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### New York's Judicial Selection Process is Fine – It's the Party System That Needs Fixing

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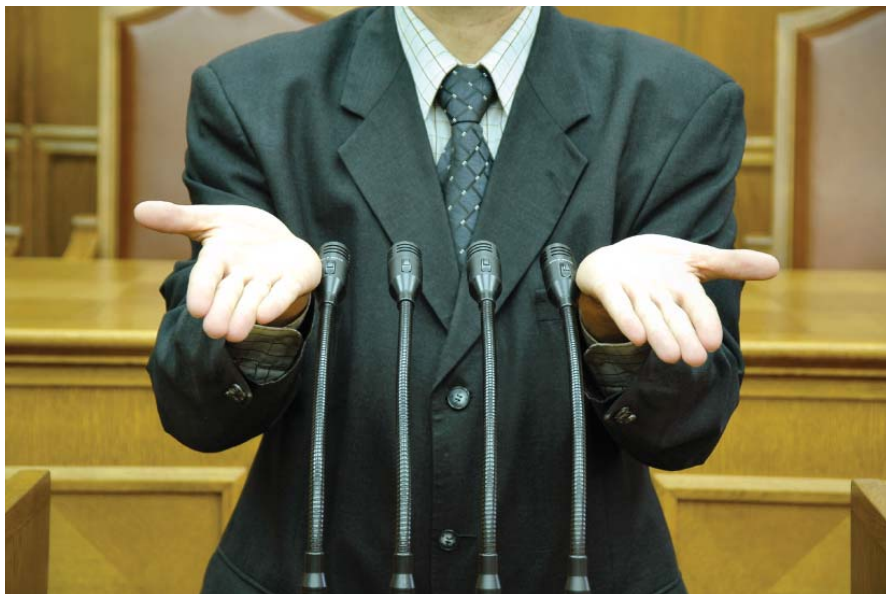
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## POINT OF VIEW

BY JAMES A. GARDNER



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# New York's Judicial Selection Process Is Fine – It's the Party System That Needs Fixing

After a long period of mounting public dissatisfaction with New York's distinctively undemocratic system of judicial elections, the federal courts have finally forced the issue onto the state legislative agenda by striking down the current system on federal constitutional grounds. Reform proposals abound, most of which would make the system either more democratic, by opening up candidate access to the primary ballot, or less democratic, by substituting a system of executive appointment. None of these proposals, however, is likely to produce much of an improvement because none of them addresses the real problem. New York's method for choosing judges is basically sensible and structurally sound. The dysfunction lies, rather, in New York's party system, which is utterly moribund. Until the state develops a well-functioning system of competitive and publicly accountable political parties, no reform to the judicial selection process can be expected to produce meaningful change.

### The Real Problem

New Yorkers have long been dissatisfied with their system for electing judges, which has existed in its current form since 1921. In 1977, this dissatisfaction resulted in a constitutional amendment that removed the Court of Appeals from the electoral system and substituted a system of gubernatorial appointment.<sup>1</sup> Lower court judgeships, however, remain elective offices. Although public dissatisfaction with judicial elections has not routinely prompted widespread movements for reform, it has manifested itself in more subtle ways, such as ballot rolloff and a general loss of confidence in the quality of state trial judges and the quality of justice. By 2003, Chief Judge Judith Kaye thought the problem serious enough to appoint a Commission to Promote Public Confidence in Judicial Elections (the "Feerick Commission"), which studied the problem and produced a set of recommendations for reform.<sup>2</sup>

While the Feerick Commission's proposals were circulating, the federal District Court in Brooklyn dramatically

altered the landscape with its decision in *López Torres v. New York State Board of Elections*,<sup>3</sup> which invalidated on federal constitutional grounds New York's method of electing trial judges. In affirming the District Court's decision, the Second Circuit ruled that the structure of the state's system of judicial nominating conventions violates associational rights of party members that are protected by the First Amendment.<sup>4</sup> Specifically, the court held that "the First Amendment affords candidates and voters a realistic opportunity to participate in the nominating process,"<sup>5</sup> an opportunity that the current system of judicial selection unconstitutionally fails to provide. In view of these rulings, the state now faces an urgent need to replace the invalidated system. If it does not, the District Court has said that it will impose a system of open primaries for elective judicial offices.

