PANEL

AN EXPLORATION OF JUDICIAL SELECTION METHODS OF STATE HIGH COURTS

ALBANY LAW SCHOOL

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Moderator: Hon. Leslie E. Stein[*]
Panelists: John Kowal,[**] *Professor Chad Oldfather,*[***]
Professor Noah Rosenblum,[****] *& David Sachar*[*****]

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I. WELCOME AND OPENING REMARKS

KYLE DURKEE: I want to thank everyone for joining us today. My name is Kyle Durkee, I'm the Executive Editor for State Constitutional Commentary. We're here with our panelists, whom I'll introduce shortly, for a discussion on judicial selection methods of

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[****] Assistant Professor of Law, New York University Law School.
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state high courts. To get us started, I'd like to welcome the President and Dean, President Carlarne.

DEAN CINNAMON CARLARNE: Hi, everyone. I get to have the pleasure of welcoming you to the law school. We're so thrilled to have you here and to be hosting this discussion. The *Albany Law Review* and the Government Law Center are the absolute two gems of who we are, so to have them coming together is really a wonderful moment. It's also, as you can see, giving rise to what's going to be a really interesting and important panel that's engaging with, to my mind, one of the most important questions before us. As we struggle with thinking about the present and future of our democracy, the role of the judiciary is incredibly important, and it's often very obscure to us how folks are selected and how that process works. Engaging with this head-on and thinking about the implications of the process is the perfect thing to be thinking about at this particular moment in time. I want to say congratulations to the law review for sponsoring this, and thank you very much to all of our panelists for being here. I hope that this is a wonderful and engaging discussion. Again, welcome to Albany Law School.

MARIE-THERESE WITTE: Thank you, Dean Carlarne, I'm so glad that you could help us get things started today. Good afternoon, my name is Marie-Therese Witte, I am a 3L here at Albany Law School and I am the Editor-in-Chief of *Albany Law Review*, Volume 87. I am delighted to welcome everyone, our distinguished panelists, our audience members (both here and on Zoom), our fabulous moderator, and other committee members who have helped bring this event to fruition. I'd like to welcome everyone here to our discussion today, "An Exploration of Judicial Selection Methods of State High Courts." This topic, while always germane, is one that has become increasingly critical given the current legal and political climate of our Nation of fifty states. With compelling news stories about high courts in states like Wisconsin and New York on how judges have ascended to these prominent positions, with the ethical behavior and independence of judges being examined in the court of popular opinion and in the media, and with recent Supreme Court cases directly impacting state constitutional laws, this panel is both timely and necessary. We are so lucky with our speakers today, who range from legal historians to judicial ethics specialists, as well as experts in the various selection methods that states employ when placing judges on their highest courts.

With that, I would like to re-introduce you all to Kyle Durkee, a fellow 3L at Albany Law School and the Executive Editor for State

Constitutional Commentary, which is an annual specialty issue that has been published by *Albany Law Review* for over twenty years. In bringing this panel together, Kyle has tapped into a rich history of state constitutional panels that *Albany Law Review* has produced—unseen during COVID, but resurrected here today. Thanks to Kyle's efforts, we have a dynamic and interesting panel of experts from across the nation joining us on Zoom, as well as Judge Stein. Here is Kyle to introduce our speakers.

KYLE DURKEE: Thank you, Marie-Therese. I want to first thank the members of *Albany Law Review* and the GLC[1] for helping put together this panel today. I also want to thank all of you for attending our discussion on a very important issue: examining judicial selection methods of state supreme courts. To conduct that discussion, we have a wonderful association of panelists assembled here today.

First and foremost is John Kowal, who's the Vice President of Program Initiatives at the Brennan Center. He's responsible for guiding the organization's Justice and Liberty National Security Programs. His areas of expertise include constitutional reform and judicial independence. John Kowal has dedicated decades to the study of judicial selection methods, and has put together two articles: a report, *Judicial Selection Methods for the 21st Century*,[2] and a Brennan Center 2018 proposal, *Choosing State Judges: A Plan for Reform*.[3]

Additionally, we have Professor Chad Oldfather joining us from Marquette University Law School from the great State of Wisconsin. He teaches courses in constitutional law, state constitutional law, constitutional theory, and judging and the judicial process. Professor Oldfather's primary area of scholarly interest is judging and the judicial process, and he regularly speaks to judges, lawyers, and other scholars about his work. He's currently working on a book tentatively entitled *Judges, Judging, and Judgment: The Importance of Judicial Character in a Polarized World*,[4] which should be released soon.

We also have with us Professor Noah Rosenblum from the New York University Law School. Professor Rosenblum is an Assistant Professor at the New York University School of Law where he works

[1] Government Law Center.

[2] JOHN F. KOWAL, BRENNEN CTR. FOR JUST., JUDICIAL SELECTION FOR THE 21ST CENTURY (2016).

[3] ALICIA BANNON, BRENNEN CTR. FOR JUST., CHOOSING STATE JUDGES: A PLAN FOR REFORM (2018).

[4] CHAD M. OLDFATHER, JUDGES, JUDGING, AND JUDGMENT: CHARACTER, WISDOM, AND HUMILITY IN A POLARIZED WORLD (forthcoming Jan. 2025).

on administrative law, constitutional law, and legal history. He's currently pursuing several projects on the place of the president in the administrative state. He received his J.D. from Yale Law School, where he was a Legal History Fellow and an Articles Essay Editor for the *Yale Law Journal.* He has a Ph.D. in history from Columbia University, where his studies were supported by the Jacob K. Javits[5] Fellowship. After graduation, he served as a law clerk to Judge Jenny Rivera[6] of the New York Court of Appeals and Judge Guido Calabresi[7] of the United States Court of Appeals for the Second Circuit. Professor Rosenblum is an authority of the New York State courts, about which he has written for several publications. For his work on judicial nominations, he was named to the City and State Manhattan Power 100 list for 2023.[8]

We also have David Sachar, who is the director of the Center for Judicial Ethics for the National Center for State Courts.[9] The National Center for State Courts for Judicial Ethics is a national clearinghouse for information about judicial ethics and discipline. Prior to being appointed director, Sachar was the director of the Arkansas Judicial Discipline and Disability Commission. Sachar's legal career includes work as prosecutor, litigator, and Special Circuit Court Judge. He also served as an Adjunct Law Professor at the William H. Bowen School of Law at the University of Arkansas at Little Rock. He's a frequent presenter on judicial ethics and an active member of the national and international judicial ethics community.

Last, but not least, we are joined by our very own Judge Leslie Stein. Judge Leslie Stein is a graduate of this law school. She pursued private practice for fourteen years and then served as Albany City Court Judge. She was then elected to the state Supreme Court in 2001 before being appointed as an Appellate Justice on the Third Appellate Division in 2008. She pursued an illustrious career before she was nominated and confirmed to serve on the New York Court of Appeals in 2015. She came back to the law school and joined

[5] Attorney General and Senator, New York State (1955-1957 and 1957-1981).

[6] Associate Judge, New York Court of Appeals (2013-present).

[7] Senior Circuit Judge, United States Court of Appeals, Second Circuit (1994-2009).

[8] *The 2023 Manhattan Power 100*, CITY & STATE: N.Y. (Aug. 14, 2023), https://www.cityandstateny.com/power-lists/2023/08/2023-manhattan-power-100/389246/ [https://perma.cc/5ZXH-AL8T]. This list names the 100 most politically influential people in Manhattan, New York. *Id.*

[9] *Judicial Selection Methods*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/consulting-and-research/areas-of-expertise/court-leadership/judicial-selection [https://perma.cc/T7D7-GS9X]. This judicial selection page is interactive to help users determine what states choose for their judicial selection method.

as the GLC director in 2021, where she currently serves today. We are glad to have her as our moderator to lead off this discussion.

Before I give it off to Judge Stein, I'd like to address the audience. If you have a question, feel free to come up and grab an index card. Toward the end of our conversation, I'll collect them and we'll read some of them out to our panelists for a Q&A session. With that, I'd like to pass it off to Judge Stein to lead off our panel discussion. Thank you, all.

II. PANEL DISCUSSION

HON. LESLIE STEIN: Thank you, Kyle and Marie Therese, for your very hard work in putting this excellent program together, and to Dean Carlarne for her welcoming remarks. I have had the great pleasure of getting to know, just a little bit, our panelists today. I think that you are in for a very informative and interesting conversation. It will be retrospective as well as forward-looking; to have that whole perspective is very important because we've all heard the phrase, "those who ignore history are bound to repeat it," for better or worse. From a personal standpoint, having been a participant in several methods of judicial selection as the selectee, it's a very complex and interesting topic.

