

Tangled Up in the Political Thicket: The desperate need to reform New York's judicial electoral system

It is rare for a federal judge to declare an election so flawed as to necessitate an additional round of voting, but the borough of Brooklyn was “blessed” with such an event in 1996. That year’s Democratic primary was so fraught with political mischief that a district court judge ruled that “substantial and widespread” deprivation of the right to vote had taken place and ordered the voting to be reopened.¹ This political scandal was centered on one bitterly contested race -- the fairly anonymous position of Surrogate Court Judge.

Even though the judge’s ruling was overturned by the Second Circuit Appellate Court,² this little-remembered electoral debacle, and the vicious campaign that preceded it, should have served as a wake-up call to New Yorkers. Instead it was just a sad precursor to a string of catastrophic failures in New York State’s judicial election process.

New York’s issues with the judiciary are different than those on the federal or even other state levels. Across the nation, the judicial branch has become a political battleground. The make-up of the federal judiciary has been a major point of contention in political races for years, and proposed filibusters against judicial nominees becoming a regular election staple. Following the death of Justice Antonio Scalia, the Supreme Court operated with eight members as Senate Republicans refused to even hold hearings on the nomination of Merrick Garland.

Similarly, on the state-level, Supreme Courts have been thrown into the political fire.³ The electoral battles for state court races are now among the most heated in the nation. Iowa saw three Supreme Court justices tossed out of office over their votes in favor of gay marriage and West Virginia’s and Wisconsin’s Supreme Court races have been widely-followed. Unsurprisingly, state Supreme Court races have also seen a huge rise in campaign spending and fundraising.⁴

Yet, New York’s judicial political fights stand out. The judicial battles in Congress and in the other states center around policy. Not so in New York. For NY, the fight is over more basic considerations.

¹ Deborah Pines, “2nd Circuit Panel Cancels Reopened Brooklyn Vote,” New York Law Journal. October 9, 1996.

² Gold, et. al v. Feinberg, et. al 101 F.3d 796 C.A.2 (N.Y.) 1996

³ Ashley Cleek, “State Judicial Elections Become Political Battlegrounds,” NPR, November 2, 2016 at <http://www.npr.org/2016/11/02/500351735/state-judicial-elections-become-political-battlegrounds>

⁴Robert Barnes,, “Judicial Races Now Rife With Politics,” Washington Post, October, 28, 2007. John Fund, “Cheesy Judges,” Wall Street Journal. April 21, 2007. P. A8 “Last year, candidates for state supreme court seats spent a combined \$40 million nationwide.” The Brennan Center for Justice. “Bankrolling the Bench” <https://www.brennancenter.org/press-release/new-analysis-2016-judicial-elections-see-secret-money-and-heightened-outside-spending>; Spending by Outside Groups in Judicial Races hits record high; Secret money dominates <http://www.brennancenter.org/press-release/spending-outside-groups-judicial-races-hits-record-high-secret-money-dominates>

New York does not allow elections for its highest appellate court – called the Court of Appeals. For that august court, the governor, with the help of the legislature and a special panel, make the choice. New York only allows elections for the lowest courts, which have no real policy making power. New York is one of nine states that have this divide – appointing the highest court and allowing elections on the lower level, though it is the only one that doesn't have retention elections for the highest court.⁵

Despite the lack of policy impact, NY's judicial elections engender big fights. The reason is simple. New York's judicial elections are an age-old battle over patronage, political power and money. As a noted criminal case showed, the judicial posts have been fund-raising machines, used to reward favored supporters with a lasting paycheck and title. Perhaps most surprisingly, NY judicial elections also serve as method to subvert legislative and executive elections. At this point, the judiciary remains one of the last vestiges of power left to the once mighty local political leaders.

We can witness this power exercised in seeing how the process actually limits the role that voters play in choosing judges. While the laws of New York State give the voters the right to choose the judiciary, for some courts this power is exercised in name only. Instead of having the voters select Supreme Court candidates (which is the lowest-level trial court – not to be confused with the state's highest court, the Court of Appeals) in a standard primary campaign, the Democratic and Republican Party hold primaries in each Assembly district to choose delegates to a judicial nominating convention, one in each of the 12 judicial districts.⁶ These delegates are barely known to the voting public.

These conventions are held two weeks after the primary – for a very good reason that we shall see later. The party leaders exercise enormous control in getting the right delegates to the convention. The conventions themselves are tightly controlled. There is no additional public input and very little press coverage. This extra step of using a judicial convention solves any concerns about voters mucking up the process. According to the New York Times, “These conventions have never selected a nominee not favored by the party leadership.”⁷ The candidate is almost assured of winning the November election. Since one party domination, be it Democrat throughout New York City or Republican in parts of upstate is the rule in the vast majority of New York's electoral races, receiving the party's nomination is tantamount to winning the race.