While this outpouring of concern over New York's dysfunctional judicial selection process is understandable, I shall argue here that it is misplaced. Although the judicial selection system

is broken, to be sure, its malfunction is only a symptom of a much more deeply rooted problem: the dysfunction of New York's political parties and, in consequence, the state's system of party democracy itself. Until these problems are addressed, no reform to the judicial selection process is likely to produce a significant improvement. In fact, there is nothing wrong with the structure of New York's judicial selection institutions, which, at least on paper, are capable of working perfectly well; indeed, the underlying design premises of the present system are sound and sensible.

The problem, rather, is with the behavior of actors *within* the institution. Evidently the party officials who in practice run the judicial selection process have entirely the wrong incentives; they, and the parties for whom they act, lack the slightest degree of accountability for undesirable behavior. A well-functioning party system can serve as a powerful tool of democratic accountability. In New York, this system has failed miserably. What we ought to have is a system in which parties compete to satisfy an obvious public demand for meaningful choice among the best possible candidates for judicial office. What we have instead is a system in which the parties collude for their private advantage, and in which they treat judgeships as a species of patronage that is theirs to dispense, on terms satisfactory to them alone. Instead of being the beneficiary of party competition, the people of New York have been shut out of the deal.

### A Fair System, at Least on Paper

In its fundamental structure, New York's system for electing supreme court justices can be best understood as an entirely reasonable response to the very real difficulties that inhere in any attempt to design a method for selecting judges in a democracy. Because of the peculiar combination of independence and accountability that judges in a democracy must possess, there is no way to select judges that does not face potentially serious flaws.

The two principal methods for selecting judges – appointment and election – sit at opposite ends of a spectrum ranging from the least to the most democratic. Yet too much democracy can be as disruptive to the success of a judicial selection system as too little.

When approached in the right spirit, a system of judicial appointment, in which the governor or other chief executive does the appointing, can without a doubt produce outstanding judges. The main potential problem with appointment, however, is its susceptibility to abuse by the appointing official. Abuse of the appointing power most commonly takes the form of patronage appointments, in which judges are elevated to office on the basis of their personal loyalty to the governor, or as a reward for having performed some kind of service to the governor or the governor's party – a condition of appointment.

Until 1845, New York, like all states admitted in the nation's first 40 years, utilized a system of gubernatorial appointment of judges. In 1846, however, the state switched to electing its judges, for two reasons. First, a Jacksonian impulse toward greater democracy swept the nation during this period, a trend from which New York was not immune. This impulse was driven by an assumption – not always well explored – that all or nearly all public officials, including judges, should be popularly elected. In New York, however, the switch to an elective judiciary also responded to a widespread belief that the state's governors had been distributing judgeships as a kind of patronage.<sup>6</sup> In New York, then, the election of judges rests historically on the belief that elected judges will be more independent, fairer, and more impartial than appointed judges.

The election of judges is by no means, however, a panacea. Electing judges, to be sure, addresses the problem of gubernatorial patronage to some degree, but does so by switching the object of judges' dependence from the governor to the public. In a democracy, of course, the depen-

dence of officials on public approval is normally thought to be desirable, but when the officials in question are judges, the practice raises at least three well-known potential problems. First, it is possible, and perhaps likely, that the public will be unable meaningfully to evaluate the qualifications of judicial candidates and the performance of sitting incumbents. Second, an elective judiciary raises the possibility that judges will pander to public opinion in their decisions rather than impartially applying the law. This is especially a concern after the U.S. Supreme Court's highly unfortunate decision in *Republican Party of Minnesota v. White*,<sup>7</sup> which held that many commonplace state ethics rules restricting the scope of judicial campaigning violate the First Amendment. Third, requiring judges to run for election requires them to raise the necessary funds, and the need to raise money opens judicial candidates to a different kind of corruption: the excessive influence of monied special interests.