I'm going to stop talking because we have much more important and interesting people to hear from. Let me just explain how things are going to proceed. I'm going to ask each of our panelists to speak for a few minutes on their perspective on this topic, starting with John Kowal, who will set the table for our conversation. John has done some interesting work in this area. He will be followed by Professor Oldfather, who has expertise in the subject of judicial character and also knows a little bit about recent events in the State of Wisconsin. After Professor Oldfather, I will call upon Professor Rosenblum, who is also a historian with a keen familiarity with the process in New York State. Last, but not least, David Sachar, who will weave the subject of judicial ethics into the conversation. After each of them speak to you for a few minutes, I will ask them some questions, and we'll leave some time at the very end for questions from the participants. With that, I'll turn it over to Mr. Kowal.

JOHN KOWAL: Thank you, Leslie, and thank you to the *Albany Law Review* and the Government Law Center for inviting me to join this timely discussion. It's a topic I love talking about.

This is a panel on judicial selection methods in the state supreme courts. As we'll find, states employ a number of different methods,

but whatever the method, the selection process for state supreme courts has become sharply more politicized in the last thirty years. In states that choose supreme court justices in competitive elections, special interests have learned that it pays to pour millions of dollars to mold a friendly judiciary at the ballot box rather than settle for a court system that is fair and impartial. In states where judges are appointed, there's similar pressure to make highly-partisan, ends-oriented appointments. Another big problem is retribution for controversial judicial decisions, either at the ballot box or when a judge seeks reappointment. In polls,[10] judges have admitted that the fear of losing their job can affect the way they think about a case, and there's certainly been disturbing social science research[11] to show that criminal sentences are harsher in the year a judge is up for election; that's another important issue I don't want to lose sight of.

It's a situation that has seemed ripe for reform for a very long time. Going back to 2000, there was a summit of seventeen chief justices that issued an urgent call to action to do something about this problem that has only gotten worse. A few states experimented with public financing, but this little boomlet came to an end and there was never much traction on reform, mostly because the go-to solution for reformers was merit selection, and merit selection, as I'll explain, has lost its popular appeal. The last time a state adopted merit selection was 1994. Since then, a number of other campaigns have fallen flat. At the same time, merit selection systems have not been immune from the pressures that other systems face as well. Special interests have zeroed in on retention elections as a form to punish and intimidate judges, and politicians have tried to weaken the independence that was a linchpin of what made it "merit" selection. The demise of merit selection has been a cause for concern, but it's also an opportunity. It actually fits a historical pattern; if you look at the history of judicial selection, it's a history of cycles. For some reason, every hundred years or so, we've had to come up with a new way of selecting judges that draws on past practices, but feels new, as a way to meet emerging challenges.

At the time of the founding of the United States, all thirteen states chose judges through a system of appointment, but it was viewed as

[10] *See, e.g.*, Anna-Leigh Firth, *Survey Says: 90% of Judges Think Judicial Independence Is Threatened*, NAT'L JUD. COLL. (Oct. 9, 2018), https://www.judges.org/news-and-info/survey-says-90-of-judges-think-judicial-independence-is-threatened/ [https://perma.cc/T6H7-NRLK].

[11] *See, e.g.*, *New Analysis: Judicialn Re-Election Pressures Ties to Harsher Criminal Sentencing*, BRENNEN CTR. FOR JUST. (Dec. 2, 2015), https://www.brennancenter.org/our-work/analysis-opinion/new-analysis-judicial-re-election-pressures-tied-harsher-criminal [https://perma.cc/3UTN-SUT2].

a step-up from the corrupt system under King George, about which the Declaration of Independence said, "Judges [were] dependent on [the King's] will alone."[12]

By the nineteenth century, as new states entered the Union and there was a greater push for popular democracy, reformers argued that appointed judiciaries were too tied to the whims of politicians and that judgeships were patronage. There was a big push to elect judges. The election of judges wasn't considered reform and was widely successful in its time. By 1909, thirty-eight states selected their judges this way, but elections brought a new set of problems. In the Progressive Era, when there was a new wave of democratic reform, reformers argued that elected judges were too often tainted by cronyism, and they were too influenced by party bosses to be truly independent.

Going back to 1913, a new idea emerged to better insulate judges on political pressure. Reformers proposed a system that became known as merit selection, and it's a system intended to focus more on individual merit than on partisan political considerations. The way the merit selection system works is that an independent panel screens and vets applicants, and then proposes a limited slate to the governor. It's an appointment system that retains some democratic check in that (they vary from state to state) it was meant to have a retention election; periodically, a judge still goes before the voters but not against another opponent, it is just "shall this judge be kept in office or not?"

Today, each one of these systems, created in three different waves of reform, still exist in this country. In twenty-two states, high court judges are elected in contested elections. In some states, they're nonpartisan. In eight states, it's with full party affiliation. Sixteen states have the merit selection system I described, where the judge is appointed by the governor and later faces the voters in a retention election. There are ten states where the judges are appointed to the supreme court without retention elections, but for fixed terms, which means that periodically they have to be reappointed and face some of the pressures that elected judges face in terms of accountability for decisions. In two states, they retain a method from the colonial period where the legislature appoints judges.

I would say that none of these systems really addresses the problems we face today. Merit selection was a good system, but it

[12] THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

just has not resonated with people. I argue in a paper[13] that we should follow this cyclical pattern and think about what would be the twenty-first century version to answer to this question. If judicial elections fixed the pressing problem in the nineteenth century about not trusting elites to make decisions, if merit selection was meant to fix the problem of party bosses, what would be a system to address today's concerns, especially about the role of organized special interest? I look forward to discussing that over the course of this hour.

HON. LESLIE STEIN: Thank you. I think that appropriately sets the table. We'll hear next from Professor Oldfather.

PROFESSOR CHAD OLDFATHER: Thank you and thanks again for the opportunity to be here and take part in this discussion of what are, of course, very important topics. No place is more timely in terms of illustrating some of these issues than where I sit right now in Wisconsin, where I've only half seriously thought to myself, "I need to keep a browser window open during the course of this discussion to keep track of breaking news as things develop here."

Let me give you a little bit of the background of what's going on here, which really illustrates all of the pathologies that have been associated with judicial elections. It's a long story, but the short version goes something like this. Wisconsin is a very polarized and politically dysfunctional state, and pretty much a purple state. Statewide elections have lately tended to trend democratic, but it's gone back and forth over the last couple of decades. We have an elected judiciary, which is nominally nonpartisan, but pretty much for the entire time I've been here (which is just about two decades now), those elections have been understood in more or less partisan terms—really as proxy contests in the larger political wars in the state.

The most recent election in April was one that flipped the court from a four-three conservative majority to a four-three liberal majority. That campaign, not surprisingly, featured two main issues: one of them was abortion, and the other was gerrymandering. The state's political maps are extremely gerrymandered. As I mentioned, the state is pretty much evenly divided politically in statewide elections, but it nonetheless is mapped in such a way that the Republicans have a supermajority in the legislature. Part of that is just a product of the fact that the political geography of the state supports natural gerrymandering because most of the Democratic

[13] KOWAL, *supra* note 2.

votes are in the state's two largest cities, but it's certainly been amplified by the way the maps have been drawn. The winning candidate, the liberal candidate Janet Protasiewicz,[14] in that election was quite open during the campaign about her views on both issues; she's a pro-choice person and someone who's characterized the maps as rigged. She did, nonetheless, say that she wasn't pledging how she was going to vote on any of those particular cases or issues if they were to come before her, but signaled quite clearly where she stood.

The latest things going on here relate to challenges to the maps. There were two cases[15] that were filed almost immediately after she took her oath of office asking the court to reconsider its decision[16] from about a year and a half ago where it, in effect, generated the maps that are being used for elections in the state (what it really did was accept maps drawn by the Republican-controlled legislature). After those suits were filed, the Republicans pretty much immediately indicated that they firmly believed that she (Justice Protasiewicz) should recuse herself and that if she did not do so, they would impeach her, or at least consider impeaching her. Late Friday afternoon, she announced that she is not recusing herself from those cases and, almost simultaneously, a majority of the court indicated that it is accepting the cases. So, the maps cases are now live before the court.[17]

The latest news is that the leader of the Wisconsin Legislature had, after initially floating the idea of impeachment, encountered quite a bit of political resistance to that. His response was to convene a sort of shadow panel of former state supreme court justices to seek their advice on whether impeachment would be appropriate. The latest development is that one of those former justices shared a letter that he wrote to the legislative leader strongly indicating his view that impeachment would not be appropriate, that it really is something that should be limited to crimes and to corruption while in office, and we don't have either one of those things here. Unless something has changed since I got on this call, that's where things stand as of the moment. It looks like impeachment won't be happening—hard to say for sure. I think that the remedy that's going to be pursued (I'm skeptical that it will be successful) would be seeking to have the U.S.

