ARTICLES

LÓPEZ TORRES AND JUDICIAL SELECTION IN NEW YORK: AN ARGUMENT FOR MERIT-BASED APPOINTMENT TO THE STATE SUPREME COURT

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I. INTRODUCTION

The New York State Supreme Court is New York's statewide trial court of general jurisdiction. Justices of the state supreme court have been chosen by popular election since that change was effected by the New York Constitution of 1846.[1] With the exception of a brief period between 1912 and 1920, political parties have nominated their candidates for the supreme court using delegate-based conventions. In *López Torres v. New York State Board of Elections*, the federal courts in New York determined that the state's current statutory embodiment of the judicial nominating convention is unconstitutional, enjoined its further use, and mandated nomination by the direct primary method pending legislative action.[2] The United States Supreme Court, in a brief and unanimous decision, reversed the lower courts, finding no

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[1] N.Y. CONST. of 1846, art. VI, § 12.

[2] 411 F. Supp. 2d 212, 255–56 (E.D.N.Y. 2006). By order dated March 3, 2006, the District Court stayed its ruling until after the 2006 election cycle. López Torres v. N.Y. State Bd. of Elections, No. 04 CV 1129 (JG) (E.D.N.Y. Mar. 3, 2006) (order granting stay of injunction). Upon grant of certiorari to the U.S. Supreme Court, the District Court again stayed its ruling, upon the stipulation of the parties, until after the 2007 election cycle. López Torres v. N.Y. State Bd. of Elections, No. 04 CV 1129 (JG) (E.D.N.Y. Mar. 1, 2007) (order extending stay of injunction one year). All of the orders, decisions, briefs, and other documents pertaining to the *López Torres* case can be found at http://www.brennancenter.org/content/resource/lopez_torres_v_nys_board_of_elections (last visited May 1, 2008).

constitutional violation in New York's convention system.[3]

Though the judicial nominating convention has survived the *López Torres* case, the decisions have revived the perennial question of the best mode of judicial selection in New York. Indeed, in a stinging single-paragraph concurrence, Justice Stevens is sharply critical of New York's process and to some degree the policy of electing judges in general.[4] This Article argues in favor of a constitutional amendment in New York instituting a local merit-based appointment system for state supreme court justices. It reviews the history of judicial selection, particularly that of the state supreme court, since New York's provincial days, and concludes that several enduring and guiding principles regarding the subject can be gleaned from the state's several experiments with different modes. Applying these principles, the Article concludes that the merit-based appointive system is preferable, as partisan and personal politics can never be wholly divorced from judicial selection, but the judicial election campaign and its insidious incidents can.

Part II describes the judicial election and nomination processes for state supreme court justices in New York and details the statutory framework for the current judicial district nominating convention. Part III briefly reviews the *López Torres* case, including the arguments of the parties and the courts' decisions. Part IV chronicles the history of judicial selection in New York, particularly for the supreme court, and posits several enduring historical principles useful in contemplating the best mode of judicial selection. Part V expounds on these principles, explores the judicial election campaign, and argues in favor of a merit-based appointive system.

II. THE JUDICIAL NOMINATING CONVENTION

Since 1846, New York's Constitution has required that state supreme court justices be chosen by the electors of the judicial district in which they are to serve.[5] To that end, New York is currently divided into twelve judicial districts, each encompassing several of the state's 150 assembly districts.[6] The judicial districts

[3] N.Y. State Bd. of Elections v. López Torres, 128 S. Ct. 791, 798–801 (2008).
[4] *Id.* at 801 (Stevens, J., concurring).
[5] N.Y. CONST. of 1846, art. VI, §12 (currently N.Y. CONST. art. VI, § 6(c)).
[6] N.Y. CONST. art. VI, § 6(a), (b); N.Y. JUD. LAW § 140 (McKinney 2005).

currently contain as few as nine and as many as twenty-four assembly districts.[7]

New York State Supreme Court justices are elected from the judicial districts at the ordinary November general election.[8] A place on the general election ballot can be obtained either by receiving the nomination of a major party[9] at its judicial district nominating convention or by filing an independent nominating petition, which requires 1,500 signatures (4,000 in New York City).[10] In addition, any candidate can have his or her name written-in on the general election ballot.[11]

With the exception of a brief period between 1912 and 1920, political parties in New York have nominated their candidates for the state supreme court using delegate based judicial conventions, with delegates elected at party primary elections or other nominating conventions. The current form of the judicial nominating convention was statutorily enacted in 1921, following several years of a failed experiment with direct primary nominations of supreme court justices.[12] The only way to obtain a major party nomination, which is tantamount to election in many areas, is by gaining a majority of the votes cast at the party's judicial convention.[13]

The nominating convention process for New York's political parties, like most convention systems, is a two-part process. First, delegates and alternate delegates to the convention are elected in each assembly district within a judicial district at the September party primary.[14] Next, the delegates gather and vote at the party's

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[7] *López Torres*, 411 F. Supp. 2d at 218–19.

[8] N.Y. ELEC. LAW § 8-100(c) (McKinney 2007).

[9] A "party" is "any political organization which at the last preceding election for governor polled at least fifty thousand votes for its candidate for governor." *Id.* § 1-104(3). New York presently has five recognized parties: the Democratic Party, the Republican Party, the Conservative Party, the Independence Party, and the Working Families Party. N.Y. State Bd. of Elections, Running for Office, http://www.elections.state.ny.us (click on "Running for Office" tab) (last visited May 1, 2008). Political organizations that have not met the threshold are deemed "independent bod[ies]" by the election law. *See* N.Y. ELEC. LAW § 1-104(12).

[10] N.Y. ELEC. LAW §§ 6-138(1), -142(2)(a), -142(2)(b-1), -142(2)(c).

[11] *Id.* § 8-308.

[12] Act of May 2, 1921, ch. 479, 1921 N.Y. Laws 1451. The relevant sections have been re-codified on several occasions since 1921 and are currently sections 6-106 and 6-124 of the New York Election Law.

[13] New York Election Law does not require judicial conventions to elect party nominees by a majority or any particular method; as a practical matter, most convention nominations are unanimous. López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 178 (2d Cir. 2006).

[14] N.Y. ELEC. LAW §§ 6-124, 8-100(1)(a). The number of delegates is specified by party rules, but by law must be in substantial accordance with the ratio of the votes cast for

nominating convention, typically held in the third week in September.[15] Each party holds its own nominating convention in any district in which a vacant seat on the state supreme bench must be filled and nominates candidates for as many seats as are vacant. The candidates who receive the majority of the votes cast automatically receive the party's nomination and a place on the general election ballot.[16]

To obtain a spot on the primary ballot, a candidate for delegate or alternate must obtain at least 500 valid signatures from registered party members residing within the assembly district in which they are running.[17] Because the requirements for signatures are very technical, and because challenges to the validity of signatures are common, a candidate must realistically gather at least two to three times the required number in order to comfortably survive a challenge. Candidates have a thirty-seven day period in which to collect signatures.[18] If only one candidate submits a petition for an open seat, no primary is held, and the person is deemed elected by operation of law; in other words, if only one slate of candidates submits petitions, there is no primary election for convention delegates.[19] In the event a primary is held, the candidate affiliations of the delegates are not listed on the primary ballot.[20]

The judicial conventions are often brief, with the determination as to candidates having been made by local political leaders, with input from the bar, before the convention is held. Delegates do regularly affirm the decision of the political leaders. Part of this is a practical matter, in that most judicial districts span multiple counties, and the leaders of each county play a role in the geographic distribution of the positions; some discussion and perhaps agreement must be had ahead of time. In many instances, however, more candidates than can be seated desire the nomination, multiple votes must be taken at the convention, candidates withdraw and their delegates

governor in the preceding election in the assembly district to the total number of votes cast for governor in the state. *Id.* § 6-124.

[15] *Id.* §§ 6-126, 6-158(5).

[16] *E.g.*, *id.* § 7-104(5).

[17] *Id.* § 6-136(2)(i). The law actually requires the lesser of 500 or five percent of the enrolled party members in the assembly district. *Id.*

[18] *Id.* § 6-134(4).

[19] *Id.* § 6-160(2).

[20] This absence of affiliation does present a significant hurdle for an outsider party candidate, as the candidate must conduct separate voter education campaigns in each assembly district within the judicial district to identify to primary voters which delegates support their candidacy.

get behind other candidates, and a majority is finally reached. Moreover, cross-endorsement by the major parties of the candidates deemed most qualified, as a means of keeping partisan electoral strife out of the judiciary, is so common that the decision of the convention is at times even more a simple ratification of a decision already made.[21] The practice of cross-endorsement of qualified candidates has often been endorsed by the organized bar.[22]

The judicial convention system has met with criticism and reform attempts since its inception.[23] As a recent illustration, in 2003 Chief Judge Judith S. Kaye formed the New York State Commission to Promote Public Confidence in Judicial Elections (the "Feerick" Commission) to study various aspects of New York's judicial election process.[24] The Commission authored a series of reports—the final report dated February 6, 2006. In this final report, the Commission detailed its investigations and conclusions regarding the nomination process for New York State Supreme Court justices.[25] The Commission recommended retaining the district convention system, as against a change to the direct primary, albeit with significant modification.[26] Notwithstanding various reform efforts through the years, the delegate based convention has remained the method by which political parties in New York nominate state supreme court justices through the present day.

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[21] *See, e.g.*, *Judges in Politics*, N.Y. TIMES, Sept. 24, 1886, at 4 ("A feeling has been growing in strength for some years in this State in favor of ignoring party considerations so far as possible in the election of Judges. . . . It has reached its highest development in the agreement of opposing parties to support the same candidate and so remove all political contest from the selection."); *This Year's Judiciary Elections*, N.Y. TIMES, Aug. 10, 1895, at 4 ("The sentiment in favor of keeping politics out of judiciary elections and partisanship off the bench has grown strong in this State in recent years, and it has been no uncommon thing for an exceptionally fit candidate to be supported by citizens of all parties.").

[22] Theodore D. Hoffman, Letter to the Editor, *Bar Association's View on Endorsements*, N.Y. TIMES, Nov. 8, 1987, at 11 LI 40.

[23] *See* COMM'N TO PROMOTE PUB. CONFIDENCE IN JUDICIAL ELECTIONS, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2006) [hereinafter COMM'N TO PROMOTE PUB. CONFIDENCE], http://law.fordham.edu/commission/judicialelections/images/jud-finreport.pdf. All the Commission's reports are available at http://law.fordham.edu/commission/judicialelections (last visited May 1, 2008).

[24] *See* COMM'N TO PROMOTE PUB. CONFIDENCE, *supra* note 23, at 2.

[25] *See id.* at 3–4.

[26] *See id.* The Commission recommended making the convention more open and effective by reducing the overall number of delegates to the convention to two delegates and two alternates per assembly district; having the delegates cast weighted votes; reducing the signature requirement to 250; having delegates and alternates serve a three-year term; having delegates and alternates elected in the year preceding their first convention; permitting candidates to address the convention delegates; and having the New York State Board of Elections provide the delegates and public with more information regarding the races. *See id.*

III. LÓPEZ TORRES V. NEW YORK STATE BOARD OF ELECTIONS

In March of 2004, the plaintiffs in *López Torres* brought suit against the New York State Board of Elections and its commissioners pursuant to 42 U.S.C. § 1983, alleging that the nominating process for the office of New York State Supreme Court justice imposes an unconstitutional burden on First and Fourteenth Amendments' voters' association and candidates' ballot access rights.[27] In June of that year, the plaintiffs moved in the United States District Court for the Eastern District of New York for an order enjoining enforcement of the relevant statutory provisions, directing the legislature to fashion a new scheme, and mandating direct primary elections to nominate state supreme court candidates in the interim.[28] The New York City and State Associations of State Supreme Court Justices, the New York County Democratic Committee, and the New York Republican State Committee intervened to defend the convention system.[29]

The plaintiffs alleged, and the lower federal courts agreed, that the combined burdens of New York's state-imposed convention scheme, viewed in a realistic light, are so onerous as to disqualify all candidates from consideration lacking either great personal wealth or strong political party connections.[30] Whereas a candidate with the backing of party leaders could easily satisfy the statutory requirements by aid of the existing party apparatus, it was alleged that unconnected party candidates have no chance of obtaining the nomination.[31] As a result, the convention system vests de facto power to appoint state supreme court justices in political bosses, to the exclusion of the rights of party members and potential candidates.[32]

More particularly, the plaintiffs averred that none of the various options open to an outsider party candidate, including (a) fielding multiple slates of candidates for delegates and alternates across numerous assembly districts, and gathering necessary signatures, in order to obtain a majority of the votes at the convention;[33] (b)

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[27] López Torres v. N.Y. State Bd. of Elections, 411 F. Supp. 2d 212, 214 (E.D.N.Y. 2006).
[28] *See id.*
[29] *Id.* at 212.
[30] *Id.* at 255.
[31] *Id.* at 249.
[32] *See id.* at 231.
[33] *See id.* at 221–23.

lobbying the otherwise-elected delegates;[34] or (c) running as an independent or write-in candidate in the general election,[35] provided a reasonable opportunity for success in obtaining a state supreme court position. In defense of the convention system, the State, the Justices' Associations, and the political parties argued that New York had chosen a reasonable and constitutionally permissible means of settling intra-party disputes, and that the availability of all of the above options rendered the system constitutionally sound as a whole.[36]

The plaintiffs pointed specifically to the experience of the named plaintiff, Judge Margarita López Torres, in her attempts to secure the Democratic Party nomination for state supreme court justice in the Second District.[37] Although a popular civil court judge in Brooklyn, Judge López Torres's efforts to secure the nomination were repeatedly thwarted by then-Brooklyn party boss Clarence Norman.[38] It was no secret that the boss's actions came in reprisal to the refusal of Judge López Torres to hire certain law clerks in her court at the direction of the party.[39] Judge López Torres was ultimately blocked by party leaders in her efforts to obtain this nomination.[40]

Following an evidentiary hearing, the district court granted the plaintiffs' motion, finding that they had demonstrated a clear likelihood of success on the merits of their First Amendment claims.[41] The court purported to analyze the case under a ballot access paradigm, and ultimately concluded, based upon an extensive record, that New York's nomination scheme severely burdens voters' and candidates' First Amendment rights.[42]

Upon finding that the process imposes a severe burden, the court applied strict scrutiny, and although assuming the government's interests compelling, determined that the electoral system was not narrowly tailored to further any of them.[43] The court declined to order the legislature to enact a new system, noting it was without

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[34] *See id.* at 223–28.

[35] *See id.* at 245–46.

[36] *See id.* at 221–28, 245–46.