Most states select their judges using some kind of hybrid system.

Because both appointment and election raise such potentially serious problems, most states select their judges using some kind of hybrid system that is deliberately structured to avoid each of the extremes. The most common method by far is the so-called "Missouri Plan," in which judges are appointed initially by the governor, often from a list of candidates recommended by a bipartisan or nonpartisan screening commission, and then stand periodically for democratic review in uncontested, nonpartisan retention elections.<sup>8</sup> New York's present system, adopted in 1921, was designed

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in the same spirit. It offers, on paper, a perfectly sensible and plausible way to combine the advantages of appointment and election, while avoiding the worst of their respective risks.

New York's system of electing supreme court judges proceeds in three stages. The first consists of a primary election, not of judicial candidates, but of delegates.<sup>9</sup> These delegates are selected by each party's rank-and-file membership for the sole purpose of attending a judicial nominating convention. Because delegates exercise no function other than the selection of the party's judicial candidates, the system clearly contemplates

The New York system, however, is more democratic than the Electoral College in that it provides for a third and final stage in which the selection of judges is referred back to the people for a final decision. Delegates to the judicial nominating conventions do not select judges, but instead merely designate nominees to run as candidates of their respective parties. The ultimate choice among what the system contemplates will be highly qualified, competing candidates for judicial office is reserved for the people through direct popular election.<sup>11</sup>

As a matter of design, this system provides an admirably balanced mix of

perverted the operation of the system to the extent that it is barely recognizable as democratic. Although official patronage has successfully been marginalized, the public in fact plays no meaningful role. Contrary to its design assumptions, New York's system has been deformed into one that dispenses patronage, but the patronage is handed out by the political parties rather than by the governor. The result is a judicial selection process dominated by party officials that is every bit as corrupt as the pathologies of appointment and election that it was so carefully designed to avoid.

How exactly is this happening? What are the parties doing to thwart the proper operation of the system? Here are just four of the most egregious offenses:<sup>12</sup>

1. The parties are extorting benefits, such as donations of money and services, from judicial candidates, including from sitting judges who seek reelection or election to a higher court.
2. The parties are attempting to influence the behavior of sitting judges by creating an informal, and extralegal, form of judicial promotion in which candidates must pay their dues in lower or specialized courts before the party will consider nominating them for supreme court.
3. The parties are not seeking out, and indeed are driving away, many highly qualified candidates, who are unwilling either to be extorted or to put in long service in a specialized lower court in which they have no interest, and then to have that service subjected to review not by voters, but by party officials.
4. Worst of all, the parties are colluding to thwart the possibility of meaningful popular choice, and to maintain their own power over judicial selection, by cutting deals about whom to run, when, and where, including cross-endorsement deals within judicial districts and even non-opposition

On paper, New York's method for selecting supreme court judges ought to work as well as any other.

that delegates will be elected by party members on the basis of their ability to evaluate the qualifications of potential judicial candidates. In the second stage, the elected delegates convene at their respective judicial nomination conventions to select their party's judicial candidates.<sup>10</sup> Under the circumstances, it seems clear that the system contemplates that the delegates, selected for their expertise in things judicial, will nominate only the very best candidates that their parties are capable of inducing to run. Up to this point, incidentally, the system bears a distinct resemblance to the federal Electoral College, which was designed to deal with what was thought at the time to be an analogous problem: the incompetence of the people to select a president. The Framers' solution, echoed in the 1921 New York judicial convention plan, was that where the people are deemed incompetent to perform some necessary function of democratic oversight, their role should be limited to the election of competent intermediaries who will make the actual decisions.

popular participation and professional expertise. By including the people at both the beginning and the end of the process, it seems well calculated to secure all the benefits of popular participation in judicial elections as a guard against official patronage. At the same time, by leaving the actual identification of judicial candidates to individuals who are selected precisely for that purpose, the system secures the benefits of quality and competence associated with appointment by informed and well-qualified experts, while avoiding the pitfalls of public incompetence in the identification and evaluation of the qualifications of good potential judges. On paper, then, New York's method for selecting supreme court judges ought to work as well as any other.