The lack of any real voter impact on this judicial convention system was so apparent, that it required the US Supreme Court to weigh in on its constitutionality. In January 2006, Federal Court Judge John Gleeson granted a preliminary injunction declaring New York State's system of selecting nominees for Supreme Court judgeships unconstitutional.

⁵ American Judicature Society, Judicial Selection in the States, https://web.archive.org/web/20141208194400/http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf

⁶ This system is not for the civil courts – they run in a straightforward election.

⁷ Linda Greenhouse, “Justices Seem to Support How State Selects its Judges,” New York Times, October 4, 2007.

Gleeson's decision took an honest -- and stark -- view of New York's judicial selection process.

"The plaintiffs have demonstrated convincingly that local major party leaders — not the voters or the delegates to the judicial nominating conventions — control who becomes a Supreme Court Justice and when... the result is an opaque, undemocratic selection procedure that violates the rights of the voters..."⁸

Gleeson's decision, and its 2nd Circuit Appellate affirmation, was overturned by the US Supreme Court. The Court may have found the law constitutional, but they certainly weren't endorsing it. In a concurrence in the decision, Justice John Paul Stevens blasted the "glaring deficiencies" in the NY election system, but noted the famous line of Justice Thurgood Marshall that "The Constitution does not prohibit states from enacting stupid laws."⁹

In this paper, I will leave aside the question of corruption in judges¹⁰ or even the larger question of whether it is good public policy to elect judges in the first place. Those questions have been the subject of significant debate and will not be settled here. The issue in New York State is that judges are uniquely subservient to politicians. It is that judges have to pay off political bosses to get the job in the first place. In New York, a judicial position is seen as an old-fashioned pre-civil service reform job. Perhaps even worse, the way New York has written its election law has allowed politics to subvert democracy in other positions. The election for judges now results in a way to prevent free and fair elections for unrelated legislative and executive elections.

Pay-to-Play: Politicians using judicial elections to benefit their campaign/personal coffers

A set of judicial scandals helped expose the inner workings of the impact of judicial corruption on the political process. In 2003, Supreme Court Judge Gerald Garson, a member of a political active family, was found to have taken bribes to help decide cases, a charge that eventually led to his conviction and sentence of 3-10 years in jail. His cousin, Judge Michael Garson, was indicted for grand larceny and forgery¹¹ He was one of three Brooklyn judges first elected in 1997 to have been kicked off the courts for unethical conduct in 2003 alone.¹² An investigation revealed that judicial positions were effectively bought and sold for patronage value.

⁸ Lopez Torres v. New York State Board of Elections,

⁹ NYS Board of Elections v. Lopez-Torres, 552 U.S. 196 2008 at p. 15.

¹⁰ There is another area that I do not touch on, and have no real idea if it is a serious problem. This is whether the members of the judiciary actually assist the machine in maintaining political control through favorable electoral law ruling (such as kicking a candidate off the ballot for signature problems). See Jerome Krase and Charles LaCerra, *Ethnicity and Machine Politics*, University Press of America, New York, 1991. P. 208 for a brief mention of political clubs being able to "rely" on judges in electoral disputes.

¹¹ Andy Newman, "Judge Indicted on Charge of Taking Aunt's Money," New York Times May 12 2005

¹² Tom Robbins, "For Judges, It's One-Stop Shopping.," *Village Voice*, May 7, 2003.

As several judges testified, the head of Brooklyn's Democratic Party, ex-Assemblyman Clarence Norman, required judicial candidates to pony up as much \$56,000 for the party's support for the nomination – money that was given to Norman's choice of campaign consultants, ostensibly to be spent on the candidate, but allegedly it was just pocketed by the consultant and Norman himself.¹³ As we will see with the Surrogate's race, these allegations should not have been a surprise: the elected judiciary is viewed as piggy bank for the political leadership.¹⁴

Norman was later convicted on charges of extortion, grand larceny and accepting illegal campaign contributions.¹⁵ After his conviction, he lost his assembly seat and was removed from the leadership of the Brooklyn Democratic organization.

Shortly after Norman's conviction, the state got a full viewing of how judicial elections could result in the most vulnerable citizens paying the price.

The Surrogate Court – at one point it was nicknamed the Widows and Orphans Court – was the battleground. The court is tasked with protecting the most vulnerable among society, those unfortunate people who just lost a loved one and do not have the legal or political acumen to navigate the process of handling the estate. It is here, among the least likely to complain, that politicians have decided to locate their political ATM machine. Back in 1966, Robert Kennedy declared war on the Surrogate's Court, aptly calling it a “political toll booth exacting tribute from widows and orphans...”¹⁶ It is clear that the toll booth is still in operation, both for the Surrogate's Court and the judicial branch as a whole. The citizens of New York are the ones who have to pay the price for this failure to reform and it lays bare the problems inherent in judicial elections.