[37] *See id.* at 234–37.

[38] *Id.*

[39] *Id.*

[40] *Id.* Judge López Torres did run on the Working Families Party line in 2003, but was not successful in the general election.

[41] *Id.* at 255–56.

[42] *See id.* at 248–50.

[43] *See id.* at 250–51.

authority to do so, but directed that New York conduct direct primary elections for nominations for the office of supreme court justice until the legislature should fashion a new electoral scheme.[44]

The Second Circuit Court of Appeals affirmed the district court's determination in full.[45] In a lengthy decision, the court opined that the district court had acted within its allowable discretion in determining that the plaintiffs demonstrated a clear likelihood of success on the merits and in its choice of remedy.[46]

The United States Supreme Court unanimously reversed the decisions of the lower courts.[47] Writing for the Court, Justice Scalia ostensibly brushed away much of the lower courts' reasoning, and distilled the constitutional question to whether the First Amendment provides a party candidate a right to a fair chance at electoral success in the party's candidate selection procedure.[48] The Court answered this narrow question in the negative.[49]

The Court first recognized that political parties themselves have a First Amendment associational right, within certain limitations, to choose their membership and structure their procedures as they desire,[50] but stated that the disappointed candidates were in no position to rely on the parties' rights to support their constitutional claims.[51] Furthermore, the Court found no support for the claim of a separate candidate's right to a "'fair shot'" at electoral success,[52] and declined to invent such a right, noting that the question of what constitutes a fair shot in any given set of circumstances would be a constitutionally unmanageable standard.[53] The Court also declined to consider as a constitutional factor, in this context, the lack of "competitiveness" (or "'one-party rule'") of an election scheme, noting that reasonable access to the general election ballot normally protects constitutional interests in this regard.[54]

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[44] *See id.* at 255–56. The Court reasoned that New York's default nomination scheme is the direct primary. *See* N.Y. ELEC. LAW § 6-110 (McKinney 2007). On that basis, it ordered use of the default system pending legislative action. *López Torres*, 411 F. Supp. 2d at 256.

[45] López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 208 (2d Cir. 2006).

[46] *Id.*

[47] N.Y. State Bd. of Elections v. López Torres, 128 S. Ct. 791, 794 (2008).

[48] *Id.* at 797–98.

[49] *Id.* at 801.

[50] *Id.* at 797–98.

[51] *Id.* at 798.

[52] *Id.* at 799.

[53] *Id.*

[54] *Id.* at 800. The Court noted that "'one-party entrenchment'" has only been used to interfere with a party's candidate selection procedures in Fourteenth and Fifteenth Amendment contexts. *Id.* Had the Court recognized competitiveness as a constitutional

Justice Stevens's brief concurring opinion, joined by Justice Souter, is worth reciting in full:

> While I join Justice Scalia's cogent resolution of the constitutional issues raised by this case, I think it appropriate to emphasize the distinction between constitutionality and wise policy. Our holding with respect to the former should not be misread as endorsement of the electoral system under review, or disagreement with the findings of the District Court that describe glaring deficiencies in that system and even lend support to the broader proposition that the very practice of electing judges is unwise. But as I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: "The Constitution does not prohibit legislatures from enacting stupid laws."[55]

IV. A HISTORY OF JUDICIAL SELECTION IN NEW YORK

New York has experimented, since its inception, with a variety of methods of selecting its judicial officers. Each has met with differing results, though several enduring principles can be gleaned from a review of New York's varied attempts. These indications will be outlined briefly at this point; none are innovations, yet all are especially confirmed through a historical survey.

First, whether judges are elected or appointed, or selected in any combination of these processes, no system will ever completely remove partisan and personal politics from the process. Second, altering the mode of judicial selection does not remove politics from the process, but merely redistributes the balance of selecting power between political leaders/bosses and executives. Third, although conflicts of interest and corruption in the selection process can be of a systemic nature, they are more often the result of individuals and personal motivations than of broad structural failure. Finally, primary elections are a poor method for making nominations in state judicial races, and New York's two brief experiments with this process resulted in quick reversals.

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factor in this context, the practice of cross-endorsement may well have been the next subject up for review.

[55] *Id.* at 801 (Stevens, J., concurring).

A. The Supreme Court of Judicature

In the late seventeenth century, New York's Provincial Assembly undertook a reorganization of the judicial system of the colony.[56] The resulting Judicature Act of 1691 "provided for a court of chancery, a supreme court, a court of common pleas, courts of sessions, and justices' courts."[57] The Supreme Court of Judicature, which was intended to preserve and administer the English common law, was first organized soon after passage of the Act, which granted the court jurisdiction over all "pleas, Civill Criminall, and Mixt, as fully & amply to all Intents & purposes whatsoever, as the Courts of Kings Bench, Comon Pleas, & Exchequer within their Majestyes Kingdome of England, have or ought to have."[58] The Act was renewed from time to time, and continued in force, with some modifications, through the organization of the state government in 1777.[59] New York's 1777 Constitution continued, albeit implicitly, the existence of the state supreme court.[60]

During this era, judges were appointed by the king or the colonial governor, and were paid and retained at their leisure.[61] The colonists fast grew weary of this arrangement, however, as the king was a frequent participant in litigation in those times, and judges dependent solely on him for their continued employment or salary were feared to be less than impartial in such matters.[62] The

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[56] *See* PAUL M. HAMLIN & CHARLES E. BAKER, SUPREME COURT OF JUDICATURE OF THE PROVINCE OF NEW YORK 1691–1704: INTRODUCTION 51 (1959); 1 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 461 (1906).

[57] 1 LINCOLN, *supra* note 56, at 462. The Act can be found in 1 COMM'RS OF STATUTORY REVISION, THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 226–31 (1894) [hereinafter COLONIAL LAWS].

[58] 1 COLONIAL LAWS, *supra* note 57, at 229; *see also* HAMLIN & BAKER, *supra* note 56, at 68. The only limitation on the Supreme Court's jurisdiction was the provision that an action must be for "upwards of twenty pounds" or for "the right or title of any freehold." *See* HAMLIN & BAKER, *supra* note 56, at 68.

[59] *See* 1 LINCOLN, *supra* note 56, at 462.

[60] The Constitution does not expressly create or continue the state supreme court, but makes references to it in passages regarding mandatory retirement age, concurrent office holding, and clerks of the court. N.Y. CONST. of 1777, arts. XXIV, XXV, XXVII, *available at* http://www.nycourts.gov/history/pdf/Library/1777_constitution.pdf. All of New York's Constitutions can be found at the New York Court of Appeals website. *See* The Historical Society of the Courts of the State of New York, Library, http://www.nycourts.gov/history/Library.htm (last visited May 1, 2008).

[61] In 1686, King James issued a royal commission to Governor Thomas Dongan specifically authorizing him to erect courts and appoint judges. *See* 1 LINCOLN, *supra* note 56, at 31 (noting that this commission contained the same provision for judges and courts as its predecessor of 1682).

[62] *An Elective Judiciary*, N.Y. TIMES, Nov. 20, 1858, at 4 ("[T]he reason why it was

colonists' complaint of the king that "[h]e has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries" was registered in both the Declaration of Independence and New York's 1777 Constitution.[63]

B. New York's First Constitution—The Council of Appointment

Several early states, including New York, sought to prevent such executive control of the judiciary by vesting the appointment authority in one or both houses of the legislature.[64] New York's 1777 Constitution provided for appointment of state officials, including judges, by a Council of Appointment, made up of four senators chosen by the Assembly, and the governor, with the latter having only a casting vote.[65] Popular election of judges was not thought an option at that time.[66] The first constitution also contained additional protections such as extended tenure for judges[67] and the perpetuation of the public jury trial.[68]

This arrangement had its difficulties in the ensuing years. Structurally, a disagreement arose as to whether the right to propose candidates for nomination was vested with the governor or members of the Council, which was resolved at the 1801

considered a great grievance that the Judges should be thus dependent on the King was that the King was frequently a plaintiff in the courts, in criminal and other prosecutions and trials, and it was feared that the Judges would thus override the constitution and the laws in their desire to please him. It was not because he was a King simply, but because he was frequently a party in causes.").

[63] THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776); N.Y. CONST. of 1777, para. 25 (omitting capital letters).

[64] *See* Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 176 n.1 (1980) (noting that "[e]ight of the original 13 states vested the appointment power in one or both houses of [their] legislature"); *see also The Elective Judiciary*, N.Y. TIMES, Dec. 5, 1853, at 4 ("Long terms, or a limitation as to age, for the higher departments of the Judiciary, and short terms for the subordinate Courts, have been established in most of the States. And the same spirit of innovation has transferred, in many instances, the appointing power from the Executive and State Senate to the Legislature.").

[65] N.Y. CONST. of 1777, art. XXIII. The first constitution contained scattered sections dealing with the judiciary and courts. *See id.* arts. XXIII–XXV, XXVII, XXVIII, XXXII.

[66] THE FEDERALIST NO. 76, at 392 (Alexander Hamilton) (George W. Carey & James McLellan eds., Liberty Fund 2001) (discussing the power of appointing government officers, and noting, "The exercise of it by the people at large, will be readily admitted to be impracticable; since wa[i]ving every other consideration, it would leave them little time to do any thing else" (alteration in original)).

[67] N.Y. CONST. of 1777, art. XXIV (providing that the judges of the supreme court shall "hold their offices during good behavior or until they shall have respectively attained the age of sixty years").

[68] N.Y. CONST. of 1777, art. XLI.

Constitutional Convention as being vested in both.[69]

Concerns also existed regarding the highly political nature of this selection body. Alexander Hamilton, in The Federalist No. 77, lamented the Council at work in New York, calling it a "small body, shut up in a private apartment, impenetrable to the public eye," and opining, "[e]very mere council of appointment, however constituted, will be a conclave, in which cabal and intrigue will have their full scope."[70] Similarly, Charles Z. Lincoln explains, in his *Constitutional History of New York*,

> Under the construction given by [the 1801] Convention the council became a powerful and sometimes a very objectionable political machine, and at the time of its abolition, twenty-one years later, it wielded a patronage including nearly 15,000 officers, with an aggregate salary list of one million dollars. It often dispensed patronage with a high hand, making appointments and removals at will; it reduced the dignity and responsibility of the governor, so that, instead of being the chief executive of the state, he had only a casting vote in this appointing body, and only one fifth of the power of making nominations.[71]

C. Appointment by the Governor

New York's second Constitution, of 1821, the product of the convention held that year, changed the process to appointment by the governor, with the advice and consent of the Senate, of all judges, with the exception of local justices of the peace, who were

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[69] *See* 1 LINCOLN, *supra* note 56, at 602–03. The Convention met in 1801 for the purpose of determining, among other things, whether the right of nomination was vested exclusively with the governor or concurrently with members of the council. The final resolution, as adopted, read, "'the right to nominate all officers other than those who, by the Constitution, are directed to be otherwise appointed, is vested concurrently in the person administering the government of this state for the time being, and in each of the members of the Council of Appointment.'" *Id.* at 610.

[70] THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 66, at 398. In *The Federalist No. 77*, Hamilton discusses the mode of selecting officials. *Id.* at 396. He compares the merits of vesting the appointment authority in a single person "of discernment" versus a select assemblage of decision-makers, and argues decisively in favor of the former for the proposed Federal Constitution, based largely upon the experience in New York. *Id.* at 397–98. In *The Federalist No. 78*, Hamilton addresses specifically the proposed judiciary but quickly dispenses with the subject of selection by referencing the arguments for appointment of all officers made in the last two numbers. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 66, at 401.

[71] *See* 1 LINCOLN, *supra* note 56, at 611.

appointed on a local level.[72] At this time, the people were not yet ready for the notion of an elected judiciary. Of such a system, Mr. John Duer remarked at the 1821 Convention, "'God forbid that the time shall ever come when suitors shall be anxious to inquire into the political sentiments of the judges by whom their cases are to be heard.'"[73] Judicial tenure during good behavior, until the age of sixty years, continued through 1846.[74]

During the many years of appointment, when the power of judicial selection was lodged first in the legislature, then in the executive, partisan and personal political connections, and all of their incidents, were never far removed from the process. The *New York Times* later commented of this era, "Vacancies were filled, if not with partisans, almost invariably by friends and adherents of the party in power. This was natural, and it is a custom, or rule, which has always prevailed in the mother Country."[75] It was likewise observed that, under the system of gubernatorial and legislative appointment,

> [p]arty caucus, party service, or disgusting log-rolling, frequently determined the choice. An eminent lawyer of the West, who had been induced to serve his county in the State Senate, once told us that he had seen claims for the Chancellorship and Supreme Bench, bartered off for votes for Door-Keeper.[76]

D. Jacksonian Democracy and Judicial Elections

The move to an elected judiciary in New York was in line with a growing national Jacksonian Democratic trend toward popular election of all public officials.[77] Under the prior systems, the people

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[72] N.Y. CONST. of 1821, art. IV, § 7. The new constitution took effect December 31, 1822. *Id.* art. I n.1, http://www.nycourts.gov/history/pdf/Library/1821_New_York_Constitution.pdf.

[73] *Elected Judges: Candid Statement of our Judicial Situation*, N.Y. TIMES, Oct. 13, 1873, at 2.

[74] N.Y. CONST. of 1821, art. V, § 3.

[75] *An Elective Judiciary*, N.Y. TIMES, Sept. 26, 1857, at 4; *see also* The Quarterly Review, *Tampering with Jurors and Political Jobbery*, N.Y. TIMES, Aug. 29, 1886, at 10 ("That form of bribery which is often a concomitant of party government—the bestowal of offices and valuable consideration of various kinds to secure allegiance to the party in power—was very common during the eighteenth century in England.").

[76] *A Popular Judiciary*, N.Y. TIMES, Apr. 13, 1853, at 4; *see also Our City Judiciary*, N.Y. TIMES, Oct. 3, 1860, at 4 ("The present system of electing Judges by popular vote owes its origin to the fact that official corruption often cast a blot upon the previously existing custom of executive appointment.").

[77] *See* Berkson, *supra* note 64, at 176 (noting that several states, including Georgia,

came to view the judiciary as more favorable to the landed aristocrats than to the tenant farmers and other less wealthy litigants, and as lacking accountability to the common citizen.[78]

In 1826, the appointive method of selecting the judges of the local justices' courts was changed to an elective process.[79] The Constitutional Convention of 1846 then determined, with little discussion, that all state officers, including judges, would be popularly elected.[80] New York's third Constitution, of 1846, created the Court of Appeals, continued the state supreme court, and provided that the justices of each would be elected by the people.[81] It also provided that state supreme court justices would be elected for a term of eight years, whereas in the past judges served, as was the long tradition, during good behavior.[82]

In line with other elective offices during this period, parties nominated their choice of judicial candidates in delegate based conventions.[83] Delegates to these conventions were chosen at

Indiana, Mississippi, and Michigan, began to experiment with judicial elections in the first half of the nineteenth century); Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 191 (1993) (quoting Learned Hand as stating that New York reformed its judiciary "under the full tide of Jacksonian [D]emocracy").