### A Failed Party System

The problem today, of course, is that the state's judicial selection system simply isn't working as intended. The public continues to do what is asked of it. The parties, however, are not by any means performing the role assigned to them under the law. Indeed, the parties have



and cross-endorsement deals that cross district boundaries.

In short, the parties are not *competing*, as they should, for the approval and votes of the electorate. Given the crucial role assigned to the parties by the state judicial selection system, the system cannot possibly function properly if the parties fail to play their assigned role. Why don't they do so? The short answer is that New York's party system has become so completely dysfunctional that it no longer serves any positive role in the democratic process.<sup>13</sup>

### No Meaningful Party Democracy

Although the reasons behind the collapse of New York's system of political parties are complex, I believe it is possible nonetheless to trace much of the present dysfunction to one, and possibly two, underlying issues: (1) the bipartisan gerrymander of the state Legislature, and (2) the three-men-in-a-room problem.

Political scientists have long argued that political parties are essential to any kind of meaningful popular control over government. The theory of party democracy, often called the responsible party model, goes something like this:<sup>14</sup> In a mass democracy, the people cannot and do not participate actively in the formulation of policy, and thus do not exercise any form of direct control over government policy. Instead, the people exercise a form of indirect control in that, if a majority of the populace feels that its wants are not being satisfied, it can replace the set of rulers in power with an alternate set; it can, that is, "vote the bums out." According to political scientists, this form of indirect popular control requires political parties because only parties can provide the coherent, unified sets of rulers who will assume collective responsibility to the people for the manner in which government power is used. For this system to work, each party must promote a coherent program of policies designed to satisfy the people's wishes. The party that wins a majority of the offices of government in the elec-

tion then takes over the entire power of the government and the entire responsibility for what the government does, and uses its power to put its program into effect. If it does a good job, the voters will keep it in power. If it does not, the voters will turn it out and designate a competing party to run things more to their liking.

In New York, any possibility of meaningful party democracy has been utterly thwarted by the parties' collusive legislative gerrymander, an arrangement that has for 30 years allocated firm control of the state Assembly to Democrats and of the state Senate to Republicans<sup>15</sup> – an impressive achievement in a state in which registered Democrats outnumber registered Republicans by approximately five to three.<sup>16</sup> This gerrymander fatally undermines the operation of the state's system of party democracy because it

thoroughly thwarts the ability of the electorate to hold any party accountable for the actions of the government. Because of the gerrymander, not only can neither party be voted out of the chamber it controls, but no single party can ever control the entire government. Since neither party can be disciplined by the voters, neither party has any incentive to be responsive to the voters' wishes – exactly the kind of incentive that a well-functioning party system is supposed to provide. Under these circumstances, the parties are entirely free to run the judicial selection process (as well as any other aspect of state governance) however they want without fear of retribution from the voters. If they choose to run the system collusively rather than competitively, the voters are virtually powerless to stop them.

In New York, the problems flowing from the collusive gerrymander of the

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state Legislature are compounded by another charming local custom: government by three men in a room. In this system, the messy complexity of an actual representative legislature is stripped down to a simple system in which essentially all significant legislative power is delegated by the Assembly to the speaker and by the Senate to the majority leader. These two legislators then negotiate the legislative agenda of the state directly and personally with the governor, behind closed doors. This practice further destroys the accountability of the political parties not only because of its opacity, but because it delegates and concentrates legislative power in the hands of individuals who are beyond the reach of public retribution. In this system, all significant legislative policy decisions are made by the two legislative leaders, yet only a tiny fraction of the electorate has any power to hold the leaders electorally accountable. The leaders consequently lack

any incentive at all to be responsive to the wishes of the vast majority of New York voters, and the only voters they need to worry about are voters in their own safely gerrymandered districts, so they need not really worry about their own constituents either. Such a system has more in common with a hereditary aristocracy than a democracy.

