>209</sup> It may also yield greater diversity<sup>210</sup> and a better caliber of judge.<sup>211</sup> At a minimum, it removes the real, potential, or perceived influence of party leaders, fundraising, and political campaigning, and “the inherently partisan nature of political party activity.”<sup>212</sup> For many, that is enough to merit making the switch. “What our investigation has shown is that elective systems are so infused with party politics that they do not and cannot protect the independence of the judiciary and promote the broadest possible access to the bench, and that the threat to public confidence alone requires New York State to adopt less partisan alternatives.”<sup>213</sup>

## CONCLUSION

Judicial selection, the way we pick our judges, is taking on greater prominence. Judicial campaigns are becoming costlier and nastier as judicial elections become indistinguishable from any

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206. RESTORING THE PUBLIC TRUST, *supra* note 133, at 16 (“Politics cannot be banished altogether from judicial selection, whether under an elective or appointive system.”); GOVERNMENT ETHICS REFORM, *supra* note 81, at 274 (“Nor do we believe that politics can be banished completely from the selection of judges.”); Goldschmidt, *supra* note 61, at 78 (“Politics has not been eradicated under merit selection, but it has been greatly minimized.”); BEST WAY, *supra* note 166 (explaining that merit selection does not ensure the “total elimination of politics” from judicial selection, but it does “minimize political influence”). Some argue that merit selection is even more political than elections. *See, e.g.*, Maute, *supra* note 72; Donald C. Wintersheimer, *Judicial Independence Through Popular Election*, 20 QUINNIPIAC L. REV. 791 (2001).

207. *See, e.g.*, Reddick, *supra* note 59; Crompton, *supra* note 116 (arguing that merit selection is necessary to preserve the integrity of the judiciary).

208. *See, e.g.*, Reddick, *supra* note 59 (suggesting use of impact on public trust and confidence in the courts as the key criterion for judging judicial selection systems and concluding that merit selection is preferable on that measure); Goldschmidt, *supra* note 61, at 4 (explaining that merit selection is “not a panacea that would completely eliminate politics from judicial selection, [but] is a far preferable system . . . than [sic] the electoral process”).

209. RESTORING THE PUBLIC TRUST, *supra* note 133, at 16.

210. *See supra* notes 79–105 and accompanying text.

211. *See supra* notes 73–78 and accompanying text.

212. GOVERNMENT ETHICS REFORM, *supra* note 81, at 273.

213. *Id.* at 274.

other elections. The Supreme Court's decision in *White*, paving the way for more judicial campaign speech, only adds fuel to the fire.

In New York, the situation is even more dire. Scandals on the Brooklyn bench have prompted the District Attorney to convene a Grand Jury to investigate, *inter alia*, the way judges are selected in that borough, and the District Court's decision in *Spargo* generated much consternation and litigation.

It is time to reconsider the merits of merit selection and to compare that system to judicial elections. This Article informs the debate by examining the two processes and the hard data regarding the judges yielded by each method.

Why have judicial elections? Its proponents aver that elections encourage citizen participation in their judiciary and promote accountability by making judges beholden to the electorate. An examination of voting behavior raises questions about those propositions. Roll-off, the reduction in numbers of those who vote for candidates in the major races (i.e., Governor) but not for a judge, is profound. While apathy exists in elections for even the highest offices, it is even more evident in judicial elections. Very few people actually vote for a judicial candidate. So much for the goal of fostering democracy and civic participation. Rather than making judges accountable to the citizenry, it appears that elections simply vest almost absolute power in the hands of political party leaders. The result is that the judiciary remains one of the last bastions of pure political patronage.

If nobody votes, then why continue to subject judges to having to raise cash from, inevitably, the lawyers who appear in front of them, or from special interests that may have cases come across the judge's docket? It cannot come as a surprise that polls consistently show that the public believes elected judges are beholden to their campaign contributors. Why continue to have campaigns that seem to encourage judges to engage in bitter campaigning, and to publicly assert their views on a variety of legal or political issues? The result has been, and will continue to be, an erosion of public trust and confidence in the judiciary.

There is still more ammunition against judicial elections. A quarter of a century of data from the New York City judiciary reveals that elected judges are significantly more likely to be disciplined for judicial misconduct than their appointed counterparts. Could it be the case that political designees are picked more for their political bona fides than their qualifications? While both elections and appointments in New York have produced more

women and judges of color in the last decade than in previous years, it is clearly the case that minorities fared much better in the elective system. Yet, a deeper analysis reveals that that result is limited to New York City. An examination of the statewide elected judiciary reveals an astonishing lack of judges of color. Outside New York City, it seems well nigh impossible for a person of color to be elected to the bench in New York State.

The solution is merit selection. The structure of the component parts of the merit selection system is critical. There must be a diverse, non- or bipartisan nominating commission with a substantial presence of nonlawyers. The commission should be guided by a diversity mandate to help ensure that the bench better mirrors the population it serves and should recommend only a limited number of candidates to the appointing authority. The appointer must then be constrained to make his/her selection from the list received from the nominating commission. A perfect system? No. Better than elections? Yes, and more likely to produce a truly "qualified, inclusive, and independent judiciary."