[78] *See* George Bundy Smith, *Choosing Judges for a State's Highest Court*, 48 SYRACUSE L. REV. 1493, 1493 (1998); *see also* Berkson, *supra* note 64, at 176 ("People resented the fact that property owners controlled the judiciary. They were determined to end this privilege of the upper class and to ensure the popular sovereignty we describe as Jacksonian Democracy." (footnote omitted)).

[79] *See* 2 LINCOLN, *supra* note 56, at 6 (noting that Governor DeWitt Clinton recommended this measure to the Legislature in 1825, and "[t]he Governor's recommendations were referred to a select committee in the senate, which, on the 3d of February, 1825, reported unanimously in favor of the election of justices of the peace, and proposed an amendment to the Constitution to accomplish that result. This amendment was adopted by the senate, and concurred in by the assembly, and ratified by the people in November, 1826").

[80] *See* Berkson, *supra* note 64, at 176.

[81] N.Y. CONST. of 1846, art. VI, §§ 2, 3, 12 ("The judges of the Court of Appeals shall be elected by the electors of the State, and the justices of the Supreme Court by the electors of the several judicial districts, at such times as may be prescribed by law.").

[82] *Id.* art. VI, § 4.

[83] *See* Editorial, *Belden Named the Judge; He Combined to P. B. M'Lennan the Nomination*, N.Y. TIMES, Sept. 23, 1892, at 4 (noting that the Republican Judiciary Convention for the Fifth District agreed after two days of balloting to nominate Peter B. McLennan to the office of state supreme court justice); *City Politics*, N.Y. TIMES, Oct. 20, 1855, at 1 (describing the results of various conventions and the judicial candidates nominated); *The Democratic Convention*, N.Y. TIMES, Apr. 28, 1870, at 1 ("The Democracy made short work of their Judiciary Convention today. The slate was all made up before the Convention assembled, and it only remained to carry out the programme agreed upon by the leaders."); *For the Supreme Court; Judge Tracy Nominated by the Republicans of the Second District*, N.Y. TIMES, Sept. 28, 1882, at 8 (describing the Republican Judiciary Convention of the Second District); Editorial, *The Kelly Nominations for Judges*, N.Y. TIMES, Oct. 12, 1875, at 4 (describing the Tammany Judiciary Convention); *Nominations of Judges*, N.Y. TIMES,

primary election meetings, sometimes known as caucuses,[84] or by other conventions or committees.[85] New York did not yet sponsor, or even regulate, these party proceedings, which were thus largely creatures of the individual organizations.[86] The parties and

Oct. 14, 1859, at 4 (describing the results of the Tammany Judiciary Convention); *Second Judiciary District; Judge Tappen Renominated by the Democrats—The River County Delegates Withdraw from the Convention*, N.Y. TIMES, Oct. 8, 1875, at 8 (noting that the Second Judiciary District Democratic Convention met yesterday at the Kings County Courthouse to nominate a successor for a place on the state supreme court); *The Sixth Judicial District*, N.Y. TIMES, Oct. 9, 1887, at 5 (noting that the Sixth District Judiciary Convention met at the Hotel Bennett to nominate two candidates for the state supreme court); *The Union Republican Judiciary Convention—Nomination of the Candidates*, N.Y. TIMES, Oct. 20, 1865, at 8; *Whig Judiciary Nominations*, N.Y. TIMES, Oct. 18, 1851, at 2 (describing the results of the Whig Judiciary Convention, which consisted of three delegates from each Ward).

[84] *See Brooklyn City: Judicial Convention*, N.Y. TIMES, Oct. 7, 1853, at 3 ("The Whigs have nominated . . . delegates to the Convention of the Second Judicial District, to be held at Poughkeepsie Tuesday next . . . . This Convention is to nominate a candidate for Justice of the Supreme Court . . . ."); *Brooklyn News: Political*, N.Y. TIMES, Oct. 5, 1861, at 9 ("The Democrats have elected the following delegates to the Judicial Convention for the Second District . . . ."); *City Politics: Interesting Meeting at Tammany Hall—Arrangements for the Primary Election—Anti-Douglas Resolutions Squelched*, N.Y. TIMES, Oct. 8, 1858, at 5 (noting that the Democratic General Committee met last evening at Tammany Hall, and "[a]fter some preliminary matters, it was ordered that the Democratic electors should meet in their respective Wards on Monday evening next, to elect delegates to a County Convention, to a Judicial Convention and to the different Congressional and Assembly Conventions"); *Judicial Nomination at Albany*, N.Y. TIMES, Oct. 11, 1861, at 8 (noting that the People's Judicial Convention of the Third District met at Albany to nominate a candidate for justice of the supreme court); *Opening of the Campaign; Dates Decided Upon for the Local Conventions*, N.Y. TIMES, Sept. 18, 1890, at 1 (noting that the Tammany General Committee set the election schedule as follows: "Primary elections in all Assembly Districts Oct. 1. . . . Judicial District Court Conventions in the Third and Seventh Judicial Districts . . . Oct. 11, 7:30 o'clock"); *Preparing for the Election; Second Republican Rally at Cooper Institute—Other Meetings*, N.Y. TIMES, Oct. 13, 1879, at 8 ("The delegates to the County, Senatorial, Aldermanic, Judicial, and Assembly conventions will be elected to-morrow night by the district associations."); *The Republican Primaries*, N.Y. TIMES, Sept. 4, 1875, at 5 ("Delegates to the Judiciary Convention were elected in the Second Assembly District of Queens County . . . ."); *Whig Primary Meetings*, N.Y. TIMES, Oct. 7, 1851, at 3 ("The Ward and Town Meetings for the election of delegates to the City, County, Assembly and Judicial Conventions will be held at the usual places, on Wednesday evening.").

[85] In some areas, county or assembly district conventions elected or appointed the delegates to the judicial conventions. *See Political: The Democratic State Convention—Delegates Elected*, N.Y. TIMES, Sept. 19, 1869, at 1 (noting that the Democratic Convention for the First Assembly District of Columbia County elected R.E. Andrews as a delegate to the Judicial Convention, and that, in Schenectady, the Democratic County Convention appointed A.W. Hunter as a delegate and S.V. Switz as an alternate delegate to the Judicial Convention); *Putnam County Republicans: Samuel H. Everett Unanimously Nominated for the Assembly*, N.Y. TIMES, Sept. 26, 1880, at 7 ("In convention here today the Republicans of Putnam County . . . without dispute selected candidates for county offices and delegates to the Judicial and Congressional Conventions.").

[86] Noting the growing complaints about conduct at the primaries, New York enacted a law in 1882 called, "[An act] to protect primary elections and conventions of political parties and to punish offenses committed thereat," which criminalized certain election conduct, including

political organizations would themselves fix a place and time to vote, at which interested voters could gather and cast a primary ballot for delegates, with a ballot box in place of today's voting machine. Although often reasoned affairs, these primary meetings could at times turn quite violent.[87]

E. The Experience with Judicial Elections

The first judicial election produced generally positive results, owing largely to the fact that the judges were elected at a special election, set apart from the general election of other officers, although parties did nominate the candidates.[88] However, the cost of administering an additional election was unwieldy, particularly in smaller localities.[89] The separate election was soon abandoned, and judges were chosen at the same election as other officers, permitting greater involvement of the usual political machinations in the judicial selection process.[90]

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various forms of voter fraud and vote buying. Act of May 13, 1882, ch. 154, 1882 N.Y. Laws 188, 188–89, *amended by* Act of May 2, 1887, ch. 265, 1887 N.Y. Laws 329. In 1890, lawmakers sought to further rein in the nomination process, and enacted "[an act] to promote the independence of voters at public elections, enforce the secrecy of the ballot, and provide for the printing and distribution of ballots at public expense." Act of May 2, 1890, ch. 262, 1890 N.Y. Laws 482, 482, *amended by* Act of Apr. 29, 1891, ch. 154, 1891 N.Y. Laws 574. New York's first comprehensive "Primary Election Law," which included, among other things, a uniform primary election day and mandatory enrollment for party primaries in first and second class cities, was enacted in 1898. Primary Election Law, ch. 179, 1898 N.Y. Laws 331, 332, 340, *amended by* Act of May 2, 1899, ch. 473, 1899 N.Y. Laws 968.

[87] *See, e.g.*, *The Democratic Primary Meetings; Terrible Riots and Bloodshed. The Hunkers Triumphant*, N.Y. TIMES, Aug. 27, 1852, at 1 (noting that in the Fourth Ward, "[r]ioting commenced early in the evening" between two rival factions, and "[a] desperate fight ensued, about sixty or seventy being engaged in a hand-to-hand conflict. Finding fists of small account, the assailants took to brick-bats, and in a short time dislodged their opponents"). The election reform bill of 1890 sought to dispense with this "meeting" style election process, by requiring, for instance, that election officers ensure "a sufficient number of voting booths or compartments . . . in which voters may prepare their ballots screened from observation as to the manner in which they do so." *See* § 23, 1890 N.Y. Laws at 489.

[88] *See* Letter to the Editor, *The Proposed Constitutional Convention—A Radical Change of the Judiciary Not Required*, N.Y. TIMES, Oct. 26, 1858, at 2 [hereinafter *Proposed Constitutional Convention*] ("The first election for Judges, too, was held by itself, distinct from the general election . . . .").

[89] *See* J. W. Edmonds, Letter to the Editor, *The Convention and the Judiciary—Letter from Judge Edmonds*, N.Y. TIMES, Sept. 13, 1867, at 5 ("[A]lmost all the towns in the State were opposed to a separate election, because it subjected them to the expense of two elections instead of one, and so the plan was abandoned. The consequence has been the mingling of the judiciary with the party politics of the day.").

[90] *See The State Judiciary*, N.Y. TIMES, Oct. 26, 1858, at 4 (noting that one of its legal correspondents suggested "that the choice of Judges at the same time with that of political officers is bad, as necessarily involving the Judiciary in partisan strife, and possibly affecting its independence and integrity. As a remedy, he purposes [sic] to return to the mode adopted

The intermingling of the judiciary with the political parties and popular sentiment soon became a growing concern.[91] In particular, judicial repudiation, or the notion that a judge might be shunned by the people or the political parties based upon unpopular, although appropriate, decisions raised questions regarding the efficacy and results of the electoral system.[92]

In 1857, for instance, the able Chief Judge Hiram Denio stood for re-election to the Court of Appeals. In the course of his decisions, Judge Denio had ruled in favor of the constitutionality of the Metropolitan Police Law and against that of the Prohibitory Law, with which the Democratic Party and the Prohibitionists took issue respectively.[93] At the Syracuse Democratic Convention that year, New York City Mayor Fernando Wood attempted to defeat Judge Denio's nomination on that ground.[94] To their credit, the remaining Democrats at the convention quickly "nipped this project in the bud," and did re-nominate the judge.[95] The Republicans considered also nominating Judge Denio, but "the question was raised whether Judge Denio could be relied on to decide the Lemon [sic] case, which will come before his Court. [sic] in accordance with the views and wishes of the Republican [P]arty."[96] The Republicans declared at their convention that the Court of Appeals should be representative of the views of their party, and nominated a candidate in opposition

at the first election of Judges after the adoption of the present Constitution, when they were chosen at a special instead of a general election. Yet this cure would be but partial, for Judges were on that occasion nominated by party Conventions and supported as party men"); *see also Proposed Constitutional Convention*, *supra* note 88 ("The change in the time of the election since made, making the election of Judges to take place at the general election, was doubtless unwise and calculated to mix up this nomination and election with the ordinary strife and scramble of a political party canvass. And such is and has been the growing tendency ever since the first election.").

[91] *See An Elective Judiciary*, *supra* note 75.

[92] *See The Elective Judiciary*, N.Y. TIMES, Dec. 5, 1853, at 4 ("Two of our contemporaries in this section of the Union—the Hartford *Courant*, and Buffalo *Commerical*, have made the recent defeat of Judge Yerger, of Mississippi, on the Bond-paying question, a text for their objections to the popular system of Judicial Elections. . . . [Judge Yerger] would have been reelected but for the dangerous element of repudiation which was brought to bear against him.").

[93] *Independence of the Judiciary*, N.Y. TIMES, Sept. 18, 1857, at 4.

[94] *Id.*; *see also The State Judiciary*, N.Y. TIMES, Sept. 30, 1857, at 4.

[95] *Independence of the Judiciary*, *supra* note 93.

[96] *The Judiciary Department*, N.Y. TIMES, Sept. 19, 1857, at 4. The case in question began as *People ex rel. Napoleon v. Lemmon*, 5 Sand. Ch. 681 (N.Y. Ch. 1852), in which eight slaves owned by Jonathan Lemmon were freed by the New York courts during his family's transit through New York. The case was not heard by the Court of Appeals until 1860. *See* William H. Manz, *"A Just Cause for War": New York's* Dred Scott *Decision*, N.Y. ST. B.A. J., Nov./Dec. 2007, at 10, 11–12, 19.

to Judge Denio.[97] Judge Denio was ultimately elected that year, and the *New York Times* expressed, "[t]he course of the [Democratic] Convention tended to elevate the Judiciary of the State; as the opposite course of a vindictive treatment of a Judge recusant to party, would have degraded it."[98]

The term of years for the newly elected judges also helped to bring the judiciary within the political grasp of the parties, with resulting concerns about judicial independence versus subservience to political interests.[99] The 1846 Constitution did provide that the salary of a judge shall neither be increased nor diminished during his or her term in office.[100] It was noted, however,

> [W]hen a lawyer abandons his clients for the purpose of turning Judge, he does so in the reasonable and perfectly honorable expectation that he will hold his office for several terms . . . . Consequently, as far as he is concerned, the Tammany Hall Committee, or the Republican or American caucuses, holds over his head the power of making a most tremendous alteration in his salary twice or three times during his judgeship, by taking it all away from him altogether, and kicking him out into the bargain.
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> . . . We should like to know wherein a caucus is more reliable or more respectable than a King.[101]

As the second half of the nineteenth century progressed, the experience with judicial elections differed between New York's cities and rural counties. In rural areas, most of which were strongly Republican, the results met with far less complaint than in the cities, particularly the City of New York.[102] In smaller

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[97] *See The State Judiciary*, *supra* note 94.

