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Fringe Political Parties Should Not Pick Our Judges

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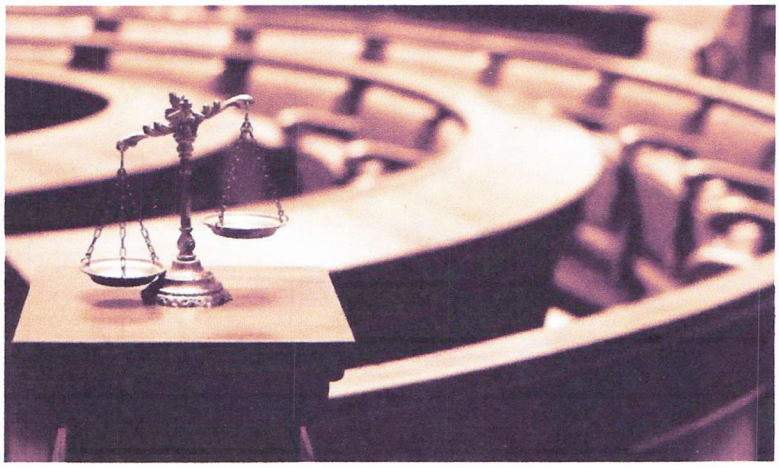
By **Sol Wachtler** | April 05, 2019



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In New York state a political party which receives 50,000 votes on its line in a gubernatorial election automatically has ballot access in the next four general elections. After last year's election for governor, our electorate gave ballot access to a total of eight different political parties. We no longer have the "Right to Life" or "Woman's Equality "or "Stop Common Core" or "Tax Cut Now" parties in ballot positions, but we have added the "Libertarian Party of New York (https://en.wikipedia.org/wiki/Libertarian_Party_of_New_York)" and the "Serve America Movement" party lines.

These minor parties are able to get the votes to keep their ballot lines because New York allows "fusion voting"—a system which incentivizes minor parties to cross endorse candidates. These minor

parties, created to promote personal and special interests, are extremely influential because they can trade off their ballot line to the major political parties for financial support, patronage or other advantages. That may be acceptable when it comes partisan gamesmanship, but it is not acceptable and is downright dangerous to allow back room deals where these fringe parties exchange their ballot line for judgeships. The newly formed election commission can not only increase the number of votes these fringe parties need to maintain a ballot line, it can also see to it that the funds allocated to public campaign financing are not dissipated by a multiplicity of primary challenges which would qualify for funding.

We tend to think of federal courts as superior to our state courts, but they are not. Federal court decisions which affect national issues tend to make headlines, but federal courts are courts of "limited jurisdiction"—limited by application of the U.S. Constitution and federal laws—whereas state courts have "general jurisdiction"—that is, the authority to hear cases of all kinds as well as those cases implicating our state constitution. Indeed, if a state court finds that our New York Constitution grants greater protection to our citizens than the U.S. Constitution, that state court judgement is immune from review by the U.S. Supreme Court. New York courts hear more than three million cases every year: issues involving trusts and estates, personal injury claims, marital disputes, custody cases, commercial disputes, and almost all criminal cases—yet most New Yorkers know nothing about our court system or how the judges who have so much to say about our lives and deaths, our property and liberty, are chosen.

For over 170 years, justices of our State Supreme Court—New York's trial court of general jurisdiction—have been elected by popular vote. That selection method was provided for by the state constitution of 1846. At the time, Alexis de Tocqueville, in his travels around America, took note of New York's novel method of selecting judges by popular election, warning that "these innovations will sooner or later, have disastrous results."

The distinguished legal scholar, Roscoe Pound, in a speech before the American Bar Association in 1906 said that "[p]utting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench." However, our legislature was not dissuaded. When Tammany Hall and the Democratic Party dominated New York state politics, it pushed through New York's Constitution of 1921, which provided that our New York State Supreme Court justices were to be nominated at political conventions. Because those conventions were and are controlled by the political bosses, it meant that the political leaders had the power to choose these justices without the fear of a primary challenge.

In 1992 Margarita Lopez Torres, the first Latina to be elected to the Civil Court for Kings County, sought her party's nomination for the New York Supreme Court. She was refused access to the ballot because of New York's restrictive nomination system. When Judge Lopez Torres sought relief in the federal courts, the U.S. Supreme Court said, in effect, that this was a New York problem and not one for the federal courts. In that decision, Justice Thurgood Marshall was quoted as saying "The Constitution does not prohibit legislatures from enacting stupid laws," and with respect to the New York system of judicial selection, Justice Anthony Kennedy wrote:

> "If New York statutes for nominating and electing judges do not produce both the perception and the reality of a system committed to the highest ideals of the law, they ought to be changed and to be changed now."

But the legislature made no changes, and the political leaders continue to select our judges. Despite this, and some will say because of this, New York state was blessed with one of the nation's finest judiciaries. Political leaders, for the most part, were scrupulous in seeking approval from local bar associations and were extraordinarily cautious in selecting those who would populate our bench. However, after "fusion voting" we came to witness the charade of judicial selection where judgeships are traded off by dealings between the major political party leaders and ideologically bankrupt fringe parties which stand for nothing

Progressives have long sought reforms in our method of selecting our judges. It has been felt that the most qualified and diverse judiciary would better serve the people of our state. "Fusion voting" not only diminishes the independence of our judiciary, it provides political barriers which discourages qualified lawyers from seeking judicial office. Only eight states allow partisan elections for judges, and none of those states permit the "fusion" nomination of judicial candidates. If New York continues to allow that sort of nomination to continue, the "disastrous results" predicted by de Tocqueville will be realized.

Sol Wachtler, *a former chief judge of the New York State Court of Appeals, is a distinguished adjunct professor at Touro College Jacob D. Fuchsberg Law Center.*