### **Break Up the Bipartisan Gerrymander**

Proposals for reforming New York's judicial selection process fall generally into one of two opposing camps: those that would make the process less democratic by creating a system of gubernatorial and mayoral appointment; and those that would make the process more democratic by instituting a more open form of primary elections. Neither type of proposal is likely to make much of a difference in the operation of the selection process, or in the ability of the parties to subvert that

process for their own benefit, until the defects in the party system outlined above have been addressed.

Let's start with appointment. Virtually all proposals to replace the current elective system with an appointive one attempt to avoid the problem of gubernatorial patronage by making use of a bipartisan screening commission.<sup>17</sup> Under such proposals, the governor may appoint only candidates who have been cleared by the commission, which will in theory forward to the governor the names only of the most qualified candidates to be found in the state. Until the party system is fixed, however, this is a false hope.

The theory of bipartisan candidate screening proceeds on the premise that political parties with opposing interests will be able to find common ground only by settling on candidates who are uncontroversially of the highest quality. However, as their current behavior indicates, if the parties are not publicly accountable, they are both willing and able to reach agreement on other grounds besides candidate quality, and one such ground has been, and is likely to continue to be, the parties' mutual, private advantage.

In assessing the likelihood that an independent judicial screening commission will produce better-quality judges than the highly politicized system now in place, it is also instructive to look at a similar area, facing similar problems: redistricting. Numerous of the reform proposals are based on the proposition that gerrymandering will stop, and genuinely competitive elections will be possible, only if the redistricting function is taken from the Legislature and given to an independent redistricting commission, usually of bipartisan composition.<sup>18</sup> Yet recent studies of the work of independent redistricting commissions already in operation have consistently found no good evidence that these commissions produce districting plans that are more competitive, or state legislatures that are more responsive, than when redistricting is performed by the legislature itself.<sup>19</sup> There is no reason to suppose a

different result for independent, bipartisan judicial screening commissions.

Then there is the elephant in the room that nobody really wants to acknowledge: For 30 years New York has used just such a judicial nominating commission to screen candidates for gubernatorial appointment to the Court of Appeals. Has this system produced the best possible high court? Has the commission successfully purged partisanship and patronage entirely from the appointment equation? Seemingly not. Although the nominating commission method seemed to work relatively well for a while, it has not lived up to its potential in some time. I don't mean to suggest by any means that recent appointments to the Court of Appeals have been of poor quality, but in a state with what is surely the greatest accumulation of legal talent in the nation, perhaps in the world, the appointment process cannot honestly be said to have elevated, or even to have considered, the very best of the best. There is no reason to suppose a screening commission would produce any better results if its charge were extended to lower court judges; indeed, the federal experience suggests that considerations other than quality tend to become much more important as one descends the judicial hierarchy, and that is true even in the presence of a reasonably well-functioning and accountable party system on the national level.

The other family of reform proposals making the rounds – and the one that will be imposed by the U.S. District Court should the Legislature fail to act – would move in the opposite direction by further democratizing the judicial selection process through a system of open primaries. Such primaries would create alternative routes to nomination for elective judgeships by permitting voters to consider not only the “official” candidates backed by state and local party leaders, but also “unofficial” candidates who, though not supported by party leaders, command significant support among the party rank and file. The motivation behind

## NYSBA on Selecting Judges

The New York State Bar Association has supported a merit system of judicial selection since 1973. In 1993 the Association's House of Delegates approved “A Model Plan for Implementing the New York State Bar Association's Principles for Selecting Judges” (the “Model Plan”) that would amend the New York State Constitution to replace the current selection process with a merit selection system. Key components of the Model Plan include the following:

- The proposal would cover the Supreme Court, including the Appellate Division; County, Family and Surrogate's Courts; the Court of Claims; the Civil and Criminal Court of the City of New York; full-time city courts outside New York City; and the District Courts.
- Nonpartisan nominating commissions would propose three “highly qualified” candidates for each judicial vacancy.
- A statewide nominating commission would propose candidates for appointment by the Governor to the Court of Claims.
- Four department-wide nominating commissions would propose candidates for appointment by the Governor to the Appellate Division.
- A New York City nominating commission would propose candidates for appointment by the Mayor to trial courts in New York City.
- Judicial district nominating commissions would propose candidates for appointment to Supreme, County, Surrogate's, Family and District Courts outside New York City, with appointment being made by the Governor in the case of Supreme Court and the chief elected official of the county in the case of the other courts.