[98] *The Election of Judge Denio*, N.Y. TIMES, Nov. 11, 1857, at 2.

[99] *See Independence of the Judiciary*, *supra* note 93 ("If political clubs and party conventions are to control our Courts of law, as well as the other departments of our Government, we may as well discard at once all Constitutions, and all attempts to preserve anything like stability in the administration of public affairs."); *Partisan Degradation of the Judiciary*, N.Y. TIMES, June 29, 1857, at 4 ("The judge elected through the nomination of a political party for a brief term of years, knows that he must answer the partizan expectations of those who put him on the road to preferment, if he hopes to secure a reelection or promotion to still higher position through the same instrumentality.").

[100] N.Y. CONST. of 1846, art. VI, § 7.

[101] *An Elective Judiciary*, N.Y. TIMES, Nov. 20, 1858, at 4.

[102] *See* Editorial, *Nominations for Judges*, N.Y. TIMES, Sept. 24, 1860, at 4 ("The system of an elective Judiciary, it is well known, has been undergoing a pretty severe test in the City of New-York. However satisfactory its workings may have been in the 'rural districts,' there can be no doubt that here many men have been led to doubt whether it were not better to return to the old system of appointment.").

communities, outside of the cities, the bar was generally smaller and better known to the populace, making the popular selection of the best candidate much easier than in a larger electorate.[103] This is not to say, however, that local political leaders or bosses did not have a hand in selecting upstate judges during this period, for certainly they did.

The Tammany organization, New York City's dominant political machine during much of the nineteenth and early twentieth centuries, had a great deal to do with the City's difficulties with judicial elections. Between Civil War times and the early twentieth century, Tammany was governed by a notorious lineup of Grand Sachems, which included the likes of bosses William M. Tweed, John Kelly, Richard Croker, and Charles F. Murphy. During this era, the selective few decision-makers known as the "Ring" exercised near complete political and governmental control in New York City.[104]

Whether for political or monetary ends, Tammany was fully involved in the selection and control of the New York City judiciary during its reign as the dominant political organization in the City. Whenever possible, the organization used its political control to select judges of its own choosing, almost universally party loyalists.[105] The *New York Times* commented facetiously, "Everybody has been struck with the encouraging fact, that [the

[103] *See id.*; *see also Our Elective Judiciary—A Remedy for its Abuses*, N.Y. TIMES, Dec. 15, 1868, at 6 ("There is, it is true, less corruption in the country than in the cities, partly because the rural Judges are more prominent, from their position, and more closely watched, than their brethren of our City Courts, and partly because the corruptions and political combinations that prevail in all large cities are less powerful in the scattered population of the rural districts. The country constituencies are generally well informed and contain a smaller proportion of the dishonest classes that have an interest in placing men of their own stamp on the bench."); *The Report on the Judiciary*, N.Y. TIMES, Sept. 14, 1867, at 4 ("It is easy to understand why the rural districts are satisfied with a system which has worked tolerably among them . . . . Nominations in small communities, where all the members of the Bar are well known, are less at the mercy of party intrigue and caucus management than they are with us."); Untitled Article, N.Y. TIMES, Nov. 4, 1869, at 4 (noting that Charles S. Spencer commented, "Republicans in the country are satisfied with their Judges . . . and do not wish to change the conditions under which they are elected").

[104] *See Political Movements of the Ring*, N.Y. TIMES, June 24, 1869, at 2 ("That select coterie of Democratic politicians and office-holders, known as the 'Ring,' whose self-sacrificing devotion to the public weal long since constrained them to take upon themselves, unasked, the task of administering the affairs of this Metropolis . . . are beginning to busy themselves about the aspects and prospects of the Fall campaign . . . .").

[105] *See Partisan Degradation of the Judiciary*, N.Y. TIMES, July 29, 1857, at 4 ("It is such occurrences as we have witnessed during recent difficulties in our City which try our elective Judiciary system and expose its defects and dangers. A man is nominated to a Judgeship because of his party fealty and party service.").

elective method] puts upon the bench bar-room demagogues, ignorant of law, and Ward politicians, regardless of justice."[106] Tammany simultaneously utilized every aspect of the judicial process in its patronage distributions, whether law clerk, receiver, referee, or other court-associated position.[107]

Tammany's control over the New York judiciary, at the trial and appellate level, produced, by most anyone's estimation, disastrous results. Many agreed that candidates of questionable judicial character were permitted to rise to the bench under the elective system.[108] The mismanagement of the criminal law coupled with the outrageous judicial favoritism towards the friends of Tammany also produced a marked increase in crime in the city.[109]

This stark decline in the administration of justice did damage to the public's confidence in the court system, and hence the business

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[106] *Our Model Judges—How Legal Principles are Settled*, N.Y. TIMES, June 8, 1858, at 4; *see also* Editorial, *Our City Judiciary*, N.Y. TIMES, Oct. 3, 1860, at 4 ("[N]o sooner does a term of judicial imbecility and injustice in the administration of criminal law draw toward its close, than both factions of a dominant political party hasten to rescue that department from falling into decent hands . . . .").

[107] *See* Editorial, *The Investigation and the Judiciary*, N.Y. TIMES, Apr. 17, 1899, at 6 ("A few facts are definitely on record now. One is that a candidate for a Judgeship pays to the party machine a very heavy assessment. . . . Another is that the Judges are expected to yield to the organization that elected them a controlling voice in most of the appointments that they make—clerks, referees, commissioners, what not. . . . A third is that, if a Judge refuses to submit to this dictation, he cannot expect a renomination.").

[108] *See Political Movements of the Ring*, *supra* note 104 ("[I]n view of the somewhat startling developments of the past year with regard to the manner in which justice is administered in this Metropolis, and the peculiar notoriety which some of our Judges have succeeded in achieving for themselves, there is considerable anxiety felt in the public mind both here and elsewhere as to what kind of men will be put forward by the Ring to fill these important positions."); *Too Much Voting*, N.Y. TIMES, May 31, 1867, at 4 ("Then we found that by the new system it was feasible for the most unworthy of men to secure the nomination that was generally equivalent to election, and ride into power in triumph . . . . Men have been raised to power who ought to have been in State Prison—some who have been there, it is said; the care of our lives and fortunes has been given over to the custody of scoundrels of the most infamous character.").

[109] *See Elected Judges; Candid Statement of Our Judicial Situation*, N.Y. TIMES, Oct. 13, 1873, at 2 ("The same causes which for the first time have made party influence a recognized power upon the Bench, and a means of reaching it, have degraded the administration of justice, and the very conception of justice itself, in the popular mind."); *see also The Police and an Elective Judiciary*, N.Y. TIMES, Dec. 26, 1866, at 4 ("Of all the persons apprehended for breaking City ordinances *seventy-five* per cent. escape before the Courts without punishment . . . ."). It is also noted

> that Capt. Brackett entered 28,836 complaints against the various City Railways for running cars without license. If these complaints had been summarily dealt with by the Courts, (as they ought to have been,) the sum of $1,441,800 would have flowed into the City Treasury from these wealthy corporations . . . . Thus far not a penny has accrued.

The Police and an Elective Judiciary, *supra*; *Gov. Hoffman and the Judiciary*, N.Y. TIMES, Oct. 7, 1870, at 4 ("Criminals know that convictions against them cannot be sustained so long as they preserve amicable relations with Tweed.").

of law[110] and commerce in New York generally.[111] It was observed,

> The belief in the corruption of the Judiciary is so widespread that our citizens decline to commit their fortunes to the tender mercies of the Ring Judges, unless they can procure a guardian angel in the shape of a Ring lawyer. As a consequence, law business is declining, clients are unfrequent, and the Bar is losing money.[112]

During this period, money factored largely in the judicial selection scheme. It was well known that in some instances large expenditures were made to secure judicial nominations.[113] At an 1885 bar association meeting, Mr. Artemus H. Holmes called on the association to recommend to the legislature a measure to prohibit the assessment of money by political parties from judges and judicial candidates.[114] In late 1897, Mr. Henry George addressed a citizens meeting in Unionport, and charged that Tammany boss Richard Croker required $35,000 in exchange for a judicial

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[110] *See* Letter to the Editor, *The Bar and the Judiciary; A Word to the Lawyers of New York*, N.Y. TIMES, Oct. 28, 1870, at 4 (noting that the Ring's corruption of the judiciary in New York "is now keenly felt by the Bar in that most sensitive organ—the pocket. Law business has been dull (outside of the Ring lawyers) for the last year, and is daily diminishing, and unless the reputable lawyers awake to a realizing sense of their position, they bid fair to shortly find themselves without a livelihood").

[111] *See The Judiciary and the Democracy*, N.Y. TIMES, Sept. 21, 1869, at 4 ("There is no security for person or property in this City, simply because there is nothing so corrupt or wicked that Judges of Democratic selection cannot be found to wink at. If the judicial existence of these men, or such as they, were extended fourteen years, we should scarcely have at the end of that time a single incorporated institution left in the City, unless it was required to keep its office here by the terms of its charter, or was bankrupt and not worth plundering.").

[112] *Bench and Bar*, N.Y. TIMES, Nov. 25, 1870, at 4.

[113] *See* Editorial, *The Judiciary*, N.Y. TIMES, Oct. 16, 1860, at 4 ("It is a matter of notorious remark that two, if not three, of the Judicial nominations to which we refer, were procured by the lavish and corrupt use of money in the Nominating Conventions . . . . They have purchased their nominations by the expenditure of sums greater than would be the whole honest earnings of the offices they seek during a full term of enjoyment; and as they are not men who would be inclined to pay so dearly for a mere empty honor, we are compelled to believe that they contemplate illegal gains and perquisites from an unjust exercise of the powers with which they are anxious to be clothed."); *see also The Judiciary Revision; Will the Work of the Commission be of Any Value?*, N.Y. TIMES, Jan. 12, 1891, at 2 ("'In . . . districts where the nominating conventions are composed of fifteen or sixteen delegates, it is believed, indeed not denied, that by the wire pulling of aspirants and by the liberal expenditure of their money, where a nomination is an election, bargains are made by one candidate with another. "You support me this time and I, with my added influence of Justice of the Supreme Court, will support you next."'").

[114] *See Judges' Political Expenses; The Bar Association Talking about Mr. Holmes's Proposed Law*, N.Y. TIMES, Mar. 11, 1885, at 2 (noting that Mr. Holmes said, "[E]verybody knew that a man nominated for a judicial office was called on to pay downright a large sum of money to the party that nominated him, and if elected was bound to pay annually to the support of that party. This practice sapped the foundation on which justice builds itself").

nomination: "'Every one of the Judges of the Supreme Court, with the exception of Roger A. Pryor' . . . 'were compelled to pay this blackmail to Tammany Hall.'"[115]

As in other times and places in New York's history, judges who refused to abide by the orders of the party organization were shunned for re-nomination. A telling illustration arose in 1898 in connection with the refusal of boss Croker to re-nominate Judge Joseph F. Daly, a twenty-eight-year veteran, for a seat on the state supreme court, based upon the judge's previous refusal to appoint a law clerk of Croker's choice.[116] The Bar Association of the City of New York fought Tammany bitterly on this decision.[117] Croker, in turn, attacked the bar association and its leaders, and then Judge Daly personally.[118] The *New York Times* assisted in denouncing Croker's action.[119]

On a rainy night in 1898, prominent leaders packed Carnegie Hall to consider the implications of Croker's refusal to re-nominate Daly.[120] In opening the meeting, Mr. John M. Bowers, chair of the Committee of Arrangement, quipped that the call for the meeting had been made by Croker himself, when in an interview several days earlier, Croker had commented:

> "I never asked Justice Daly to do anything for me, personally or politically, in my life. I suppose he refers to a request made of him by Tammany Hall to appoint Michael T. Daley a clerk in his court. If that was what he meant, Tammany Hall has no apology to make for the request. Justice Daly was elected by Tammany Hall after he was discovered by Tammany Hall, and Tammany Hall had a right to expect proper consideration at his hands."[121]

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[115] *George Charges Crime; He Accuses Both Senator Platt and Richard Croker of Levying Blackmail*, N.Y. TIMES, Oct. 24, 1897, at 1.

[116] *See* Editorial, *It Would Be Unwise*, N.Y. TIMES, Oct. 12, 1898, at 6.

[117] *See Bar Association Acts; Indorses the Nominations of Justices Daly and Cohen after a Stormy Session*, N.Y. TIMES, Oct. 16, 1898, at 1.

[118] *See* Editorial, *Mr. Croker and the Judgeships*, N.Y. TIMES, Oct. 18, 1898, at 6 ("Mr. Croker may berate the Bar Association to his heart's content. He may accuse and convict Root and Choate of running the association as a partisan machine."); *see also Croker Denounces Daly; Tells Tammany District Leaders the Candidate is "Not an Upright Judge"*, N.Y. TIMES, Oct. 25, 1898, at 1 (noting that one of Daly's fellow judges asked for his re-nomination, and describing the relationship between Daly, Root, and Tweed).

[119] *See* Editorial, *The Wise Way*, N.Y. TIMES, Oct. 29, 1898, at 6.

[120] *See The Judicial Nominations; Candidates Discussed by Prominent Men at a Mass Meeting at Carnegie Hall*, N.Y. TIMES, Oct. 22, 1898, at 1.

[121] *Id.*

F. The Constitutional Conventions of 1867 and 1894

During the later half of the nineteenth century, the question of the best method of judicial selection was never far from consideration. Problems with the judiciary in New York raised the issue to prominence in connection with the Constitutional Conventions of 1867 and 1894, although debate over appointive judicial selection did not figure largely into the later convention. Yet with all its perceived faults, particularly in New York City, the elective system endured all attempts to secure its demise.

The Convention of 1867, which labored through 1869, had reform of the judicial article as one of its prime objects. Concerned citizens wrote letters expressing their dissatisfaction with the elective judiciary and suggesting various reform proposals.[122] Leaders of the bench and bar appeared before the Convention to make impassioned speeches in favor of reform.[123] Topics of discussion included the subject of the elective versus appointive judiciary, judicial tenure, and assignments, among many others. Through 1868 and 1869, the Convention and the citizenry continued to debate various proposed revisions to New York's judicial article.[124] Submitted to the voters in November of 1869, the new judiciary article was initially thought defeated, but, in the total canvass, passed by a narrow margin of 5,369 votes.[125] Among the several amendments in the new article, the judicial term of office was changed to fourteen years and the mandatory retirement age set at seventy.[126]

Many had hoped that the new proposed judiciary article would contain a return from the elective method to the appointive method. Delegates were worried, however, that a change to an appointive system woven in with the new article might doom the entire article

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[122] *See, e.g.*, Letter to the Editor, *The Constitutional Convention, the Judiciary and the Bar*, N.Y. TIMES, June 5, 1867, at 2; *see also* Edmonds, *supra* note 89 (supporting term limits as a means of ensuring an independent judiciary).