The Surrogate's Race of 1996:

In 1996, Kings County's Surrogate Court Judge Bernard Bloom, a former local political leader who had just barely escaped removal from the bench for ethical violations,¹⁷ had hit the court's mandatory retirement age. The race to replace Bloom was seen as a battle to “determine who controls the Democratic Party in Brooklyn.”¹⁸ There was a big financial reason for the perceived importance of the Court, as politically connected lawyers received lucrative appointments handed down by the Surrogate judge. According to the Times, it is viewed as the “...last bastion of patronage, funneling hundreds of

¹³ See Wayne Barrett's “The Sales of Justice,” *Village Voice*, January 13, 2007.

¹⁴ Tom Robbins, “Brooklyn Dems Celebrate as Scandal Mounts, For Judges, it's one-stop shopping,” *Village Voice*, May 7-13, 2003.

¹⁵ Michael Brick, “Former Brooklyn Officials Surrender for Prison Terms,” *New York Times*, June 6, 2007.

¹⁶ Homer Bigart, “Kennedy Assails Surrogate Court,” *New York Times*, November 30, 1966. P.1

¹⁷ Bloom, received a censure from the State Commission on Judicial Conduct for providing false testimony to a judicial conduct commission. Two of the eight members of the Commission voted to remove Bloom from office. Joseph P. Fried, “Panel Censures Brooklyn Judge for Lying,” *New York Times*, February 8, 1995.

¹⁸ Jonathan Hicks, “A Little Brooklyn Job with Lots of Influence,” *New York Times*, April 14, 1996.

thousands of dollars a year to lawyers who serve as guardians and conservators in thousands of estate cases.”¹⁹

In the 1996 election, Kings County Democratic Chairman Clarence Norman threw his weight behind Civil Court Judge Michael Feinberg. The insurgent group led by Assemblyman Anthony Genovesi, supported Judge Lila Gold. Gold managed to raise more than \$500,000 for the position.²⁰ Longtime Brooklyn elected official, Councilman Howard Lasher, also ran, as did one controversial candidate named Fern Goldstein. The race itself was unpleasant,²¹ and some late breaking ballot developments²² resulted in an Election Day disaster. The Board of Elections was unable, or in the eyes of Gold supporters unwilling, to get their act together. Only 10 to 15 of the 1,800 polling sites were able to open at 6AM,²³ as machines were not delivered in key precincts until late in the afternoon. There were also reports that voting on certain candidates would lock the machine, preventing voters from casting votes for other candidates.²⁴

When the dust cleared, Feinberg won, garnering 54% of the vote. But that was just the start of the fight. Goldstein, along with a number of other aggrieved losing candidates in other races, filed a case in federal court. Calling the election a fiasco, Eastern District Judge David Trager did not order a revote, but instead ruled that an extra day of primary voting would be held in 400 election districts. The 2nd Circuit Court of Appeals canceled the voting, holding that the “unintended irregularities” did not rise to the level of a federal case. Because the case did not have the “intentional or purposeful” discrimination mandated by the Second Circuit case law, the revote was tossed out.

There were no immediate repercussions from the voting chaos. Norman was able to crow in the press about his victory and consolidate power in the borough.²⁵ With the exception

¹⁹ Jonathan Hicks, “A Little Brooklyn Job with Lots of Influence,” *New York Times*, April 14, 1996.

²⁰ Tom Robbins, “The Judge in the Purple Plastic Gloves,” *Village Voice*, July 2, 2003.

²¹ Tara George, “Bar Brawl in Surrogate War,” *New York Daily News*, September 3, 1996. Despite the fact that all four candidates were Jewish, there was a strong component of racial and ethnic division. The biggest publicized flare-up was over a campaign flier urging a vote for Gold saying: “Don’t let the politicians with black anti-semitic Clarence Norman destroy us.” The two sides traded charges over who was responsible for the flier. See Jonathan Hicks, “Wake Up! It’s Primary Time,” *New York Times*, September 6, 1996.

²² The turning point in the race was a legal fight over a perceived spoiler candidate, Fern Goldstein. According to Gold’s supporters, she ran at the behest of Norman. Using a time-honored vote-siphoning method, Feinberg’s team hoped that voters would confuse Lila Gold voters, who would then accidentally vote for Goldstein instead. Gold contested whether Goldstein had enough signatures to be put on the ballot. She succeeded in getting Goldstein kicked off the ballot, with the Federal Court ruling the day before the vote that Goldstein’s name had to be manually removed from each machine. This seeming victory for Gold turned into a disaster. Charisse Jones, “Old Style Board Faulted after Botched Voting,” *New York Times*, October 12, 1996.