The Model Plan has served as a key resource in the development of current legislation to implement a merit-selection system and efforts by the Association to reform the current process for selection of New York's judges.

such a reform seems to be to break the leadership's stranglehold over nominations and allow independent, insurgent candidates to crack open the system.

Until New York acquires a meaningful system of party competition, however, this too is unlikely to produce any great improvement. As an initial matter, the open primary proposals have all the flaws associated with excessive popular involvement in judicial selection. First, the public has little basis on which to evaluate the candidates. Second, judicial campaigns tend to be of low salience for the majority of voters and turnout is far lower in judicial races than in races further up the ballot.<sup>20</sup> Low turnout is even more of a problem in primaries, the only phase of the process that these reforms would affect, and those who do turn out tend

disproportionately to be party activists and loyalists,<sup>21</sup> who would likely support the inside party candidate in any case. As a result, the parties are likely to be just as dominant under an open primary system as under the current system.

Furthermore, even in a more open system of primary selection, candidates supported by the formal party organization will still have a huge advantage over independent party candidates because they and only they will have access to party campaign resources and expertise. At most, all an open primary is likely to do is to allow party outsiders who are rich enough to self-finance their own campaigns to bring themselves to the attention of the party leadership. Interparty cross-nomination and noncompete deals will still



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allow parties to marshal the resources to crush outsider campaigns, and as a result the parties will still have ample means to co-opt serious independents. What is needed is a system that gives parties an incentive to choose the very best candidates, and to offer them competitively to the public. An open primary system does not do that, and the parties will lack such an incentive until the public is able to hold them accountable for their behavior.

Such accountability will not be possible until, at a minimum, the bipartisan gerrymander of the state Legislature is broken up. Only when political parties are forced actually to compete with one another for control of the Legislature can voters influence the content of governmental policy. Only when the voters have the ability to dislodge one party from legislative power and install its competitor will they have the ability to hold parties accountable for their behavior, thereby providing the parties with meaningful incentives to alter their behavior to conform to public wishes. Obviously, the Legislature will not undertake this task by itself. The electorate could do it, of course, but the parties seem to have a knack for mutual self-preservation that leads them to mollify the public – or enough of the public to avert a threat – just before the point that it gets angry enough to do something. That leaves the courts in the best position to address the problems posed by the offending gerrymander.

The Second Circuit's decision in *López Torres* is troubling in many respects, but its most troubling feature by far is that the court simply misanalyzed the problem. The reason New York's system of judicial selection is dysfunctional has little to do with its underlying legal structure, which the court precipitously invalidated. It has instead everything to do with the dysfunction of New York's party system. As a rule, I am disturbed when a federal court steps in to dictate to a state how it has to structure its internal

political system,<sup>22</sup> and I would much rather see this matter handled by state courts as a matter of state constitutional law, which furnishes many potentially promising grounds on which to restrain abuse of the redistricting process. If federal courts are going to intervene, however, I would rather see such intervention where it would do some good – to break up the state's collusive, bipartisan legislative gerrymander – than to invalidate a specific and perfectly reasonable choice made by New Yorkers about how to set up a particular aspect of their democratic self-governance. ■