[123] *See Constitutional Convention; Brilliant Debate on the Judiciary—Speeches of Judge Daly and Mr. Evarts—Absenteeism*, N.Y. TIMES, Dec. 6, 1867, at 5.

[124] *See The Judiciary and the Democracy*, N.Y. TIMES, Sept. 21, 1869, at 4; Letter to the Editor, *The New Constitution; A Defence of the Judiciary Article—The Elective System—Long and Short Terms*, N.Y. TIMES, Oct. 4, 1869, at 2; Letter to the Editor, *The New Judiciary Article; Its Changes Explained—Why it Should be Adopted*, N.Y. TIMES, Oct. 26, 1869, at 5; *Our Elective Judiciary—A Remedy for Its Abuses*, N.Y. TIMES, Dec. 15, 1868, at 6.

[125] *See The Judiciary Article Adopted*, N.Y. TIMES, Nov. 25, 1869, at 5; *The Lost Judiciary Article—Moral Responsibility of the Bar*, N.Y. TIMES, Nov. 5, 1869, at 4.

[126] N.Y. Judiciary Article of 1869, § 13.

to electoral failure.[127] Even the *New York Times* reluctantly conceded that such a change would not likely pass muster with the voters.[128] In order to preserve the issue for review, however, the Convention determined that separate questions would be put to the voters in 1873 as to whether judges of the Court of Appeals and state supreme court, as well as New York's lower courts, should be appointed rather than elected.[129]

The final amendments, changing judicial selection from elective to appointive, were widely debated amongst the people and political conventions in 1873.[130] In general, the Democrats opposed the change on the grounds that it was the right of the people to select their judges, however personal interest may have factored into this position.[131] The questions were presented in November, and the voters chose in favor of retaining the elective system for the Court of Appeals and state supreme court, as well as the lower courts by a substantial margin.[132]

A convention was again gathered in 1894 to consider revisions to New York's venerable charter. Revision of the judiciary article

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[127] *See The Judiciary Article of the New Constitution*, N.Y. TIMES, Oct. 31, 1869, at 4 ("A little reflection will convince any one that if the Constitutional Convention had actually incorporated into its plan a proposition to appoint instead of elect the Judges of the new Bench, that course would have been fatal to the whole scheme of judicial reform.").

[128] *See The Report on the Judiciary*, N.Y. TIMES, Sept. 14, 1867, at 4 ("[T]here seems to be very little hope that a change in the choice of Judges by the popular vote will ever be effected. In this, as in many other instances, the City and the country have different views and interests.").

[129] *See The Judiciary Article of the New Constitution*, *supra* note 127 ("[1873] will be a favorable time for the decision because the power of appointment will confer very little immediate patronage or none at all.").

[130] *See, e.g.*, *Elected Judges; Candid Statement of Our Judicial Situation*, N.Y. TIMES, Oct. 13, 1873, at 2 ("At the request of the Union League Club and the Council of Political Reform, Mr. Dorman B. Eaton has prepared an address in favor of the adoption of the pending constitutional amendment providing for the appointment of judges."); Editorial, *The Judiciary Amendment*, N.Y. TIMES, Oct. 7, 1873, at 4; *The Judiciary; Shall Our Judges be Elected or Appointed?*, N.Y. TIMES, Nov. 1, 1873, at 4; *Our Judiciary; Statistics which Require that Judges Shall be Appointed*, N.Y. TIMES, Oct. 15, 1873, at 2.

[131] *See The Judiciary Amendment*, *supra* note 130 ("[C]onvictions [of the Democrats] go no further than that the people have a right to elect the Judiciary. Nobody disputes this point, but they still insist upon it with great vehemence in order to show that they are zealous guardians of popular rights. They consider only what the people can do, not what they should do, and therefore are treating the matter simply as demagogues."); *Political Movements of the Ring*, *supra* note 104 ("[I]n view of the somewhat startling developments of the past year with regard to the manner in which justice is administered in this Metropolis, and the peculiar notoriety which some of our Judges have succeeded in achieving for themselves, there is considerable anxiety felt in the public mind both here and elsewhere as to what kind of men will be put forward by the Ring to fill these important positions.").

[132] *See The County Canvass*, N.Y. TIMES, Nov. 14, 1873, at 5; *The State Election; Additional Official County Returns*, N.Y. TIMES, Nov. 15, 1873, at 9.

figured largely in this convention, and a great many lauded members of the bench and bar appeared in the debates of the Judiciary Committee, which was itself chaired by Elihu Root.[133] Some of the considerations included increasing the mandatory retirement age from seventy to seventy-five years, judicial pensions, court consolidation, and increasing the number of judges on the Court of Appeals.[134] Although there did exist interest among some of the delegates to debate the return to an appointive judiciary, the issue was not as prominent as in the 1867 Convention.[135]

Among other provisions, the new article, as approved by the Convention, abolished several of New York's lower courts, merging them into the state supreme court, and abolished the General Term of the Supreme Court, replacing it with the Appellate Division, whose members were to be chosen by the governor from the pool of elected state supreme court justices.[136] New York's fourth Constitution was ratified by the voters at the November general election that year.[137]

By 1903, lawyers and judges in the Fifth Judicial District, including Justices Edward W. Hatch and John Woodward, were denouncing the political nature of Governor Benjamin B. Odell, Jr.'s appointments to the Appellate Division.[138] In a meeting of bench and bar in that district, Justice Hatch noted that declining conditions have been created by "pure political power and the giving of places in these divisions as rewards for political relations. . . . 'There has been debauchery of the judiciary of this district. It fails to stand independent and alone, but leans upon the

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[133] *See More Judges Not Favored; Views of Chief Justice Andrews on Proposed Change*, N.Y. TIMES, June 8, 1894, at 8 [hereinafter *More Judges Not Favored*] (noting appearances of Chief Justice Charles Andrews of the Court of Appeals and ex-Chief Justice Robert Earl); *To Reform the Judiciary; Judge Herrick Before the Constitutional Committee*, N.Y. TIMES, June 22, 1894, at 6 [hereinafter *To Reform the Judiciary*] (noting the appearance of D. Cady Herrick, a supreme court judge).

[134] *See More Judges Not Favored*, *supra* note 133; *To Reform the Judiciary*, *supra* note 133.

[135] *See* Editorial, *As to Appointing Judges*, N.Y. TIMES, Nov. 25, 1893, at 4.

[136] N.Y. CONST. of 1894, art. VI, § 2; *see also The Judiciary of the State: The Article Adopted by the Constitutional Convention*, N.Y. TIMES, Sept. 14, 1894, at 12.

[137] *See A New Constitution Jan. 1; The Work of the Recent Convention Ratified*, N.Y. TIMES, Nov. 8, 1894, at 5. Confusion arose as to when the judiciary article of the new constitution was to be effective. Ultimately, it was resolved that the intent of the article was that it would take effect after the last day of December 1895. *See* Editorial, *The Question of Judges*, N.Y. TIMES, Dec. 9, 1894, at 4. This view is consistent with the plain language of several sections of the amended judiciary article, including sections five, six, nine, and fourteen.

[138] *See Justices Declare the Judiciary Debauched; Judges Hatch and Woodward Attack Executive Assignments*, N.Y. TIMES, Jan. 4, 1903, at 1.

executive power, and is consequently subordinated to it.'"[139] Justice Hatch suggested that the power to appoint Appellate Division Justices should rest with the Court of Appeals.[140]

G. The Rise of Direct Nominations: 1900 to 1913

Through the early twentieth century, political parties in New York continued to nominate most candidates, including judges, using delegate based conventions.[141] The novel idea that people should nominate public officers directly at the party primary first came into vogue in the late 1800s, but did not gain its full populist momentum for several years, during which a handful of other states began to experiment with this and other progressive ideas such as direct nomination of United States Senators and the initiative and referendum.[142] Turnout at the party primaries was not very high,

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[139] *See id.*

[140] *See id.*

[141] *See, e.g.*, *Barnes Man Chosen Despite Roosevelt; Republican Judicial Convention Nominates W. P. Rudd of Albany for Supreme Court*, N.Y. TIMES, Oct. 6, 1910, at 1 ("Col. Roosevelt to-day failed to carry the Republican judicial convention against William Barnes, Jr."); *Deadlock in Convention; Disorder and Excitement in Eighth Judicial District*, N.Y. TIMES, Oct. 10, 1902, at 1 (describing the Eighth District Judicial Convention); *The Judicial Convention; Attorney General Davies to be Nominated in Fifth District*, N.Y. TIMES, Sept. 4, 1902, at 3 ("It was decided to-day to hold the Judicial Convention for the Fifth District at Syracuse on Sept. 25, and at that time Attorney General John C. Davies will be nominated to succeed Milton H. Merwin of this city [Utica] as a Supreme Court Justice."); *Judicial District Convention Call*, N.Y. TIMES, Apr. 26, 1905, at 5 ("The Republican Judicial Convention of the Fourth District, which will choose the candidate for Justice of the Supreme Court to succeed Judge Martin L. Stover, has been called at Saratoga for Thursday, June 29."); *Named for Supreme Court; Second District Democrats Put Judicial Slate Through—No Fusion*, N.Y. TIMES, Oct. 7, 1911, at 3 ("Nominations for Justices of the Supreme Court in the Second District were made by both the Republicans and Democrats yesterday, the conventions being held in Brooklyn."); *Odell Crushed Again; Iron-Clad Alliance Against Him at a Judicial Convention*, N.Y. TIMES, Sept. 21, 1906, at 3 (describing the Republican Judicial Convention in the new Ninth Judicial District for state supreme court justice); *Sawyer for Justice of Supreme Court*, N.Y. TIMES, Oct. 3, 1907, at 3 ("The Republicans of the seventh judicial district in convention this morning unanimously nominated County Judge Samuel Nelson Sawyer of Wayne county as their candidate for Justice of Supreme Court . . . ."); *Supreme Court Candidates; Two Nominees will Probably be Chosen by the Fourth Judicial District Republican Convention*, N.Y. TIMES, May 30, 1903, at 2 ("The Fourth Judicial District Republican Convention . . . will probably nominate two candidates for the Supreme Court bench, and, as the district is intensely Republican, the nominations will be equivalent to an election.").

[142] *See Boss Rule is Doomed, Declares T.L. Woodruff; Tells Kings Republicans Party Must Purge Itself*, N.Y. TIMES, Dec. 6, 1905, at 5 (noting that ex-Lieutenant Governor T.L. Woodruff "made a sensation at the annual meeting of the Kings County Republican Committee" by arguing in favor of a direct nomination system. The ex-Lieutenant Governor stated, "'When a few years ago the question of direct primary nominations was mooted I advised this committee to appoint a subcommittee to investigate and study the subject, with the result that a conclusion favorable to the proposition was reached, but so great was the opposition

prompting sentiment for further reform of the existing methods.[143] It was hoped that direct nominations would loosen the stranglehold bosses held over the process, and in turn infuse the party members with a revitalized enthusiasm and desire to participate.

Charles Evans Hughes, an early champion of the direct primary, was decrying political involvement and bossism in the judiciary and arguing in favor of direct party nominations, even as he first campaigned for governor in 1906.[144] Hughes, a Republican, took office in 1907, and was, throughout his tenure, an ardent proponent of the direct primary.[145] His opponents, as well as other interested observers, questioned whether direct nominations would in fact abate the rampant bossism of the day, or simply permit it to become more entrenched.[146]

The Governor's actions earned him the ire of many of the bosses of

encountered that the bill introduced by Senator Marshall failed to become a law'"); J. T. Clark, Editorial, *Direct Nominations of Public Officers*, N.Y. TIMES, Jan. 11, 1909, at 8; *Reforms in Election Laws; New Yorkers Argue Before the Senate Judiciary Committee*, N.Y. TIMES, Mar. 15, 1900, at 8 ("Several large delegations from New York City this afternoon appeared before the Judiciary Committee of the Senate to urge amendments to the election laws. One favors a bill proposing direct nominations at the primary elections in New York City and abolishing all party conventions except for State and judicial officers.").

[143] *See Against the Primary Law; F. M. Brooks of Brooklyn Supports the Morgan Bill for Making Nominations During Registration*, N.Y. TIMES, Mar. 13, 1901, at 5 ("[T]he fact that the delegate and convention method of selecting candidates for public office is participated in by only a few of the enrolled members of the leading parties demonstrates the need for such a change in the primary laws as to secure in the selection of party candidates the co-operation of practically all of the enrolled members of each party."); *Report on Elections Bill; Right of Search Stricken Out of Elsberg Measure—New Berths*, N.Y. TIMES, Apr. 6, 1905, at 6.

[144] *See Hughes Hotly Assails Deal on the Judiciary; Tells Canandaiguans Hearst-Murphy Compact is Bossism*, N.Y. TIMES, Oct. 12, 1906, at 3; *Says Judiciary Deal Gives Lie to Hearst; Hughes Declares it Upsets His Profession of Honesty*, N.Y. TIMES, Oct. 26, 1906, at 2 ("Charles E. Hughes, in an address to one of the largest and most enthusiastic meetings of his campaign here to-night, told of the inability of capable lawyers in New York City to obtain places on the Supreme Court bench without subservience to the bosses.").

[145] *See* James F. Clark, Editorial, *Direct Nominations of Public Officers*, N.Y. TIMES, Jan. 4, 1909, at 8; Editorial, *Direct Nominations*, N.Y. TIMES, Jan. 7, 1909, at 8.