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[14] Justice, Wisconsin Supreme Court (2023-present).

[15] Clarke v. Wis. Elections Comm'n, 998 N.W.2d 370 (Wis. 2023) (striking down the maps); Wright v. Wis. Elections Comm'n, 999 N.W.2d 262 (Wis. 2023) (denying the plaintiff's petition to commence an original action).

[16] Johnson v. Wis. Elections Comm'n, 972 N.W.2d 559 (Wis. 2022).

[17] Since this Symposium, the Republican-drawn maps have been struck down by the Wisconsin Supreme Court. *See Clarke*, 998 N.W.2d at 379.

Supreme Court intervene under a theory that her sitting on this case would be a violation of due process, rooted in a case called *Caperton v. Massey*.[18]

The bottom line is we're pretty much at the leading edge in terms of all the various unpleasant things that can happen relating to judicial elections. Very, very briefly, my contribution to how we fix things (in the book[19] that Kyle mentioned earlier) involves a re-focus on what's often called "judicial character," by which I mean habits of mind that we associate with having good judgment, things like taking a detached perspective, being intellectually humble, and so forth. It's not an entire fix. I don't think there's a complete magic bullet fix out there, but I'm at least going to make my small case for that. With that, I'll pause for now.

HON. LESLIE STEIN: Certainly fascinating dynamics going on right before our very eyes. Next, Professor Rosenblum will give us some insight into New York's system of judicial selection.

PROFESSOR NOAH ROSENBLUM: Thank you so much. After John and Chad, I feel like I have very little to add of interest. John's analysis of the history struck me as exactly right. In comparison to what we're seeing in Wisconsin, the New York courts are just a model of boring probity and stability, and that's despite having had what I think is widely regarded to be the most contentious selection for the New York Court of Appeals in recent memory (in which I did play some role that we can talk about). Why don't I just spend a couple seconds telling you a little bit about the history and how we got here. Then, some of the questions that might be in front of people about New York judicial selection, both in reference to that history and by contrast with Wisconsin, we can talk about during the Q&A.

The history first. Just to reiterate what John said, putting on my legal history hat, there are cycles of selection when it comes to the way state judges have been picked. You should read John's paper, obviously, but if you're interested in a purely historical look, you could look at a legal historian named Jed Shugerman who wrote this book called *The People's Courts*[20] that gives a deep history of judicial selection in the United States, and it tracks that waffling back and forth.

New York State was traditionally considered a state with a deep commitment to elections. In the 1970s, there's even a lot of discussion

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[18] Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

[19] OLDFATHER, *supra* note 4.

[20] JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (2012).

about how other states in the Progressive Era embraced merit selection or looked at other ways of doing things, but New York—despite the dominance of some pretty corrupt machine interests like the Tweed[21] Democratic ring in New York City—remained committed to elections. Why does this matter? Well, in the early 1970s, there were some pretty hard fought and contested elections like what Chad was describing happening in the most recent Wisconsin election. It didn't involve much outside money, it didn't involve a sense that the broader national culture wars were being fought out in New York, but it did involve some contests between characters that made old fashioned virtues (like judicial temperament) seem out of place. As several government reports at the time referred to it, the election was perceived to be "unseemly."

I have to put on my history hat and put a little asterisk here. There's a lot of other stuff going on there. The election pitted the then-sitting Chief Judge Charles Breitel,[22] who won against a tort lawyer, Jacob Fuchsberg,[23] after whom Touro Law Center is now named. Even the descriptions of the characters capture something about the tension between the two that might make you think there's more going on here than just a fight about judicial temperament. Charles Breitel was described as being soft-spoken, dressing in a suit, vest and tie, whereas Jacob Fuchsberg is always described as a former plaintiff's lawyer who spent hundreds of thousands of dollars of his own money on clashing suits, shirts, and ties. When I teach my students about the legal profession, I remind them that up until the 1960s, even major New York law firms refused to hire immigrants, Jews, Irish people. The New York Bar was one of the most discriminatory organizations in American legal culture. I'm not saying the New York Court of Appeals was like that, but part of what's going on here is a lawyer who's not like "us" trying to break into this more staid world of people who look the right way and act the right way.

This super contested election everybody says is very "unseemly" leads to a raft of reforms, volumes of government reports, and a message from Governor Hugh Carey[24] saying, "there are a bunch of problems with the New York courts and we should really address

[21] William Marcy Tweed, Grand Sachem, Tammany Hall (1863-1871). *See generally* TERRY GOLWAY, MACHINE MADE: TAMMANY HALL AND THE CREATION OF MODERN AMERICAN POLITICS (2014).

[22] Chief Judge, New York Court of Appeals (1974-1978).

[23] Associate Judge, New York Court of Appeals (1975-1983).

[24] 51st Governor of New York (1975-1982).

them, in particular, we should rethink how we're doing judicial selection."

Judicial selection isn't the only thing folks are thinking about at that moment. What becomes the constitutional amendment that gets us our current method[25] of selection of judges in New York includes, among other things, the creation of the Judicial Conduct Commission. There's a sense that we need to regulate judges and that the regulation of judicial ethics is intimately related to judicial selection. You can see how the realm of questions Professor Oldfather is working on in his book is directly related to the political issues that actors at the time are grappling with. Those reform pass and they get us the method of selection for judges that we currently have. That then gets us to the point that John was making earlier: there are benefits and downsides to any method of selection.

The method of selection that New York chose, this hybrid merit selection model, has real advantages to it. As compared to the way in which the elections in the 70s brought in vast expenditures and put judges in this position many people thought was "unseemly"—where they needed to campaign but couldn't actually take stands on the issues they were campaigning on (think back to Professor Chad Oldfather's presentation about Wisconsin, the challenges that are put on a judge who is simultaneously campaigning while knowing that they're going to hear cases related to what they're campaigning on, and the ethics issues that raises)—you go to the merit selection model that New York has and you get rid of that. That seems like a nice advantage. There are some other knock-on advantages too. The system we use in New York for the highest court, the New York Court of Appeals, is that there's a Commission on Judicial Nomination that does an initial cut and selects a certain number of names to be forwarded to the governor, the governor picks one, then it goes to the senate for confirmation. That part of the process was explicitly modeled on the federal selection process. The Commission gets to do the first cut and the Commission includes lawyers from a bunch of places in the state with a bunch of different concerns, and they very, very rarely let through people who don't meet minimum standards of qualification. Great positives.

On the other hand (and this takes us back to John's story), when you have a bunch of people in a room somewhere making a decision about who gets to make the most important decisions over freedom, liberty, and equality, that can make people uncomfortable. That's

[25] N.Y. CONST. art. VI, § 2.

why you get this revolt against this kind of elite selection during the Jacksonian[26] Era, and then at other moments in the twentieth century, people want a closer connection between the judges and the people. In New York State, the Commission on Judicial Nomination had a whole bunch of rules it was supposed to follow. It was supposed to be concerned about professional diversity, it was supposed to solicit applications widely, and yet many people were a little disappointed with the historic lists that were put forward. While there were some amazing candidates on the lists, it began to look like the lists were not necessarily matching up with what the Commission was supposed to be doing. When you started to peer behind the Commission to ask, "wait, what are the mechanisms of accountability for this Commission, who's actually picking what happens on this Commission?", we started to hear some disturbing things.

Under former Governor Cuomo,[27] who made some wonderful selections for the court, there were also rumors that he was prebaking who would actually come out of the Commission on Judicial Nomination. There was no way to check or figure it out, but that begins to look like an undermining of the merit principle that John was describing before. The method of selection may have solved some problems but undermined some other problems.

That gets us to where we find ourselves today. I hasten to add that, while many courts of last resort have been divided in some of the same ways that Wisconsin is, New York's court—even though there are ways that you can track politicization both as a historic matter and as an analytic matter—tended to avoid the worst forms of politicization that we can see in other courts like the United States Supreme Court. However, there are some of the same questions that are going to come before the New York Court of Appeals that have come before other courts. For example, the court in New York is going to hear a case[28] about the drawing of congressional districts in New York State, which could have similar national impacts.