1. N.Y. Const. art. VI, § 2(c), (e).
2. Commission to Promote Public Confidence in Judicial Elections, Report to the Chief Judge of the State of New York (June 29, 2004) ("Feerick Comm'n Report").
3. 411 F. Supp. 2d 212 (E.D.N.Y. 2006).
4. *López Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006).
5. *Id.* at 187.
6. Peter J. Galie, *The New York State Constitution: A Reference Guide* 128–29 (1991); Peter J. Galie, *Ordered Liberty: A Constitutional History of New York* 82–83, 105–06 (1996).
7. 536 U.S. 765 (2002).
8. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689, 714–26 (1995).
9. N.Y. Election Law §§ 6-106–6-124 ("Elec. Law").
10. Elec. Law §§ 6-124, 6-126, 6-158(5).
11. N.Y. Const. art. VI, § 6(c).
12. These and similar practices are common knowledge among the bench and bar. The specific items listed in the text are culled from a *Buffalo News* investigative series by Michael Beebe and Robert J. McCarthy, "Courting Big Money" (July 14, 2002), "Putting Politics First: Democratic Boss Wields Big Power in Choice of Judges" (July 15, 2002) and "Appeal for Reform" (July 16, 2002); the Feerick Comm'n Report; and the opinions of the District and Circuit courts in *López Torres*.
13. The one exception may be at the level of state-wide office, especially governor. Here, the system functions to some degree as it ought, though not nearly as well as it might.
14. This account relies mainly on Austin Ranney, *The Doctrine of Responsible Party Government* 10–14 (1954). See also American Political Science Ass'n's Committee on Political Parties, *Toward a More Responsible Two-Party System*, 44 Am. Pol. Sci. Rev. Supp. 15–24 (1950).
15. Gerald Benjamin, *Reform in New York: The Budget, the Legislature, and the Governance Process*, 67 Alb. L. Rev. 1021, 1052–53 (2004). For earlier accounts, see Richard Lehne, *Legislating Reapportionment in New York* (1971); Calvin B.T. Lee, *One Man, One Vote: WMCA and the Struggle for Equal Representation* (1967).
16. N.Y. State Board of Elections, *County Enrollment Totals* (Nov. 1, 2005), available at <[http://www.elections.state.ny.us/NYSBOE/enrollment/county/county\\_nov05.htm](http://www.elections.state.ny.us/NYSBOE/enrollment/county/county_nov05.htm)>.
17. This is the method currently employed to select candidates for the Court of Appeals. N.Y. Const. art. VI, § 2(d)(1). Most proposals for judicial appointment typically would merely extend this system, or something very like it, to lower court elections. See, e.g., New York State Bar Association, *Report of Action Unit #4 of the New York State Bar Association: A Model Plan for Implementing the New York State Bar Association's Principles for Selecting Judges* (May 14, 1993), at 7–9. Even the Feerick Commission, whose charge did not include consideration of switching to an appointive system, recommended that the judicial nominating system be modified to include bipartisan screening commissions in each judicial district. Feerick Comm'n Report at 19.
18. Bipartisan composition is the most common format for existing independent redistricting commissions. See, e.g., Ariz. Const. art. 4, § 1(3); N.J. Const. art. II, § II(1)(b); Wash. Const. art. II, § 43(2).
19. See, e.g., Alan I. Abramowitz, Brad Alexander & Matthew Gunning, *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. Politics 75, 79 (2006); John G. Matsusaka, *Institutions and Popular Control of Public Policy*, USC Center in Law, Economics and Organization, Research Paper No. C06-14, at 24 (Nov. 2006), available at <<http://ssrn.com/abstract=946828>>; Seth Masket, Jonathan Winburn & Gerald C. Wright, *The Limits of the Gerrymander: Examining the Impact of Redistricting on Electoral Competition and Legislative Polarization* (paper presented at annual meeting of American Political Science Association, Aug. 31–Sept. 3, 2006).
20. For example, in 2006, more than a quarter of voters in the First Judicial District did not record a vote for Supreme Court justice. In the Second Judicial District, more than a third did not cast a vote for Supreme Court. In the Eleventh and Twelfth, nearly one-third did not cast such a vote. See N.Y. State Board of Elections Home Page, <<http://www.elections.state.ny.us>>.
21. See, e.g., Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J. L. Econ. & Org. 304, 321–22 (1998).
22. See James A. Gardner, *Forcing States to Be Free: The Emerging Constitutional Guarantee of Radical Democracy*, 35 Conn. L. Rev. 1467 (2003).

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