[146] *See Wadsworth Flays Direct Primaries; Speaker Says Governor's Plan Would Set Up a Type of City Bossism and Corruption*, N.Y. TIMES, Feb. 6, 1909, at 3 (noting that James W. Wadsworth, Jr., Speaker of the Assembly, assailed Hughes's proposals, and in one speech stated, "'the greatest fallacy which advocates of direct primary nominations indulge in is that this proposed system will do away with party leaders or so-called bosses. It will not do away with them. The desire and necessity for leadership is inherent in human nature.' . . . 'Under the direct nominations system the influence of the boss would continue to control while his public responsibility would cease'"); *see also* Clark, *supra* note 142 ("In Boston, for instance, the home perhaps in this country of the direct nomination plan, the party control has as great sway as ever . . . ."); *Direct Nominations*, *supra* note 145 ("Nor are we ready to admit that the old and long-tried plan of nominations by delegates chosen by the people has broken down. We put forward Gov. Hughes himself as a most conspicuous and convincing exhibit in proof of its continuing efficacy.").

his own party, who threatened to withhold the nomination from him in 1908; Hughes's popularity with the people carried the day, and he was re-elected to a second two-year term.[147] In his annual message to the legislature at its opening session in 1909, he argued vehemently against the ills of the present system:

> In practice the delegates to nominating conventions are generally mere pieces on the political chessboard and most of them might as well be inanimate so far as their effective participation in the choice of candidates i[s] concerned. Party candidates are in effect generally appointed, and by those who have not been invested with any such appointing power.[148]

Governor Hughes battled his opponents in the legislature for the next two years, but to no avail.[149] The move to direct primaries saw

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[147] *See Bosses Renew Fight to Defeat Hughes; Encouraged by Assurance that the President will Keep His Hands Off*, N.Y. TIMES, Aug. 29, 1908, at 1; *Direct Nominations*, *supra* note 145. Albany's Republican boss, William Barnes, opposed Hughes on philosophical grounds, in that Barnes was a staunch supporter of the proposition that a select group of elite decision-makers should control the selection of public officers. *See Makes Anti-Hughes Plea to Roosevelt; Congressman J. Sloat Fassett Declares Opposition to the Governor is Growing*, N.Y. TIMES, Aug. 18, 1908, at 2.

[148] *Gov. Hughes Urges Pure Elections; In His Message He Recommends Direct Primary Nominations and Strengthening of Laws*, N.Y. TIMES, Jan. 7, 1909, at 6.

[149] The Hinman-Green bill, introduced in 1909, was the embodiment of the Governor's revised direct nomination scheme. *See Provisions of the Bill; General Enrollment of Voters by Parties is Provided*, N.Y. TIMES, Mar. 20, 1909, at 4. His opponents in the legislature introduced their own Meade-Phillips Bill, which preserved the convention method for nominating candidates, including judges. *See Hughes's Opponents Have Primary Bill; Introduce Measure that Preserves the Convention Method of Nominating Candidates*, N.Y. TIMES, Mar. 27, 1909, at 4. Ultimately, no bill was passed that session, and both the Senate and Assembly defeated Governor Hughes's designs by overwhelming majorities. *See Leaders Defeated Gov. Hughes's Plans; Killed His Direct Nominations, New City Charter, and Telephone Control Bills*, N.Y. TIMES, May 1, 1909, at 2. The fight continued through the legislative session of 1910. Eventually, compromise measures, providing for direct nomination for some offices, but not others, began to surface, which had more broad-based support. *See* Editorial, *Plans Compromise on Direct Primary; Senate Judiciary Committee Reports Bill Affecting Nomination of Legislators Only*, N.Y. TIMES, May 7, 1910, at 8. Ultimately, the only bill to pass was the Meade-Phillips measure, which had the support the Republican machine leaders, and provided for nomination by convention with delegates elected at the primary. *Direct Nominations Beaten in Assembly; Hinman-Green Bill, Urged by Gov. Hughes, is Lost, 67 to 77*, N.Y. TIMES, May 12, 1910, at 1; *Direct Nominations Beaten in Senate; Hinman-Green Bill, Favored by Hughes, is Voted Down, 25 to 23*, N.Y. TIMES, May 19, 1910, at 1; *Direct Nominations Killed in Assembly; Cobb Compromise Beaten, 94 to 46, at 1 o'Clock This Morning, After Long Filibuster*, N.Y. TIMES, May 27, 1910, at 1 (noting the defeat of the Cobb bill); Editorial, *Hughes Advocates Cobb Primary Bill; Declares Compromise Measure a Long Step Toward Complete Direct Nominations System*, N.Y. TIMES, June 11, 1910, at 10. Governor Hughes announced he would veto the bill. *Legislature Meets Once More To-night; Begins Extra Session Called by Gov. Hughes to Consider Direct Nominations*, N.Y. TIMES, June 20, 1910, at 5.

a setback, and Hughes's opponents became emboldened, when its staunch supporter announced he was accepting a position as an associate justice on the United States Supreme Court.[150]

Governor John Alden Dix, a Democrat, took up the torch for direct nominations in 1911.[151] Early in the year, the legislature defeated the compromise Ferris-Blauvelt direct primary bill, which provided for direct nomination of all party candidates at the primary election, with the exception of state officials, and town, ward, village, and school officials.[152] When the legislature reconvened, however, Governor Dix again pressed the issue, and the compromise bill was passed by the legislature and at long last signed into law by the Governor.[153] The bill was slated to take effect November 15, 1911, so as not to disrupt that year's elections.[154] State supreme court justices were included in the 1911 direct primary bill.[155]

Under the provisions of the 1911 act, party committees were to be constituted, for each office to be nominated, with members of the various committees elected at initial primary elections.[156] The bill provided that in judicial districts including more than one county, a judicial district committee, composed of three members from each assembly district, would nominate state supreme court justices.[157] In New York City judicial districts that contained only one county, the members of the county committee were to make up the judicial district committee.[158] These committees would meet and designate their choices for nomination.[159] If other party members were dissatisfied with the committee's choice, they could propose a different candidate for nomination by collecting signatures of

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[150] *See Bosses Plan to Beat All Primary Bills; Conciliatory Policy Abandoned Since Hughes Announced Retirement from Politics*, N.Y. TIMES, Apr. 29, 1910, at 6. Governor Hughes left office Oct. 6, 1910.

[151] *See Dix Primary Bill In; Stirs Up Opposition; Both Sides Find Much in it to Condemn and Freely Predict its Defeat*, N.Y. TIMES, May 4, 1911, at 3.

[152] *See Legislature Rests; Primaries Bill Lost; Senate Defeats it by 23 to 20 After Attack on Dix's Change of Front*, N.Y. TIMES, July 22, 1911, at 2.

[153] Act of Oct. 18, 1911, ch. 891, 1911 N.Y. Laws 2657; *see also Direct Primaries a Pledge, Says Dix; Tells Legislature that Both Parties Declared in Favor of Direct Nominations*, N.Y. TIMES, Sept. 28, 1911, at 3; *Voters to Enroll Soon After Nov. 15; Direct Nominations Will Then be a Law and Primaries Will Choose Candidates*, N.Y. TIMES, Oct. 8, 1911, at 8 [hereinafter *Voters to Enroll Soon After Nov. 15*]. Section 29 of the 1911 Law provided which offices were to be nominated by direct primary or convention. 1911 N.Y. Laws at 2681–82.

[154] *Voters to Enroll Soon After Nov. 15*, *supra* note 153.

[155] 1911 N.Y. Laws at 2679.

[156] *Id.* at 2678–79.

[157] *See id.* at 2679.

[158] *See id.*

[159] *See id.* at 2682–83.

registered party members.[160] This candidate would then face off in an additional primary election against the party committee's choice.[161]

Efforts to further reform the primary laws, including an expansion of the direct nomination to all public officials, continued in the ensuing years.[162] An attempt was also made, supported by the State Bar Association, to provide for election of judges on a separate ballot without regard to party designation, but this measure was defeated.[163] Meanwhile, turnout at the party primaries did not realize the desired increase in participation.[164] All three candidates for governor in 1912 advocated some further reform of the primary election laws.[165]

Having succeeded in his bid for the governorship, William Sulzer rallied for replacement of the state convention system with a state-wide direct nomination bill.[166] The Progressive Party supported this idea, and introduced a bill early in the legislative session reflecting it.[167] The *New York Times* questioned the efficacy of this proposal, particularly whether any actual changes could be had:

> We delude ourselves with the fiction that we have an elective judiciary. In truth, our Judges, in this district at least, are

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[160] *See id. at* 2684–86. The signature requirements were similar to the present-day numbers.

[161] *See id.* at 2694.

[162] Early in 1912, the legislature passed the Ferris-Blauvelt "Short" Direct Primary bill, which prohibited the use of party funds or emblems in primary election contests, decreased the signature requirement and increased the time period for independent party nominations, and increased the number of state committee persons to 150. *See* Editorial, *Plan Primary Changes; Democrats Would Increase State Committeemen to 150*, N.Y. TIMES, Jan. 18, 1912, at 12.

[163] *See Judiciary Ballot Beaten; Senate Votes Down Plan for Partisan Election of Judges*, N.Y. TIMES, Mar. 7, 1912, at 8.

[164] *See Few Citizens Voted in State Primaries; Heavy Expense Incurred in Most of the Counties and Little Interest Shown by Voters*, N.Y. TIMES, Sept. 22, 1912, at 13 ("It is evident from last Tuesday's primaries that the majority of the enrolled voters do not care for two primaries and one general election in a single year. . . . In the strictly rural counties the expenses of the second primary are looked upon with great disfavor.").

[165] *See Let People Rule, Put Three Ways; Academy of Political Science Gets Primary Views from the Candidates for Governor*, N.Y. TIMES, Oct. 26, 1912, at 22. The Republican candidate, Job E. Hedges, advocated repeal of the Ferris-Blauvelt bill, arguing, "It is involved, cumbersome, a burden on the taxpayers, full of chicanery, and obviously intended to sicken people of the direct primary idea." *Id.*

[166] *See Wider Primary Law Asked by Sulzer; In Special Message Governor Urges Direct Nomination of All State Officers*, N.Y. TIMES, Apr. 11, 1913, at 3.

[167] *See Progressive Primary Bill; Abolishes Party Conventions and Use of Party Funds and Emblems*, N.Y. TIMES, Jan. 27, 1913, at 2. The Progressive Party also introduced a bill providing for separate non-partisan nominations and elections of judges. *Non-Partisan Bench Bill; Progressive Measure Provides for Free Choice of Judges*, N.Y. TIMES, Feb. 24, 1913, at 15.

> appointed, appointed by Mr. Murphy. We are convinced that his power of appointment would by no means be taken from him under the provisions of Mr. Sulzer's bill.[168]

The Governor's bill was defeated in the legislature in any event.[169]

It was thus left to Democratic Governor Martin H. Glynn to put through an acceptable state-wide direct primary bill.[170] Ultimately the Glynn direct nominations bill was passed in 1913, effective December 17, which abolished the official state convention and provided for nomination of all candidates, except for town, village, and school district offices and electors of the president and vice-president of the United States, by direct vote at the primary election.[171]

H. The Fall of Direct Nominations: 1914 to 1921

It was not long before the direct nomination scheme met with difficulties and criticisms in New York, as it had in other states that had tried it.[172] Among these, it was pointed out that

> the enormous cost of it to the candidates is making it impossible for men without wealth or wealthy backers to run for office, which tends to the debauching instead of the purification of politics; that the selecting of candidates by conventions has been superseded by their selection in private conferences, which strengthens bossism instead of crushing it; [and] that the system of nomination by petition, intended

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[168] Editorial, *The Governor's Primary Bill*, N.Y. TIMES, Apr. 29, 1913, at 8.

[169] *See Beat Sulzer Bill and Attack Him; Rejecting Primary Measure by Huge Vote, Senate Will Re-Pass Vetoed Bill*, N.Y. TIMES, May 1, 1913, at 1. After the legislature had adjourned, Sulzer called a special session to try to force through his primary bill. *See Gov. Sulzer to Call Session on June 18; His Bill or Nothing Will be the Slogan in Direct Primary Campaign*, N.Y. TIMES, May 8, 1913, at 1. After an impassioned fight for his proposal, Sulzer's bill was again defeated. *See Defeat Sulzer Primary Bill; Vote in Assembly, 54 to 92, as Against 47 to 93 at the Regular Session*, N.Y. TIMES, June 25, 1913, at 1; *Plan Speedy Death for Sulzer's Bill; Organization Leaders in Senate and Assembly Will Kill Primary Measure on Floor*, N.Y. TIMES, June 18, 1913, at 2.

[170] *See Tammany May Take Glynn Primary Plan; Even Consent to Abolition of State Convention—"Wouldn't Hurt Us," Says Wagner*, N.Y. TIMES, Nov. 12, 1913, at 6.

[171] Act of Dec. 17, 1913, ch. 820, 1913 N.Y. Laws 2318; *All Ready to Beat Glynn Primary Law; Leaders of Both the Old Parties Have Devised a Plan to Control Nominations*, N.Y. TIMES, Dec. 18, 1913, at 3.

[172] *See* Editorial, *Direct Primary Defects*, N.Y. TIMES, Sept. 1, 1914, at 8 (speaking of "the direct primary system which the whole nation is now beginning to understand will not transform the United States into a political Utopia").

to ascertain the popular will, produces no such result.[173]

The new scheme certainly did not produce the increased voter turnout that had been hoped.[174] As had been predicted by some, instead of loosening the bosses' grip on the nomination process, the direct primary actually strengthened it.[175]

In 1914, the people voted in favor of holding a constitutional convention in the following year.[176] One of the central issues at the 1915 Convention was the question of whether New York would best be served by a return to the appointive method of selecting judges. Leading lawyers and bar associations strongly favored such a return.[177] The New York County Lawyers' Association favored appointment by the governor, with the advice and consent of the Senate, of all judges, except for the Chief Judge of the Court of Appeals, who would be elected to four-year terms.[178] In a speech to the State Bar Association, ex-Judge D. Cady Herrick argued in favor of an appointive process, stating, "'[w]hen we see Judgeships offered for sale, when we see men placed upon the Supreme Court bench who ought to have been disbarred, it is high time for a change in the method of selection of our Supreme Court Justices.'"[179]

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[173] Editorial, *Direct Primary Defects*, N.Y. TIMES, June 15, 1914, at 8 (giving examples from experiments in Pennsylvania, Connecticut, Ohio, Missouri, and California).

[174] *See* Editorial, *The Primary in Operation*, N.Y. TIMES, Sept. 30, 1914, at 8 ("Forty per cent. of those who had the right to vote in the primaries did so. That is well above the record of some States, and slightly below that of others.").

[175] *See* Editorial, *For the Appointment of Judges*, N.Y. TIMES, May 29, 1915, at 10 ("That the people at the polls merely ratify the selections made by the party bosses is so notorious that no demonstration is required."); Editorial, *Letting the People Rule*, N.Y. TIMES, July 12, 1914, at C4 ("The direct primary law was passed with the intention of doing away with machine control and letting the people rule. As far as we have gone in making preparations for the first direct primary, its effect has been exactly the reverse.").

[176] *See Convention Voted by Margin of 1,353; Nine Counties, Including New York, for Constitutional Gathering by 56,965 Majority*, N.Y. TIMES, May 1, 1914, at 7.