There's a whole body of literature that looks at the relationship between state law and federal political issues and suggests that it's increasingly difficult to maintain the barrier. That barrier has been important, historically, for some of the independence of state courts from national political dynamics. There are real questions about the future of New York State courts, which makes it even more important

[26] Andrew Jackson, 7th President of the United States (1829-1837).
[27] Andrew Cuomo, 56th Governor of New York State (2011-2021).
[28] Hoffman v. N.Y. State Indep. Redistrictiong Comm'n, 234 N.E.3d 1002 (N.Y. 2023).

to consider the extent to which the selections for New York judges does or does not live up to the problems that it was meant to solve.

HON. LESLIE STEIN: Thank you. Finally, Mr. Sachar, after hearing all of this, I think we could use a little bit on judicial ethics.

DAVID SACHAR: Well, thank you so much. Thank you to Albany School of Law and to all my co-panelists for having me be a part of this. I am actually being hosted by Appalachian State in Boone, North Carolina; I was on vacation but wanted to be a part of this panel, and they've graciously taken me in so I could be sure to speak to you today. I'm from Rose Bud, Arkansas, which is a long way from anywhere, particularly to where I am now working with all the chief justices in the United States and traveling abroad.

Judicial ethics has been part of my path for the last fifteen, twenty years as a Judicial Ethics director. Over all these years that I've investigated and prosecuted judges for misconduct, what I've learned is that the vast majority of judges serve with honor and distinction, and they got there by rising to a level of success in their own profession. I believe the judiciary is the heart and soul of our democracy; we do need the bones and the muscle from the legislature and the executive branch, but fundamentally, we are who we are because of the judiciary keeping our promises. It doesn't matter how populist something might be, there are certain things about us that we've decided that make us American and that's where it's kept. What we're talking about really is quality control. How do we make sure that we select these people and that our judges maintain that ethical point of view?

One thing to remember is that we do hear a lot about the Supreme Court and federal courts, but 98.5% of all cases in America are filed in state court. It's not even close. The National Center for State Courts was started by Chief Justice Burger[29] because he saw, over fifty years ago, that the feds have this great system and it's all similar no matter where you are. How do we make sure that the best practices happening in Wisconsin are also happening in Arkansas? We do that by bringing these people together, including our court administrators and our chief justices. We have all heard the quote from George Washington[30] that "the due administration of justice is the firmest pillar of good Government." [31] However, many forget that he also said, "I have considered the . . . Judicial department as

[29] Warren Burger, Chief Justice, United States Supreme Court (1969-1986).
[30] 1st President of the United States (1789-1797).
[31] Letter from George Washington to Edmund Randolph, United States Attorney General (1789-1794) (Sept. 28, 1789).

essential" to our country and to its stability, "hence the selection of the fittest characters to expound the laws, and dispense justice, has been an invariable object of my anxious concern."[32] George Washington lost sleep about how we're going to pick judges, and that's why we're here today.

The Federalist Papers even talk about how not all are going to have the highest qualifications to be a judge; we expect more and we should. I'm glad that we do and, in general, our states follow some sort of way to try to vet them and make that possible. I think John was right on-point talking about how there hasn't been a fundamental change since '94 with Rhode Island.[33] We talk about it a lot, but how do you get it done?

One thing I've said as a judicial ethics person (I was the president for the Association of Judicial Disciplinary Council), if I take a side, I might not be in the conversation, I might alienate certain people. While the Professors may have different ways of looking at it, my point of view is that I don't care if you elect them or if you appoint them. I want two things. I want it to be transparent; I want to make sure that I'm there as a voice of ethics, and people at the Brennan Center and the National Center for State Courts are there to say, "we need to know who our judges are beholden to." Secondly, whatever we do, it promotes independence. All the comments so far have mentioned that, to a certain extent, we can't have judges that have a one-year election term; it's going to turn into a populist situation. It's one of the reasons why, and I'm going to show my hand a little, I don't particularly like retention elections because then, all of a sudden, it's populist (it's 50% plus one). If that person gets appointed and then four years later, they are sitting on a gay marriage case in the South (where gay marriage was not as popular), guess what? They don't have anyone to run against; they're just running against the fact that people don't like their last opinion. When I'm called upon to talk about things like how we promote judicial independence and how we create confidence, I'll follow up on my two-pronged argument of transparency and independence.

I think those are the most important things from an ethics point of view because it gets us better people and it insulates our judges from the ethical issues that they all face. Let me promise you that, over fifteen years—and I had some really big cases involving judges who were removed from the bench, big scandals—I am more confident in

[32] *Id.*

[33] In 1994, Rhode Island amended its constitution to establish merit-based judicial selection. *See* R.I. CONST. art. X, § 4.

our judiciary than I was fifteen years ago. I have met fantastic, brave people who make decisions that don't benefit them at all. They suppress evidence against a terrible criminal because it's the right thing to do. They make decisions, even in political arenas, that are not easy to do. I am more confident in them, but they do face constant ethical challenges. They just do. You've got friends, whomever helped you get to where you are, and they don't care about your judicial ethics the same way you do as the judge. So again, I hope that we're able to contribute that way. It's certainly something that has driven my career and what we're doing now at the National Center. Again, I'm very thankful to be here and happy to be a part of this panel.

HON. LESLIE STEIN: Thank you. Now we'll try to unpack some of this a little bit. My first question was going to be, why is the process of selecting high court judges important? But I think maybe George Washington answered that question already. Unless anybody has anything to add to that, which you're welcome to do, I'll move on.

I want to talk a little bit about values. The Brennan Center has posited that the following values are important in determining how to select high court judges: judicial independence, accountability, public confidence, diversity, and quality. To that, I might add transparency, although all of these interact. I would ask first, if anyone disagrees with that list? If you do, why? Are there any other values that should be added to that list?

JOHN KOWAL: I'd add just one more value, which is democratic legitimacy. The challenge, of course, is how to do that. It doesn't mean that every ruling is subject to popular override. I think David is right, the populist element can become a constraint or a threat to judges. At the same time, it needs to feel like the judiciary is operating in a constitutional way. I do think people go to elections as a way of having democratic legitimacy, but there's other ways. I think it goes to how you select judges, which David got into a little bit, even in an appointment system.

PROFESSOR CHAD OLDFATHER: Maybe this is an addition, maybe it's just filling out some of what's already on the list. I reference talking about, in the book, intellectual humility as an important value. To underscore that, one of the things that troubles me that one sees increasingly these days (and it's possible my perspective is skewed by being where I am) is that there are judges and justices who seem, much more often nowadays than in the past, to insist that there is a single correct methodology for deciding legal issues, and that if another judge or justice does not follow that methodology,

they're acting illegitimately. I think that threatens a lot of values. It threatens the perceived and actual legitimacy of courts. It's objectionable to me both in that sense and intellectually, I don't think that's appropriate. Nobody has the answers to all of the questions; there are too many conflicting values that the legal system has to attempt to accommodate. To think that there's a single key to doing so just seems, to me, to be misguided. We have a judiciary for functional reasons. Courts are there to serve a social purpose. If we replace trying to serve a social purpose with trying to be faithful to a methodology, I think we're really losing sight of something important.

PROFESSOR NOAH ROSENBLUM: I totally agree. For me, a key anchor is the old dictum that "justice requires the appearance of justice," which I first encountered in a Frankfurter[34] opinion[35] but goes back much deeper in the common law. It's exactly what John and Chad are picking up on with this question of legitimacy. I remember in my first year of Civil Procedure as we got to the different values that procedure serves, my teacher said, "and then of course we have finality and repose." I remember thinking, "what are you talking about?" The professor explained that people go to court to solve problems and we need the courts to be able to solve those problems, which means people need to be able to walk out and have brought their dispute to finality, to let the dispute repose. That doesn't mean that they're satisfied, it just means that whatever their dissatisfaction is, they can live with it.

