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Weighty judgment

New York's judicial selection process is tainted by politics, not process

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New Yorkers have long been dissatisfied with elections. In a sad parody of democracy, the real decisions are made not by the electorate, but by party bosses who decide who will run and whether judicial elections will even be contested.

The problem today is that the state's judicial selection system isn't working as intended. Although the public continues to perform its role, the parties have badly perverted the system. They extort donations from judicial candidates. They enforce an extralegal system of judicial promotion from lower to higher courts. They drive away qualified candidates who are unwilling to play ball. And they collude to thwart popular choice by cutting deals about whom to run, when and where.

Last year, a federal court pushed judicial election reform onto the state legislative agenda by invalidating the existing system. Unless that ruling is reversed by the Supreme Court, which recently took the appeal, the state must craft a new system or face judicial imposition of open primaries for judicial offices.

While public and judicial concern over New York's dysfunctional judicial selection process is understandable, it is misplaced. There is nothing wrong with the structure of New York's judicial selection institutions. The real dysfunction lies in New York's party system, which is utterly moribund.

Judges typically are chosen either by appointment or election. Judicial appointment can yield outstanding judges, but is susceptible to abuse in the form of patronage. New York switched in 1846 from appointive to elective judgeships partly to prevent exactly this abuse.

Electing judges, however, has its own drawbacks. The public may be unable to evaluate the qualifications of judicial candidates. And judges who run for election must raise money, opening them to the influence of special interests.

New York's system is a reasonable hybrid meant to combine the advantages of appointment and election, while avoiding their respective risks.

The state's system of electing Supreme Court judges proceeds in three stages. First, voters from each party elect delegates to a judicial nominating convention. The delegates then convene and select their parties' judicial candidates. The final selection of judges is referred back to the people at the general election.

By including the people, this method guards against patronage appointments. Yet by leaving the identification of judicial candidates to elected delegates, the system gains the benefits of appointment by well-informed observers. On paper, then, New York's method for selecting Supreme Court judges ought to work as well as any other.

The problem is the parties are not competing, as they should, for the approval and votes of the electorate.

Why not? The short answer is that New York's party system is dead. Although the reasons are complex, much of the present dysfunction can be traced to the bipartisan gerrymander of the state Legislature.

In a modern democracy, the people control government indirectly by replacing one set of rulers with another. Alternate sets of rulers are supplied by political parties competing for the people's votes. But in New York, party democracy has been thwarted by the parties' collusive legislative gerrymander, which for more than 30 years has allocated control of the Assembly to Democrats and of the Senate to Republicans.

This gerrymander fatally undermines party democracy because it prevents the electorate from holding any party accountable for the actions of the government. Because of the gerrymander, no party can be voted out of the chamber it controls, nor can a single party take control of the entire government. Since neither party can be disciplined by the voters, neither party has any incentive to be responsive to their wishes.

Most proposals for reforming New York's judicial selection process would substitute either gubernatorial appointment or open primary elections. Yet neither reform is likely to make a difference until the party system is fixed.

Almost all proposals for appointment would limit the governor to appointing candidates who have been cleared by a bipartisan screening commission. But if the parties are not accountable, there is no reason to expect screening commissions under party control to stop treating judicial appointments as party patronage.

Open primaries wouldn't fare much better. Insider candidates supported by the party organization would have a huge advantage over outsiders because of their access to party campaign resources and expertise. And the parties could still make cross-nomination and noncompetition deals to crush outsider campaigns or co-opt serious independents.

Real party 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 to actually compete with one another for control of the Legislature can New York voters influence the operation of their government and the content of its policies.

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