[177] *See* J. Hampden Dougherty, Letter to the Editor, *Elective Judges; Should be Done Away With at Constitutional Convention*, N.Y. TIMES, Jan. 23, 1915, at 10; J. Hampden Dougherty, Letter to the Editor, *Why Are New York's Judges Elected?; A Question Never Properly Debated in this State Demands Treatment by the Constitutional Convention*, N.Y. TIMES, Feb. 17, 1915, at 10; *Would Have Judges Named by Governor; Bar Association Recommendations Cover Appeals and Supreme Bench*, N.Y. TIMES, Mar. 10, 1915, at 8 (noting that the Executive Committee of the Bar Association "last night adopted a recommendation of the special committee on Constitutional Amendments favoring the appointment of Judges of the Court of Appeals and Justices of the Supreme Court by the Governor instead of election").

[178] *See Want Governor to Name All Judges; Lawyers' Association to Submit New Plan to the Constitutional Convention*, N.Y. TIMES, Apr. 18, 1915, at C4.

[179] *Herrick Attacks State Judiciary; Men on Supreme Court Bench Who Ought to be Disbarred, He Tells Lawyers*, N.Y. TIMES, Mar. 27, 1915, at 1. The Bar Association adopted resolutions recommending that the Constitutional Convention make changes to the judiciary article, including the appointment of all supreme court justices by the Chief Judge of the Court of Appeals and elections of Court of Appeals Judges on separate ballots in odd years.

The 1915 Convention debated the matter of a return to the appointive system for judges extensively.[180] The Suffrage Committee of the Convention also considered a return to the state convention system.[181] Regarding the judiciary, the leaders of the Convention concluded that the people were not ready to give up on the electoral system and feared including an appointment provision might doom the entire newly revised article; the proposal was thus abandoned.[182]

In the ensuing years, efforts to return to the convention method of nomination continued in full force, all of which were subdued for various political reasons.[183] In particular, the veto power of Governor Charles S. Whitman and Governor Alfred E. Smith, or its threat, several times saved the direct primary during this period.

Governor Whitman, a Republican, held office from 1915 to 1918, and fought his own party in the legislature on the issue through practically his entire tenure. Governor Whitman's support of the

See id.

[180] *See Discuss Many Plans of Court Reform; But Constitutional Convention is Unlikely to Provide for an Appointive Judiciary*, N.Y. TIMES, May 1, 1915, at 7 ("The wisdom of the proposed change is not disputed by a majority of the lawyers who are delegates to the Convention, but on every hand the fear is expressed that the adoption of the suggestions made might endanger the revised draft of the Constitution when it is submitted to the voters for ratification this Fall."); *Ingraham Assails Bossism in Courts; Amazes Constitutional Convention Committee by Recital of Conditions in this City*, N.Y. TIMES, May 28, 1915, at 5 [hereinafter *Ingraham Assails Bossism in Courts*] (noting that "[f]or more than three hours today the Judiciary Committee of the Constitutional Convention was closeted with Presiding Justice George L. Ingraham of the Appellate Division for the First Department"). Ingraham detailed the evils of bossism and the elective system in New York City and strongly advocated for a return to the appointive system. *See Ingraham Assails Bossism in Courts*, *supra*; *Judge Gives Plan for Court Changes; Bartlett Tells Constitution Makers the Views of State's Highest Tribunal*, N.Y. TIMES, June 4, 1915, at 6 [hereinafter *Judge Gives Plan for Court Changes*] (noting that Chief Judge Willard Bartlett of the Court of Appeals appeared before the Judiciary Committee to argue in favor of retaining the elective system); *Taft Would Reform Plan of the Courts; Advocates, Before Constitutional Convention Delegates, Abolition of Grand Jury*, N.Y. TIMES, June 12, 1915, at 7 (noting that ex-President William H. Taft appeared before the Judiciary Committee to argue in favor of an appointed judiciary). Chief Judge Bartlett, on the other hand, while before the Judiciary Committee, argued for retaining the electoral system, stating, "'There have been some objections to elective Judges, but these are insignificant in my opinion when compared with the advantage to the whole State of the present system. Besides I do not think the people are ready to surrender their right to elect the Judges.'" *Judge Gives Plan for Court Changes*, *supra*.

[181] *See Urge Plan to Revive Party Conventions; Guthrie and Wickersham Lead Assault on State's Direct Primary System*, N.Y. TIMES, June 17, 1915, at 5.

[182] *See Separate Election Planned for Judges; Ex-Senator Saxe Would Have State Choose its Judiciary Every Fourth Year*, N.Y. TIMES, July 18, 1915, at 9.

[183] *See* Editorial, *Primary Law Reforms*, N.Y. TIMES, Feb. 7, 1917, at 12 (noting that "Mr. John Godfrey Saxe suggests to Mr. J. Henry Walters, Chairman of the Senate Judiciary Committee, certain changes in the direct primary law, to give 'relief from the present burdensome and expensive method of making party nominations'").

direct nomination system was natural, as he had twice been nominated under the direct system in the face of influential opponents within his party.[184] The Governor was understandably loath to relinquish the nomination scheme that had secured him consecutive terms, and he repudiated every effort to return to the convention system.[185]

During this time, the organized bar in New York continued to support a repeal of the direct nomination scheme. The New York City Bar Association repeatedly indicated its desire for such a change.[186] In 1918, a bill was introduced in the legislature that provided for a return to the convention system for state officers and justices of the supreme court.[187] Noted leaders, including William D. Guthrie and Job E. Hedges, argued in favor of a return to the convention system at hearings of a special Senate committee.[188] Governor Whitman made known, however, that he would veto any bill repealing the direct primary, and legislative leaders abandoned their attempt.[189]

Governor Alfred E. Smith took office January 1, 1919, and although he initially came out as receptive to repealing the direct

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[184] *See Anti-Primary Bill May Force a Fight; Republicans Leaders at Albany Plan to Push the Measure Through*, N.Y. TIMES, Apr. 30, 1917, at 9; Editorial, *The State Convention*, N.Y. TIMES, May 1, 1917, at 12.

[185] *See The State Convention*, *supra* note 184 ("Known and pardonable is the affection of Governor Whitman for the direct primary system, which has been kind to his ambitions . . . .").

[186] *See Bar Association Assails Primaries; Approves Governor Miller's Program for Restoration of State Convention*, N.Y. TIMES, Apr. 3, 1921, at 14 (noting that in approving Senator Walton's bill, the Association's Committee on the Amendment of the Law commented, "'It is a truism that in the vast majority of nominations the direct primary election merely consists of an adoption and confirmation of a slate prepared by the leaders. The conferences of the party managers are held in secret. No accredited delegates attend it. Only those bidden to the feast are privileged to partake of it. The rank and file of the enrolled voters are blissfully ignorant of the plans of those in control of the party machinery until information as to the proposition is vouchsafed'"); *New York Bar Finds Bad Bills in Albany; Condemns Proposal to Limit Tax Rate to 2 Cents, Also Public Defender Measure*, N.Y. TIMES, Feb. 21, 1919, at 8.

[187] *See* Editorial, *The Good and the Bad at Albany*, N.Y. TIMES, Feb. 14, 1918, at 10; *Primary Law Fight Impends at Albany; Governor's Third-Term Chance is Involved in Contest to Begin This Week*, N.Y. TIMES, Feb. 17, 1918, at 12 ("The bill, if enacted . . . would also make conventions the agency for the nomination of candidates for judiciary positions and stop the scramble on the part of future Judges for signatures to petitions enabling them to qualify for places on the primary ballot."); *Would Resume State Conventions; State Senate Committee Favors Ending Direct Primaries for State Offices*, N.Y. TIMES, Mar. 1, 1918, at 20.

[188] *See Noted Men Attack the Direct Primary; Guthrie, Hedges, Senator Brown, and Others Demand Return to Convention Plan*, N.Y. TIMES, Mar. 14, 1918, at 7.

[189] *See Anti-Primary Bill Dropped at Albany; Senator Brown and His Followers Give Up Fight to Restore Convention System*, N.Y. TIMES, Apr. 13, 1918, at 15; Editorial, *The Pillar of the People's Hope*, N.Y. TIMES, Mar. 26, 1918, at 10.

primary, he soon reversed his position.[190] Not only was Governor Smith an ardent populist, who believed there was no reason the people themselves could not be entrusted to nominate the candidates of their political party, but he was also a Tammany man.[191] Although Tammany had initially been opposed to the direct primary, the organization warmed to the idea after using the device successfully in the municipal elections of 1917 to ward off all attempts at anti-Tammany fusion.[192]

Senator Charles W. Walton and Assemblyman George R. Fearon introduced bills providing for a return to the convention system for state offices and supreme court positions in three successive sessions of the legislature.[193] In general, the Republican Party strongly supported this proposal, but at first deemed it politically unwise to push the bill to fruition, worried that they would be playing into the hands of Governor Smith.[194] In later sessions the bill did pass, only to be vetoed, as promised, by the Governor.[195]

Dissatisfaction with the direct nomination process continued. As in past years, the direct primary did not solve the problem of boss control, and instead made matters worse.[196] The immense cost

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[190] *See Propose to Restore State Convention; Bill Prepared for Introduction by Republicans Modifying Direct Primary System*, N.Y. TIMES, Feb. 5, 1919, at 4.

[191] *See* ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 87 (1974); *Gov. Smith Attacks Move to End Primary; Says Miller and Republican State Platform Threaten to Put Control in Hands of a Few*, N.Y. TIMES, Oct. 15, 1920, at 4 [hereinafter *Gov. Smith Attacks Move to End Primary*] (noting that in one speech Governor Smith attacked the plan to quash the direct primary, and stated that such a course would "'close the gateway of opportunity to the enrolled voters of a party to make their own nominations, and it threatens to put back into the hands of the few the power which is now wielded by the many'").

[192] *See Predict Repeal of Primary Law; Leaders Believe Whitman Will No Longer Oppose Fight for Convention*, N.Y. TIMES, Sept. 8, 1918, at 21; Editorial, *Restoring the Party Convention*, N.Y. TIMES, Jan. 24, 1920, at 10; *Tammany to Uphold Direct Primaries; Spokesmen in Legislature Will Oppose Governor's Plan for Return to Conventions*, N.Y. TIMES, Jan. 16, 1921, at 12.

[193] *See Plan to Bring Back Party Conventions; Republicans Will Introduce Bills at Albany to Restore State and Judiciary Meetings*, N.Y. TIMES, Jan. 23, 1920, at 10; *Revives Nomination by Convention; Walton Bill Presented as First Step Toward Direct Primary Repeal*, N.Y. TIMES, Mar. 11, 1921, at 16; *Urge Modification of Primary Law; "Appeal to the People" Issued by Sponsors for Walton-Fearon Bill*, N.Y. TIMES, Mar. 3, 1919, at 5.

[194] *See Republicans Veto Repeal of Primary; 'Politically Unwise at this Time,' Verdict of the Executive Committee*, N.Y. TIMES, Mar. 20, 1919, at 8; *Saratoga Leaders Plan Last Rites of Direct Primary; Republicans Determined to Make its Overthrow Dominant Note of Convention*, N.Y. TIMES, July 26, 1920, at 1.

[195] *See Gov. Smith Attacks Move to End Primary*, *supra* note 191; *Vetoes Bill to Name Judges by Convention; Governor Says it is Better to Select Candidates by Vote of Whole Party than by Favor of Few*, N.Y. TIMES, May 18, 1920, at 17.

[196] *See Attacks the Bench in Civil Code Fight; "Justices Named by Political Bosses" Regardless of Ability, Says F. W. Hinrichs*, N.Y. TIMES, Jan. 14, 1917, at 14 (noting that at a

involved with direct primary nominations also continued to be problematic.[197] In 1920, Congressman John Davenport Clarke explained his opposition to the direct primary law:

> "It entails a heavy expense on the taxpayers, with no tangible benefit. It involves a heavy expenditure on candidates, and makes it almost impossible for a man of modest circumstances, however great his ability, to obtain a nomination because he is not able to devote the time or stand the expense involved in a primary, to say nothing of the general election."[198]

In his campaign for governor, ex-Judge Nathan L. Miller condemned the direct primary and pledged a return to the convention system upon his election.[199] Governor Miller, a Republican, was elected in November 1920, and soon set about fulfilling his promise.[200] In 1921, the legislature passed a measure known as the Whitley bill, which provided for a return to the state convention for nominating state officers, and further provided for formal judicial district nominating conventions for the state supreme court bench.[201] Governor Miller signed the bill into law, and the direct primary was abolished for the listed offices beginning in 1921.[202] The judicial district nominating convention has since been the method of major party nomination for the office of state

meeting of the State Bar Association, Frederic W. Hinrichs, a civic reformer, argued that "'[w]e all know about the Justices' . . . . 'For the most part they are named by the political bosses, with little regard for experience, training, or ability'"); *Calls Primary Law Luxury for Bosses; Ernest Harvier Says it Costs $500,000 and Merely "Rubber Stamps" the "Slates"*, N.Y. TIMES, Sept. 21, 1919, at 17; *No 'Bossed' Judges, Independents Cry; Hughes, Wickersham, Littleton, and Colby Attack Tammany at Newburger Meeting*, N.Y. TIMES, Oct. 22, 1919, at 17.

[197] *See* Editorial, *Primary Expenses*, N.Y. TIMES, Oct. 4, 1916, at 10; *Republicans Want Primary Reforms; Leaders Here Will Ask Governor-Elect for Drastic Revision or Repeal of Old Act*, N.Y. TIMES, Nov. 28, 1920, at 20 [hereinafter *Republicans Want Primary Reforms*]; *Will Discuss Conventions; County Republicans Refer Nomination Plan to a Special Committee*, N.Y. TIMES, Jan. 17, 1919, at 6.

[198] *Republicans Want Primary Reforms*, *supra* note 197.

[199] *See Direct Primary Bill to be Put in Early; Repeat Measure Embodying Governor's Views to be Introduced Next Wednesday*, N.Y. TIMES, Jan. 6, 1921, at 8; *Miller Declares Primary a Fraud; Promises if Elected to Try to End it in State and Judicial Nominations*, N.Y. TIMES, Oct. 23, 1920, at 4.

[200] *See Republicans Want Primary Reforms*, *supra* note 197.

[201] *See Senate Repeals Direct Primaries; Assembly Agrees to Concur in Resolution of State Nominations by Convention*, N.Y. TIMES, Apr. 16, 1921, at 2.

[202] Act of May 2, 1921, ch. 479, 1921 N.Y. Laws 1451; *Conventions Bill Signed by Governor; New York City Election Will Still be Under Direct Primary System*, N.Y. TIMES, May 4, 1921, at 10; *Named for Supreme Court; Assemblyman Martin Nominated for Justice by Fifth District Republicans*, N.Y. TIMES, Sept. 21, 1921, at 12 ("Assemblyman Louis M. Martin of Clinton . . . was nominated for Supreme Court Justice at the Fifth Judicial District Convention in [Syracuse] today. The convention was the first to be held under the new law.").

supreme court justice.