Thinking about this as just a boring person, it's really hard to live with a decision if you feel the decision is unjust. If the decision appears unjust, it's very hard for you or for others to treat it as just. To me, I feel like that dictum, "justice requires the appearance of justice," is a great guide for judicial ethics. It's also a pretty useful guide for thinking about selection of judges. It picks up on many of the values that Judge Stein and John were talking about before. Why is diversity so important? For reasons of epistemic humility—just as Chad was saying, you have a lot of different perspectives, it's a big, pluralistic world—but also just for "the appearance of justice." If I go in front of a court and it's got four eighty-year-old dudes on it who tell me what the law is—if I've got a lot of confidence in those four eighty-year-old dudes, if they're all Judge Guido Calabresi and my grandfather, maybe I trust them—as a thirty-seven-year-old younger

[34] Felix Frankfurter, Associate Justice, United States Supreme Court (1939-1962).
[35] *See* Offutt v. United States, 348 U.S. 11, 14 (1954).

man, do they even understand how I see the world? Does that appear like justice? It's going to be a lot harder, especially if you imagine it in front of a court that looks really different, that's got a much greater diversity of ages or professions or values. This is a long way of saying that I think from that tiny little insight, that "justice requires the appearance of justice," you can actually start to get an awful lot of substantive commitments, including several of the values that John and Judge Stein pointed to.

DAVID SACHAR: I get the benefit of hearing the esteemed panelists talk before me, and it's wonderful. I'll add collegiality. I'll also say that, because we're talking about the states' highest courts, there are a lot of people who can do a traffic court, but I'm talking to appellate court judges all the time who tell me, "it was hard to get used to the fact that I couldn't just make a decision and there it went, I now have to talk to find four other votes or three other votes." That collegiality we're talking about is legitimate, but also, it's a vital function of being on an appellate court. It's a different skillset than being a trial court criminal judge, where you say, "I'm going to make a ruling on evidence, let's move on." No, on the Supreme Court, now you got to figure out if someone's going to dissent. If they're going to dissent, am I going to respond to their dissent or should I change my opinion? All those things come in.

In the military, they've got the generic term of "conduct unbecoming." We should have that in our judiciary. You don't mouth each other; you don't call each other "Reagan[36] judges" and "Carter[37] judges" and all that stuff we see right now. I do a continuing legal education on this. You know what your platform is? Your oath. I can break the oath down and say, "this is your platform." Now, we talked about the difficulty of campaigning on that. How do I talk to people when they're asking me questions about all this stuff? But those are two very important things.

Briefly on diversity, I also agree that it's an important part to see people like you and feel like you have an opportunity. I did some work a couple years ago in the U.N. in Qatar. They had promised to have 30% of their judges be female by 2030, which would exceed U.S. numbers in most places, if not all. Why? Because the Qataris know they have to have a legitimate, secular court system to have the billion-dollar businesses they want to come there. If they think it's just some eighty-year-old dudes or just some local dudes that don't

[36] Ronald Raegan, 40th President of the United States (1981-1989).
[37] Jimmy Carter, 39th President of the United States (1977-1981).

understand our business, they won't do business there. The legitimacy makes people have confidence, and confidence is the fuel of the judiciary.

HON. LESLIE STEIN: I'm assuming that when we talk about intellectual humility and collegiality, it goes in the bucket of the quality of judges. There probably are an infinite number of things that we might identify as what we want to see in the judge. Certainly, being ethical.

One question I have is have societal views of these values changed over time? Is that something that we can expect to keep changing? Does that affect how we should be designing our methods of high court judicial selection?

PROFESSOR NOAH ROSENBLUM: I'm happy to take a first crack at this as an allegedly card-carrying historian. Absolutely, attitudes about this have changed in ways that I find totally fascinating. One example I like to bring up is that Judge David Davis[38] was made a Supreme Court Justice because he was Abraham Lincoln's[39] campaign manager. It was widely understood that he was a political actor, so much so that during the contested election of 1876, when the issue came before the country about how to resolve who would be the next president (Rutherford B. Hayes[40] or Samuel Tilden[41]), the commission they had put together (evenly divided between Democrats and Republicans) decided they would give Davis the tiebreaking vote. The Republicans, thinking, "oh wait, he's a Republican," decided that, in order to sway him to their side a little bit more, they would just elect him to the Senate (back then, state representatives picked their senator, it wasn't direct election). And they did, and then he resigned to become a senator. Nobody thought there was anything untoward in that. Even up through World War II, the independence of the judiciary that we now take for granted, which people believed in as a value (go back to David's letter from George Washington), was manifest in very different ways. Fred Vinson,[42] Chief Justice in the Truman[43] Era, is playing cards at the White House, and nobody thinks that's a problem.

The attitudes around what it means to be a judge have changed, and the related attitudes about how we should pick them changes too.

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38 Associate Justice, United States Supreme Court (1862-1877).
39 16th President of the United States (1861-1865).
40 19th President of the United States (1877-1881).
41 25th Governor of New York State (1875-1876).
42 Chief Justice, United States Supreme Court (1946-1953).
43 Harry Truman, 33rd President of the United States (1945-1953).

If you think of your judge as someone who's supposed to go play poker with the president, you're going to be much less concerned about the kind of campaigning they're doing with an elected official. If you pick Abraham Lincoln's campaign manager to be a justice, then you're actually drawing from politics in a way that, now, we're much more concerned about. I think many legal historians point to Abe Fortas,[44] a Supreme Court Justice who was forced to resign because of ethical improprieties. Putting on my historian's hat, I would just say that a lot of the things Abe Fortas did, other justices had done before and weren't a problem. What's changing there is popular attitudes and expectations.

Since then, we expect a much greater degree of removal for our judges. That is hard to maintain when the judges are acting in ways that are so implicated in our politics. To end my little rant, Frankfurter (the guy who introduced me in his opinions to "the appearance of justice") was terrified about what would happen if the courts got into the business of ruling on questions like voting rights or how districts were drawn; he feared it would pull judges into what he called the "political thicket."[45] Frankfurter wanted judges to be, in some sense, independent and he believed that you had to really limit what judges could rule on in order to have that independence. Frankfurter lost. He wanted a much more cabin judiciary and he ultimately was in dissent a lot in his last years because the Warren[46] Court began hearing a much wider range of cases.

Now, that ship has totally sailed. Regardless of what political party you're from, the federal and state courts are ruling on such a huge swath of issues (including, as Chad and I were telling you about, questions of gerrymandering). If that's the kind of judiciary we're going to have, it's much more difficult to then turn around and say, "wait, we want to have the same kind of harsh division between the political and the judicial." Thus, the methods of selecting are going to be much more in this other genre. I think that Judge Stein's question is right on the money, and explains why it's so important to think about this in a historical perspective.

JOHN KOWAL: I want to add to that note. Noah, I think it was really well put. For better or for worse, in every form of government in the U.S., state and federal, we have a political selection system (political actors make the choice). It is true that politicians have been moved into the judiciary throughout our history, and that happens

[44] Associate Justice, United States Supreme Court (1965-1969).
[45] Colegrove v. Green, 328 U.S. 549, 556 (1946).
[46] Earl Warren, Chief Justice, United States Supreme Court (1953-1969).

probably more at the state level than at the federal these days. But we have moved, and I think it's mostly because of two things: we've relied on the courts to make more momentous decisions; and because they are the ultimate policymaker on a lot of decisions that could and should be made legislatively, it's raised the stakes of who gets to be on a court. These more removed characters are also people who seem less and less in-tune with most people's lives. You have a lot of judges now who get to the judiciary in a kind of judicial hatchery—they, basically, belong to one society or another and they're vetted for their ideological purity. In the old days, for someone like a Frankfurter, who was a political insider and had FDR's[47] ear, the push is much, much more that even a slight deviation makes you a traitor; no more Souter,[48] no more Roberts.[49] It's always that call, and you're going to hear it on the progressive side.

I will say, not having politicians has also led to decisions that make no sense. It used to be that there'd be a few former political officials on the U.S. Supreme Court. I think the thing that has changed, and maybe could shift again in our culture, is moving away from the high-stakes notion of the judiciary making all of these important decisions. Have the political branches reassert their role and authority and do more, and take the responsibility for making those decisions. Conceive of the judicial role in a more minimalist way, making smaller decisions and having people be happy with that. That's a culture change, that would take a long time.

HON. LESLIE STEIN: It seems pretty obvious that the goals of independence and accountability are at great tension with one another. What are some ways that we can reconcile them?

DAVID SACHAR: I'll answer a little bit. Independence is the judge's freedom from influence and control, other than those provided by the law. The code of judicial conduct is standard, to a certain extent; almost every state says something similar. Judges should be free from public clamor and they shouldn't be going, "oh my, this is going to make such a big difference, I'm going to have a hard time on this one." No, that's what they're there for, as has already been said; finality and having the ultimate decision is exactly what they're there for what. It's very Marcus Aurelius, basic, stoic logic. I need something to tell me, "what is it?" We get lost in the forest sometimes, but that's what we need from our judges.