I. The Court of Appeals

While the chief concern of this Article is New York's state supreme court, the recent history of the selection process for the Court of Appeals is instructive in contemplating whether politics can be removed from judicial selection. Although there have been contentious contests in the history of Court of Appeals elections since 1846, the involvement of state political leaders and state and local bar organizations, as well as the common practice of cross-endorsement, has generally kept partisan strife out of the process.[203]

In 1967, New York enacted a law permitting petition access to the primary ballot for state-wide offices, including judges of the Court of Appeals.[204] The change resulted in a series of unusual candidates and "vitriolic" elections for positions on New York's highest bench.[205] Out of this second experience with the direct primary system, a move arose toward a merit-based appointment process for the Court of Appeals, which was galvanized by Governor Hugh L. Carey and Chief Judge Charles D. Breitel, and widely supported by civic groups and bar organizations.[206]

The legislature passed concurrent resolutions providing for a constitutional amendment in this regard in 1976 and 1977,[207] and the measure was approved by the voters in November of 1977.[208] Under the amendment, the governor appoints judges to the Court of Appeals from nominees submitted by a statewide Commission on Judicial Nomination, subject to the advice and consent of the Senate—this system has continued to date.[209] The Commission is a bipartisan body whose purpose is to "recommend to the governor those persons who by their character, temperament, professional

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[203] Luke Bierman, *Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*, 60 ALB. L. REV. 339, 342–43 (1996).

[204] Act of May 2, 1967, ch. 716, 1967 N.Y. Laws 1828; DANIEL BECKER & MALIA REDDICK, AM. JUDICATURE SOC'Y, JUDICIAL SELECTION REFORM: EXAMPLES FROM SIX STATES 21 (2003).

[205] *See* BECKER & REDDICK, *supra* note 204, at 21; Norman L. Greene, *Perspectives on Judicial Selection Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience*, 68 ALB. L. REV. 597, 600–01 (2005) (noting in particular the races between Jacob Fuchsberg and Charles Breitel, and then Fuchsberg and Harold Stevens); Smith, *supra* note 78, at 1493–94.

[206] *See* BECKER & REDDICK, *supra* note 204, at 21–23.

[207] 1976 N.Y. Laws app. at 15; 1977 N.Y. Laws app. at 7.

[208] *See* BECKER & REDDICK, *supra* note 204, at 19.

[209] N.Y. CONST. art. VI, § 2.

aptitude and experience are well qualified to hold such judicial office."[210] It is made up of twelve members, four appointed by the governor, four by the Chief Judge of the Court of Appeals, and one each by the speaker of the Assembly, the temporary president of the Senate (majority leader), the minority leader of the Senate, and the minority leader of the Assembly.[211]

Virtually all would agree that the merit-based appointment system has produced exceptional results. It is also generally agreed, however, that this change did not in any significant sense remove partisan and personal politics from the selection process.[212]

Concerns have been raised by the unusually low number of applicants for vacancies on the prestigious Court of Appeals, and a feeling has been aired that only those with close ties to the governor have a reasonable chance of obtaining a seat.[213] The necessary incidents of personal and partisan politics have also lingered in the judicial selection process.[214]

V. FOR THE MERIT-BASED APPOINTIVE SYSTEM

From a historical review of judicial selection in New York, several useful principles can be gleaned.

First, whether judicial selection is accomplished by election or appointment, no system will completely remove partisan and

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[210] *Id.* art. VI, § 2(c).

[211] *Id.* art VI, § 2(d)(1). There are additional requirements for choosing members; of the four chosen each by the governor and Chief Judge, no more than two may be of the same political party, and two are to be lawyers and two lay persons. *See id.*

[212] *See* Bierman, *supra* note 203, at 353 (noting that researchers generally have found that merit-based appointment does not remove partisan politics from judicial selection).

[213] *See* BECKER & REDDICK, *supra* note 204, at 25 (quoting John Caher, *Read Tapped for Court of Appeals: Her Confirmation Would Create a Majority of Women on the State's Highest Bench*, N.Y. L.J., Jan. 7, 2003, at 1) ("In recent years, some observers have expressed concern about the low number of applications for open positions on the court of appeals. When a vacancy occurred in 2002, such a small number of candidates applied for the position that the commission on judicial nomination extended the application deadline. Some potential candidates said that they 'did not bother to apply because it appeared that only a couple of candidates with close connections to the Pataki administration had any real chance of being selected.'"); *see also* John Caher, *Model for Selecting Top Court Judges Reveals its Flaws*, N.Y. L.J., Nov. 13, 2003, at 1 [hereinafter Caher, *Model for Selecting Top Court Judges*] (noting that only one of approximately sixty Appellate Division justices applied for the recent vacancy on the Court of Appeals).

[214] *See* Caher, *Model for Selecting Top Court Judges*, *supra* note 213 ("While [Judge Robert] Smith's credentials were roundly lauded, his appointment—and news that he and his wife had contributed at least $146,000 to Mr. Pataki and supportive political committees—reinforced the perception that only friends and contributors have a realistic shot at garnering the support of Mr. Pataki.").

personal politics from the process. From the earliest days of the Union and before, political faith and party loyalty have always played a role in the selection of public officers, including judges. Recall that the controversy in *Marbury v. Madison* arose because John Adams, in the waning years of the Federalist Party, made a host of last minute appointments of Federalist judges, which Thomas Jefferson and his Republican allies refused to honor.[215] Inasmuch as partisan faith is inextricably intertwined with personal philosophical and sometimes moral belief, and the selection of comrades and confidants in any forum is, by human nature, affected by personal influences, partisan and personal politics will always play a role in judicial selection.

Second, the only difference between the elective and appointive systems is the political player in whom the selection decision is lodged. In any appointive system, the friends and partisans of the executive are in best stead for judicial selection, and in any electoral system, those of the boss are best situated. Even if, theoretically, New York City had a merit-based appointive system, Judge López Torres might have had similar difficulties securing a supreme court seat had she previously fallen out of favor with the City's executive.

Furthermore, whether candidates are nominated by direct primary or convention, the political leaders/bosses will always retain control of the process in an elective system. This feature is mainly systemic, in that the electoral processes are complex and esoteric, but voter apathy also makes a fair contribution to this situation. In fairness, however, it is a mistake in most situations to presume that these decisions are made unilaterally by any person. Instead, with the exception of certain instances, the bar and local leaders also have input, parties cross-endorse the best candidates, and the elective system produces fine judges.

Third, the existence of conflicts of interest and corruption in the judicial selection process is largely a function of the political actors in the system. In some instances, political leaders use their

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[215] Of this, Jefferson later wrote:

> I can say with truth that one act of Mr. Adams' life, and one only, ever gave me a moment's personal displeasure. I did consider his last appointments to office as personally unkind. They were from among my most ardent political enemies, from whom no faithful cooperation could ever be expected, and laid me under the embarrassment of acting thro' men whose views were to defeat mine; or to encounter the odium of putting others in their places. It seemed but common justice to leave a successor free to act by instruments of his own choice.

Letter from Thomas Jefferson to Abigail Adams (June 13, 1804), *quoted in* John Copeland Nagle, *The Lame Ducks of* Marbury, 20 CONST. COMMENT. 317, 317 (2003).

influence over the process in a corrupt and demeaning manner and improperly utilize the judicial offices as spoils and their courts deposits of patronage appointments.[216] Yet, any selection mode has the potential to work well, when the participants in the process have a genuine desire to choose the most qualified judicial candidates.

Finally, New York's experiences with primary elections for state supreme court justices and Court of Appeals judges have demonstrated that this is a poor process for nominating state judicial candidates. As detailed above and below, the expense and other problems of the judicial campaign are only highlighted when judges are forced to participate in an additional election. On the two occasions New York has tried the direct primary method for nominating state judicial candidates, the results were not palatable, and the process was promptly discarded. The move away from direct primary nominations of judges has been supported by the organized bar on both occasions as a means of keeping partisan electoral strife out of the judiciary.

Having considered these principles, the argument for a merit-based appointment system is grounded in the notion that if politics cannot be removed in any mode of selection, then at least it is desirable to rid the process of the judicial election campaign.

Indeed, the judicial campaign is an anathema to nearly every sitting magistrate and aspiring jurist, and even if the campaign does not become vitriolic and expensive, it amounts to little more than a waste of the jurist's time and energy. With other protections of accountability in place such as public trials, jury service, and removal for cause, there seems little tangible benefit to forcing a judge or judicial aspirant to trudge about soliciting voters for pledges.

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[216] Mr. Charles J. Hynes, the District Attorney for Kings County, submitted amicus briefs in the *López Torres* case, which detailed long-standing corruption in connection with the judicial nomination process in Brooklyn. Mr. Hynes wrote of instances of misconduct during the leaderships of Clarence Norman and legendary Brooklyn leader Meade Espositio. In one passage, Mr. Hynes recounts that

> in an interview recounting the Esposito era, former state Supreme Court justice Thomas R. Jones, who sat on the bench between 1969 and 1985, later admitted that he paid $35,000 in cash to a Brooklyn district leader, Thomas Fortune, in exchange for his seat, with the knowledge and acquiescence of Mr. Espostio.

Brief of Amicus Curiae Charles J. Hynes, District Attorney for Kings County, New York, in Support of Respondents at 19–20, N.Y. State Bd. of Elections v. López Torres, 128 S.Ct. 791 (2007) (No. 06-766), 2007 WL 2088647. Interestingly, this $35,000 seems a paltry sum compared to the same figure allegedly charged by Tammany boss Richard Croker in 1897.

Participation by judges and judicial candidates in the machinations of an election campaign, particularly in areas of money, speech, and partisan politics also raises grave concerns regarding propriety and its appearance. These concerns have led to a network of regulations regarding judges' and judicial candidates' conduct and participation in various aspects of the campaign and partisan political activity in general.[217] A local merit-based appointment system, while not removing partisan and personal politics from the process, would do away entirely with the judicial election campaign and the need for most of these regulations.

One obvious dilemma arises from the notion that to finance a campaign, a judicial candidate will often have to raise money from constituents, whether family, friends, or members of the community. The idea of a judge taking money from potential future litigants is antithetical to maintaining judicial propriety and its appearance. In an effort to mask such concerns, New York's regulations provide that a candidate "shall not personally solicit or accept campaign contributions, but may establish committees of responsible persons to conduct campaigns for the candidate."[218] Yet, even if a judicial candidate has every bit of integrity in this regard, the appearance of impropriety cannot be entirely stemmed.

Another problem arises when judicial candidates communicate in the context of a campaign. In an election campaign, a voter's essential questions involve why one candidate will be better than the other. This gives rise to concerns regarding what kind of opinions or information a candidate will express to the voters.

New York's Rules Governing Judicial Conduct provide that a candidate shall not "make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office,"[219] and shall not, "with respect to cases, controversies or issues that are likely to come before the court, make commitments that are inconsistent with the impartial performance."[220] One such campaign regulation, which contained

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[217] New York's rules regarding this subject are contained in the Rules Governing Judicial Conduct. N.Y. COMP. CODES R. & REGS. tit. 22, § 100.5 (2006). Subsection A of § 100.5 provides that judges and judicial candidates are prohibited from all manner of political activity, including holding party positions, except during a strict window period defined in the rules, and then only as to certain narrowly defined activities. *Id.* § 100.5(A). These rules regarding partisan political activity would not likely be affected by a return to the appointive system.

[218] *Id.* § 100.5(A)(5).

[219] *Id.* § 100.5(A)(4)(d)(i).

[220] *Id.* § 100.5(A)(4)(d)(ii).

an "'announce clause'" that broadly forbid judicial candidates from announcing any "'views on disputed legal or political issues,'" was deemed to violate the First Amendment in *Republican Party of Minnesota v. White*.[221] New York's Court of Appeals has so far deemed New York's regulations to fit within the Supreme Court's permissible boundaries.[222]

The campaign also gives rise to concerns regarding how a candidate should distinguish him or herself from the opponent. In the best scenario, this forces a candidate, when communicating to the voters, to essentially discredit another jurist, even if by implication only, which is highly undesirable.[223] In the worst scenario, this can give rise to vitriolic and abusive election campaigns between candidates, from which no good can possibly come. Regardless, effective voter comprehension and participation in judicial elections is minimal, and in the event of a cross-endorsement, the ordinary voter literally has no choice.[224]

Putting to an end the judicial election campaign is a highly laudable goal. So would be ending the need for judges to raise money and to publicly speak about their opinions and opponents. Surely any admirer of the bench and bar would shrink to witness a

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[221] 536 U.S. 765, 768, 788 (2002) (citing MINN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(1) (2000)). In a concurring opinion, Justice O'Connor writes of her concerns regarding the practice of electing judges generally and its effects on impartiality. The opinion contains Justice O'Connor's oft quoted admonition:

> Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.

See id. at 792 (O'Connor, J., concurring).

[222] *See, e.g.*, *In re* Watson, 794 N.E.2d 1 (N.Y. 2003); *In re* Raab, 793 N.E.2d 1287 (N.Y. 2003). *But see* Spargo v. N.Y. State Comm'n on Judicial Conduct, 244 F. Supp. 2d 72 (N.D.N.Y. 2003), *vacated*, 351 F.3d 65 (2d Cir. 2003).

[223] N.Y. COMP. CODES R. & REGS. tit. 22, § 100.5(A)(4)(e) provides that a candidate "may respond to personal attacks or attacks on the candidate's record as long as the response does not violate" other provisions regarding propriety in general and false statements. *See id.* § 100.5(A)(4)(a) & (d).

[224] In conjunction with its reports, the Feerick Commission to Promote Public Confidence in Judicial Elections caused surveys to be conducted by the Marist Institute regarding participation and confidence in the judicial election process. Among the results of the poll, fifty-eight percent of New York State registered voters said the main reason they would not vote in a judicial election is that they have insufficient information about the candidates. Additionally, eighty-three percent of voters indicated they believe that raising money for a judicial campaign has at least some influence on the decisions judges make. *See* COMM'N TO PROMOTE PUB. CONFIDENCE, *supra* note 23, at app. E.

judge or candidate wasting needed time standing in front of local storefronts, or knocking door-to-door, ceremoniously passing out flyers in order to gain name recognition. A system of local merit-based appointment for the state supreme court would not be a panacea for New York, but it would end the insidious practice of forcing high-minded candidates for a position so honorable to engage in the unnecessary incidents of partisan political and electoral strife.