[47] Franklin D. Roosevelt, 32nd President of the United States (1933-1945).
[48] David Souter, Associate Justice, United States Supreme Court (1990-2009).
[49] John Roberts, Chief Justice, United States Supreme Court (2005-present).

First of all, I would love to have this panel choosing judges because I think we would come up with some really good folks, it would be great. I promise you, the political powers that be are never going to turn that over to us, but nevertheless. In Arkansas, they were considering a reform (John maybe remembers it) and changing to some sort of merit selection, at least for the appellate. If it was up to me and I had to pick something, I would have done a fourteen-year one time term, well-vetted (whether it was a big committee that included the bar and the local senate), it goes to the governor, and the governor could choose one of those three.

If you really wanted to be independent, you let people see how they were selected and then you give them the freedom to say, "now I'm on the bench in good behavior. We always say lifetime terms. That's not what the Constitution says; it says in "good Behaviour,"[50] which is where my career was started, making sure that there was good behavior by those judges, and that's what we did. I think that was something that was driving that type of independence and the transparency that comes with it.

We just did some focus groups, and the results aren't coming out yet, but I'll give you a little preview. When people were asked about judicial elections, one of the things they said was, "we want more information, we want a bio, a current picture (people will put pictures on from when they were in high school, apparently), and in 150 words or less, what their career was and who they are that is more than the advertisements we see on TV." I think those are things that help drive independence. Again, there are many more, but having the discussion of truly looking at, "no, I don't want my judge to be worried that two years from now, every major decision is going to result in a campaign against them." We saw that in Iowa and we saw that in Tennessee, where the retention elections were not about whether Oldfather, Rosenblum, Sachar, or Kowal were qualified, it was about, "I didn't like their last opinion and I would have voted against it." There was a time in this country where women weren't allowed to vote and all kinds of other things that were very popular if they would have been voted on. That's not what we promised; we promised we would be better than that. How can we keep our promises if we don't give them that independence?

JOHN KOWAL: It's interesting you mentioned the fixed term, David. At the Brennan Center, we looked at this question. When you talk about accountability, first of all, it means accountability to

[50] U.S. CONST. art. III, § 1.

the role of a judge, accountability to the Constitution, not accountability to the faction, the party that got you in. It happens in both parties, whether it's trial lawyers or the Christian right: "We get our person on the bench and they're there representing *us*." That can't be accountability.

As I mentioned in the beginning, there's the pressure of getting selected in the first place, whether it's elections or appointive systems. It's the reselection that we really put our finger on. Once you're on the court, if you have to be reelected and face the voters in a retention election, whether or not you get reappointed by a governor down the road, can you really be accountable to your function fully, can you be really independent, or are you looking over your shoulder?

For a long time, our view was "let a hundred flowers bloom," and we supported all kinds of reforms. What we've really landed on is that we need to get rid of judicial elections. There can be a way of appointing through a publicly accountable appointment system. That means that you would have a very clear criteria for selection, an open process that people could view, and (taking a lesson from some successful reforms related to redistricting) a panel that includes more diverse interests. One of the important values would be that it can't just be white people or men coming out of the system. The other significant part of our suggested reform is that you would have one long term and it would be done; whether it's fourteen years or eighteen years, you cannot be reselected to this position. You could always go try to be appointed to another job later, but basically, you could return to the practice of law. We would just take away the pressure of having to appeal to or please the people who are reselecting you to the position.

HON. LESLIE STEIN: I'm wondering if, since that's been proposed, you've heard any resistance to the one long fixed term. In some ways, that makes instinctual sense, but I'm wondering if there are groups or ideals that would resist that.

JOHN KOWAL: When I released my paper and then we released this reform, I will be candid to say, it did not set the world on fire. It was just a time when this issue was not in front of mind when there's so many other big, pressing challenges to the future of our democracy. But I've been encouraged in the last couple of years. I've suddenly been asked, "I read your paper, I want to talk to you about it." There're people seeing that it's time to come back to this.

I have to say, the one long term absolutely resonates with people. A lot of people in the system say that it would solve a lot of problems and it would be fine. I'm sure there's some people looking to make a

career as a judge that might prefer something else, but from what I have seen, there's not a lot of pushback to that idea.

PROFESSOR CHAD OLDFATHER: About eight years ago now, there was a group of fairly high-profile individuals advancing that proposal, I think it was for a sixteen year term (I don't remember for sure), as a solution to what ails us in Wisconsin. It got some traction, I think, within the Bar. Part of the problem is it's so difficult to amend our state constitution that it just ran into problems of inertia. I wouldn't be surprised to see that reemerging here after the latest turn things have taken.

HON. LESLIE STEIN: Several of you spoke to the fact that there has been some resistance to reform, or that there hasn't been a push for reform lately. Do you see that changing at all in the near future? What can be done to bring more attention to it, if anything?

JOHN KOWAL: Usually it takes scandal or some public concern to raise the salience of reform. If you go back twenty-five years, the growing awareness of all the corporate money going into state judicial elections did wake up a lot of people, and you had some of the building blocks for that. Two states actually passed public financing for judicial elections; I don't think it was the solution to anything, but it was still amazing that it passed in Wisconsin and in North Carolina. Later, when conservative Republican governments came in, they made a point of shutting those down and ending them. It's evidence, to me, that if you get the right groups (the civic groups, the bar associations) and you have that little rocket fuel of some scandal or public concern, any traction in one state would deal with the inertia that's really paralyzed it for, I would say, the last fifteen years.

DAVID SACHAR: I agree entirely, John, on the scandal part. We have a code of judicial conduct, in major part, because of the Black Sox Scandal[51] in 1919. We had a federal judge who was thumbing his nose at the rules and saying, "yeah, I'll be commissioner of baseball and I'll be a federal judge, who's going to stop me?" Taft,[52] who was a much more proficient Supreme Court Chief, was always strong on ethics. Finally, we had the currency back then to get it done.

SCOTUS[53] has a lot of issues right now going on and the press is continually reporting on that. Maybe those are things that are going to get people's attention and they're going to start reading these

[51] During the World Series between Cincinnati and Chicago, the White Sox were allegedly paid to throw the game. *See generally* SCANDAL ON THE SOUTH SIDE: THE 19191 CHICAGO WHITE SOX (Jacob Pomrenke ed., 2015).

[52] William Howard Taft, Chief Justice, United States Supreme Court (1921-1930).

[53] Supreme Court of the United States.

articles and looking at how else we can do this; the Professors and people like John are going to have some ideas.

I chose fourteen years because they got double retirement years counting, so that's a twenty-eight-year full retirement; you can retire, you can go be a professor, you can do all kinds of things. Secondly—there's some good articles out there, Philip Oliver, who was a professor of mine, wrote two similar articles[54]—the average Supreme Court term is seventeen years, so maybe we should do an eighteen-year term for the United States Supreme Court. That would mean every two years, if you stagger them. No one's hanging on breathing oxygen and trying not to die until the green candidate gets in there, because guess what? I got elected, I get two; if I get elected again, I get two more. It's clockwork, and it takes a little bit of the politics out of it. Now, I'm being a little bit of a Pollyanna thinking we've got the currency to change the United States Constitution, but it's not a bad idea. One of my professors, when he posed that, I was like, "that's a pretty interesting thing if you're studying that."

JOHN KOWAL: We support that, too, at the Brennan Center.

HON. LESLIE STEIN: I think we're nearing the end of this portion of the program. Before we turn it to the audience to ask their questions, why don't I give each of you a minute to wrap up or respond to anything else that you heard. John, do you want to start?

JOHN KOWAL: I've really enjoyed this conversation, and I look forward to hearing from members of the audience. I'm sorry we can't all be there in person. I would just go back to something I said at the beginning; this is an important democracy issue that, for a variety of reasons, has moved to the background and there's been not as much public awareness of these challenges. I have worked on this issue for twenty-five years—I was involved in philanthropy and supporting groups that worked on this issue, I've seen a lot of public opinion, research, focus groups, etc.—and people do care about this if they're informed about what the problem is, and they do believe deeply in the values of a fair and impartial judiciary.

I think this is a sleeper issue that could take off. What Chad has told us about Wisconsin can happen in a lot of places, and it's going to happen as long as we have a federal judiciary that's going in a certain direction for a long time. You're going to see more push in the

[54] Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO STATE L. REV. 799 (1986); Philip D. Oliver, *Assessing and Addressing the Problems Caused by Life Tenure on the Supreme Court*, 13 J. APP. PRAC. & Process 11 (2012).

states for alternative outcomes and alternative ways of interpreting the constitutions. It could be a great conversation, but it could also raise unrealistic expectations of what judging is. I think we're coming to a moment where people might say, "you know what, we need that judicial selection method for the twenty-first century and let's invent it and push it out there."

HON. LESLIE STEIN: Thank you. Professor Oldfather?

PROFESSOR CHAD OLDFATHER: John, we'll have to airdrop you into Wisconsin and have you solve our problems here because this could very well be the first domino to fall. I think there's really going to be an appetite for changing things because there was a little bit of one before and this last race was really, really extraordinary (even in the series of extraordinary races).

This goes back to John's comment about judicial hatcheries. For me, something that has shifted that's significant, that is worthy of attention, is the way that the divides that have entered our society more generally have also entered the legal profession in a serious way. I think that's a new development that we should try to counteract. The world would be a much better place without the Federalist Society and the American Constitution Society, if they just didn't exist. I know that's an awfully sort of Pollyannish statement to make as well, but I think that, by creating these silos for people, we lose something of the fabric of the profession. Professional norms play a role in providing for judicial accountability, as well as many other things, in ways that we really haven't focused on as much as we ought to. Turning our attention to norms and reestablishing and re-solidifying them is something to focus on going forward.

HON. LESLIE STEIN: Thank you. Professor Rosenblum?

PROFESSOR NOAH ROSENBLUM: I totally agree with Chad and John, but I'm going to sound just a slightly different note. There's no question that when reform happens, there will be powerful forces arrayed against it, trying to stop it, and they will accuse people of trying to destroy the independence of the judiciary, of disrespecting the norms of collegiality, and of politicizing a process that is apolitical. We know they're going to say that because that is what they have always said whenever these reforms have been pushed. Especially to the students in the audience, for some of the reasons that Chad and John have identified, these questions are not going away. Absolutely, it will be better when we are able to do the reforms and reinscribe these norms and strengthen our institutions, but the process is already political, the breakdown has already happened, the forces are already arrayed. I encourage you to gird your loins and

remain clear-sighted because, as John suggested, the road to reform is going to be a generational project. It's going to be ugly because, as a historical matter, reform has never followed a sanitized version that you might imagine, especially where what is genuinely at stake are questions of power, freedom, and equality.

The judiciary remains the heart and soul of our democracy, but it's going to be a challenging fight to preserve that heart and soul. I suspect, speaking for myself, that people are going to allege that you are not trying to preserve it, even if that's what you're ultimately trying to do.

HON. LESLIE STEIN: Thank you. And to wrap it up, Mr. Sachar?

DAVID SACHAR: I agree and I just want to piggyback on one thing. It is incumbent upon the Bar to be involved. I'm an ethics geek, but one of my favorite works is *Ethics and Service*[55] by Taft where he addressed Yale. If you read it, you will think he's talking about today. I think it's really important that students, law professionals, professors, and the Bar all work for the rule of law. International examples tell us, right now, that the canary in the mine that we see society going down is whether there's an ethical judiciary and whether that judiciary can be bought off. We see that in places like Poland and Israel with some of the issues that they've had and they're fighting against. That canary is going to survive or we're never going to trust those judiciaries again.

Having just come back from Mongolia, I will end with this: "The strength of a wall is neither greater nor less than the courage of the men who defend it." That is Genghis Khan, and that is who we're supposed to be. We are supposed to be the men and women who defend it. That's what I will be and that's what my career has become. You in the audience, whatever you do, fight for the rule of law, fight for fairness, don't fight for my team versus your team. Let's demand it from each other, and also criticize each other when we're hypocritical about it. Make us think about it because it is who we are. Otherwise, it's just the fickle law.

HON. LESLIE STEIN: A very apt conclusion. I just want to say, before we go to the audience questions, that I think one of the hallmarks of a good discussion is that it is thought provoking. I think that this one has been both illuminating and thought provoking. I do thank you all.

[55] WILLIAM HOWARD TAFT, ETHICS IN SERVICE (1915).

III. Q&A

HON. LESLIE STEIN: Do we have any questions?

KYLE DURKEE: Yes, we do. Thank you to all the panelists for that robust discussion about this topic. We're glad to now open it up to the audience. How this is going to work is we'll alternate between questions we have from the in-person audience to the Zoom audience. Any questions the audience has written on their note cards, please pass them forward.

HON. RACHEL KRETSER[56] **(AUDIENCE)**: Thank you very much. Has anyone read, "I Was Alabama's Top Judge and I'm Ashamed of What I Had to Do to Get There"?[57] I commend it to you. It appeared in *Politico* in 2015. The Chief Judge in Alabama talks about how her treasurer would set aside an afternoon every week where she had to call the people who appeared in her court and shake them down, really, for money. I forget how much it was, but it was a huge amount that she and her opponent raised in this manner. She felt like she had to take a shower immediately after this. In New York, thankfully, judges don't have to do that, but it's only slightly removed because our treasurers are doing that for us, in a sense. We do end up knowing, many times, who contributed because we see them at our fundraisers. It's only a step removed. To the extent that we can take money out of the process, I think we are all much better served and there will be a greater sense of validity of the judiciary. That's more of a statement than a question, and I apologize for that, but public financing is maybe something we want to reconsider.

HON. LESLIE STEIN: For those of you who are less familiar, that was a former Judge of Albany City Court. New York has this very haphazard system of judicial selection; depending upon what geographical area you're in, what court you are seeking to sit on, the process can be very, very different. Judge Kretser, like I, experienced the elective system.

KYLE DURKEE: We next have a question from our audience on a note card. It reads, "When the judges of the New York's highest court, the Court of Appeals, were selected by partisan elections—Benjamin

[56] Judge, Albany City Criminal Court, Third Judicial District (2006-2016).

[57] Sue Bell Cobb, *I Was Alabama's Top Judge. I'm Ashamed by What I Had to Do to Get There.*, POLITICO (Mar. 2015), https://www.politico.com/magazine/story/2015/03/judicial-elections-fundraising-115503/ [https://web.archive.org/web/20241217110153/https://www.politico.com/magazine/story/2015/03/judicial-elections-fundraising-115503/].

Cardozo,[58] Irving Lehman,[59] Stanley Fuld[60]—the court was extremely influential and widely regarded as one of the very best—if not the best—state or federal court in the country. Today, in New York's supposedly merit appointment system, no one would honestly suggest that the New York Court of Appeals has compared to those earlier elected courts. Why do you think that might be?"

PROFESSOR NOAH ROSENBLUM: Woah! We've got some great judges since we went to the appointive model. I'm a Law Professor at N.Y.U. Law, so you'll excuse me if I limit myself only to discussing the great Judge Kaye,[61] but there are other great judges we can point to as well. As my students would say, "don't fight the hypo," but I can't resist. That said, I take the point that, obviously, an elective system can produce some incredible judges. I would just come back to the transformation, the political environment, and some of the other considerations that went into it. I'm a legal historian, I love putting things in context and thinking about what it was that made it possible to elect someone like a Cardozo and a Lehman. New York State was a very different state than where we find ourselves now. Who knows what would happen if we immediately went to an elective system for the New York Court of Appeals, but based on what we saw fifty years ago, there's reason to believe that you would have a large influx of private fortunes that would then influence the way in which those elections play out.

Irving Lehman, related to the Lehman family, was a very wealthy guy. Those with vast fortunes can also be good judges, great politicians; it's not that wealth is inherently disqualifying. Judge Fuchsberg[62] was a significant judge; there were some ethics issues, but he wrote some important opinions. It's not that it's disqualifying all-around, it's that the concerns that were raised in that election are the concerns that motivated the reform, and there's reason to believe they might return.

The sum up would be, different time then, different concerns now. While we might disagree about whether Judge Kaye and Judge Cardozo should be listed in the same sentence, I will go to the mat saying that they should. That suggests that the appointive model can

[58] Associate Judge and Chief Judge, New York Court of Appeals (1917-1926 and 1927-1932).
[59] Associate Judge and Chief Judge, New York Court of Appeals (1923-1939 and 1940-1945).
[60] Associate Judge and Chief Judge, New York Court of Appeals (1946-1966 and 1967-1973).
[61] Judith Kaye, Associate Judge and Chief Judge, New York Court of Appeals (1983-1993 and 1993-2008).
[62] Jacob Fuchsberg, Associate Judge, New York Court of Appeals (1975-1983).

provide a way for even judges as illustrious as some of the great olds like Cardozo, who got through on elections, to get through today.

PROFESSOR CHAD OLDFATHER: Wisconsin proves the point that continuing with elections does not mean continuing with a highly regarded court. Just an anecdote on that, I think it was 2019, I was at a conference and the audience was state court judges and justices from across the country. I cannot tell you the number of times during the breaks at that conference that I would have these judges come up to me and ask some version of, "what happened to your state supreme court, we used to look up to that court?" It used to be a very well-regarded court. Now, it is true that most of the people you would want to have running for justice would not want to do it because of what you have to go through. The political dynamics have changed in such a way as to really scare off those people. Elections maybe once worked.

Here's an interesting story about contrasting norms. Minnesota, in the last election cycle, had one third of its judiciary up for re-election. There was exactly one contested race in the entire state. The judge whose race was contested happens to be a friend of mine. He is possibly the most qualified person to be a judge in the entire state, and he was challenged by a recent law graduate who thought he'd run for judge because he hadn't found a job to his liking and figured he might as well take a shot. He got 40% of the votes. I think that's partly a story about judicial elections, it's partly a story about different norms. The legal profession in the state next door to us, maybe because they've peered over the border and decided that we're not the example to follow, is just following a different path. It seems to still work there, it doesn't work here.

JOHN KOWAL: I would add that Judge Cardozo did not have to wage his campaigns on television, he didn't have to raise the kind of money required. It's not just fending off some attacks. You're not a real candidate if you're not on television. That started a long time ago, even before these wars. Now, you have to have a huge war chest to basically dissuade people from running a campaign against you and run it against someone else. I think that has been a game-changer. It's become inconsistent with being a judge to have to spend all your time raising money, or having others do it on your behalf (but you still know who's giving you money). I think that affects public confidence in the courts as much as anything else; the idea that you can give a judge money and then be the lawyer in a case before that judge. That doesn't make any sense to any person not in the system.

DAVID SACHAR: I'll just add, because I want to comment on the younger generation, nostalgia is fondly remembering things as they never were. We know from some of the opinions that that's true, but we also know that it's easier to be a deceased judge from the past than it is to be one right now. I see this next generation, they're going to change the world; they care more about some things. My generation was, "when do I make partner and get my seven series?" That doesn't seem to be the paradigm anymore. We could easily go, "Babe Ruth was better than the Yankees (they were terrible this year, by the way) are today." We really need to be careful of over glorifying the past, and realizing that, today, we have a lot of really good public servants. We hear about the bad ones (that was my job, so I know that), but I always want to make an effort to say, "I know that most of the judges out there are doing the right thing and really trying hard." We just need more of them, and we need to make sure they're more independent.

HON. LESLIE STEIN: Thank you. Kyle, do we have time for another one?

KYLE DURKEE: We have one last question from the audience. It reads, "What does it mean for finality and adherence of justice when parties request and are granted the ability to reargue and overturn recent high court precedent that favors one political party after the political composition of the high court swings the other way, specifically in North Carolina, Wisconsin, and New York?"

PROFESSOR NOAH ROSENBLUM: There's a theoretical question and then the immediate question. I don't think I'm well positioned to think about the immediate question relating to the particular cases that are pending, so I'll put that to the side. On the theoretical matter, you're actually getting at a deep, deep question: what do we do with questions of precedent and change in light of the values of independence and judgment? I think we all acknowledge that, sometimes, judges get it wrong and it's really important for judges to be able to revisit their decisions, *and* that there's something a little unseemly in the idea that the way a court rules is entirely a product of the personnel on the court. It's a profound puzzle and the tools that we've elaborated in response are clearly inadequate. For the most part, both as a theoretical and political matter, we gesture at the problem and hope that it goes away.

Putting on my legal history hat, *Brown v. Board of Education*[63] is often pointed to as a prooftext, as an example of a case where it was

[63] Brown v. Bd. of Educ., 344 U.S. 1 (1952).

so important for the court to reverse itself and say, "no, we got it wrong and now we're changing it." I think a lot of people today (right in line with what David was saying a second ago) have nostalgia for the past that never was. Now, we look and say, "yeah, of course *Brown* was rightly decided and it was totally right for the court to reverse the wrong-headed earlier decision, how could anyone think otherwise?" Of course, if you look back at the history, you see how incredibly contested it was at the time. The response to *Brown*, by many people, particularly in the south of the United States, was, "what a partisan, political decision without foundation, a product entirely of the change of the personnel on the court done to advantage one group over another, this is indefensible." It's only with the benefit of time that we've been able to look back and say, "actually, the people who had *that* position, they're the ones who were wrong." What looked at the time, to some, as an unprincipled political reversal was in fact a necessary step in the law.

I think the theoretical question that this question is getting at is really deep and hard to address. For me, it's a reminder that the rhetoric around this can be incredibly heated and why it's so important to get back in touch with what we think the genuine, correct motivating principles are.

JOHN KOWAL: I agree with Noah that there's no easy answer to this question. On the one hand, when a court does a 180 on an issue that it decided in the recent past because of a change in the population of the court, the court is going to seem less dispassionate and more political in many people's eyes. On the other hand, when we talk about accountability, part of accountability is that the courts don't always get it right and, in our system, we have to have ways to deal with that. One way to deal with it is constitutional amendment or passing a new statute. If we're talking about state court issues, sometimes it is about people saying, "we don't want judges who are so clueless and don't understand." For example, in talking about judicial diversity, in eighteen states, there's not one person of color on the court. If there's a case involving racial justice and people are disappointed in that, maybe they would agitate politically to have more diversity that reflects the state. That would be viewed as a popular form of democratic legitimacy, people think that's good.

It's challenging, but I do want to say that there is this push and pull where we need to respect the finality of decisions, but judges are not on Mount Olympus telling us they are the only one truth that exists. Through the push and pull of politics, we can demand that the courts go in a different direction. That sometimes manifests itself

in a change of who's on the court. It's going to feel different ways to different people; some people are going to feel like it's a vindication of democracy, some people are going to see it as political hackery. There isn't a particularly easy answer to this. Judges should be very mindful of it, however, and not just veer in a completely different when they have the chance to maximize their own personal views.

PROFESSOR CHAD OLDFATHER: I agree with all of that. Wisconsin, again, illustrates how difficult these issues can be. This question of maps was, in a way, the central issue in the election. What do you do with the fact that there's no way to amend the state constitution without two consecutive legislatures signing off on a state constitutional amendment? The very problem of gerrymandering prevents that from being a possibility. Here, we the people have, arguably, overridden the legislature on that, which seems like that should count for something. It also seems like it makes the judicial power at the state level, potentially, a very different thing from the judicial power at the federal level because the counter-majoritarian difficulty isn't a thing because any given member of the state supreme court is able to point to the fact that they were elected statewide, which is not true of any single member or subset of the Legislature. It's a complicated problem.

DAVID SACHAR: I understand that the issue of seeing something get changed, fundamentally, because it looks like the other side is in control is the issue. But finality is just that; you don't have to be very deep in criminal procedure to teach about retroactivity. We also have the ability to revisit when it comes to fundamental things in the law, and that's not necessarily a knock at finality.

I'll end with a folksy quote from one of our football coaches down here after one of them got fired (he was the interim coach). He faces the media for the first time and they say, "how does it feel to have the label of interim head coach?" and he said, "son, we're all interim." Isn't that the truth? We like to think it's all final, but finality can take care of all of us. There's going to be an issue of trust and confidence with the judiciary to make sure that we think they're changing because they're revisiting fundamental issues, not because of political powers and who they're beholden to. It is a very good question and a very deep issue.

HON. LESLIE STEIN: We could probably continue this conversation for several days, and I wish we could. I think this is a good place to finish. Kyle, do you have any closing remarks?

IV. CLOSING REMARKS

KYLE DURKEE: I just want to thank everyone for joining us here today for this important discussion. First and foremost, again, I'd like to thank the GLC and the *ALR*[64] for helping put this together, but also to Professor Rosenblum, Professor Oldfather, David Sachar, and John Kowal for joining us today. Thank you, everyone, for joining us, coming together today, and listening to this important issue.

MARIE-THERESE WITTE: A big thank you to Judge Stein for wrangling these four experts, we really appreciate it.

[64] *Albany Law Review*.