²³ “Ballots Late in Brooklyn,” *Associated Press*, September 11, 1996.

²⁴ Charisse Jones, “Old Style Board Faulted after Botched Voting,” *New York Times*, October 12, 1996

²⁵ One of the more interesting outcomes took place in 1998, when Norman refused to back then-Brooklyn Congressman Charles Schumer for the Democratic nomination for the U.S. Senate, due simply to the fact that Schumer remained neutral in the Surrogate’s race. Frank Lombardi, “Dem Boss Won’t Back Schumer,” *New York Daily News*, April 28, 1997. Norman also made a point to back then-embattled

of a few brief easily ignored negative news stories,²⁶ the Surrogate's Court went back into the shadows.

It was not until 2005 that the Court came roaring into view. In that year, the state's Court of Appeals removed Feinberg after he was found to have given almost \$8.5 million in estate fees to one of his law school buddies, Louis Rosenthal, without ever seeing paperwork showing that the money was earned. Feinberg also routinely granted Rosenthal commissions higher than the state norm, resulting in approximately \$2 million in excessive charges - all paid out from money that was rightfully the property of the heirs.²⁷ This type of behavior was exactly what reformers were concerned about.

The race to replace Feinberg proved to be an earthshaking one for the Democratic machine. Norman selected a sitting judge Diane Johnson as the county machine's anointed candidate. Running against her was a formidable opponent, Judge Margarita Lopez-Torres, an individual at the center of the judicial reform movement - it is her case that the US Supreme Court decided over and it was her election that resulted in the investigation into Norman's misbehavior in taking campaign funds for personal use.²⁸ Lopez Torres was the heavy underdog in the Feinberg succession race. However, in a close vote, Lopez Torres was declared the winner by 205 votes.²⁹

The state legislature's behavior in the wake of this defeat is another example of the desire for spoils from the judiciary corrupting the political process. The Democrats cut a deal with Governor George Pataki, adding 21 new state judges, 14 of whom would serve on the Court of Claims by appointment of the Governor, and in return the Pataki approved the creation of a second Surrogate Court's seat for Brooklyn.³⁰ Following the end-around tradition of making sure the voters have as little say as possible, they voted in such a way

Assemblyman Dov Hikind, stressing his support of Feinberg in the Surrogate's race, see Joseph P. Fried, "Despite Indictment, Hikind is supported by a Party Chief," *New York Times*, August 9, 1997.

²⁶ The *New York Post* did a series on Surrogate Court scandals throughout the city. For example, in 2000, a number of top political leaders, including ex-state Senator Guy Velella -- who before his conviction was the head of the Bronx's Republican Party -- were widely reported to have financially benefited from similar lucrative judicial assignments. That scandal got quickly swept under the rug. Additionally, Queens Democratic Boss Thomas Manton was attacked for his law firm's having received over \$1 million in fees from Surrogate Court cases.

²⁷ Leslie Easton, "State Commission Seeking Ouster of Surrogate Judge in Brooklyn," *New York Times*, February 15, 2005. See Nancie L. Katz "Sorry Tale of Two Plundered Estates," *New York Daily News*, April 8, 2006.

²⁸ Lopez-Torres was originally elected to a 10-year term on the civil court in 1992, but quickly got into trouble when she refused to appoint a machine-approved attorney to serve as her law clerk. The party retaliated, refusing to support her bid reelection. Lopez-Torres overcame this significant hurdle, and defeated party-supported candidates in the 2002 primaries. The two losing candidates were forced to pony up thousands of dollars in campaign funds, including paying \$9,000 to an associate of Norman for a get-out-the-vote campaign. Former Civil Court Judge Karen Yellen testified that only a fraction of the funds were actually used for her campaign. Instead, it was taken as an effective pay-off for Norman's team.

Leslie Easton, "Familiar Look as Democrats Pick State Court Candidates," *New York Times*, September 11, 2003.

²⁹ "Lopez Torres wins" *New York Observer*, October 28, 2005.

³⁰ Joyce Purnick, "The Big House Can't Break the Clubhouse," *New York Times*, September 29, 2005.

as to ensure that the seat would be created too late for a primary to be held. Therefore, the borough's leadership would hand select the all-but-certain Democratic nominee for the second Surrogate seat. They chose Assemblyman Frank Seddio, a member of the powerful Thomas Jefferson club, who held Anthony Genovesi's former seat in the Assembly.

Less than a year and a half later, Seddio was gone. He resigned the Surrogate seat in May 2007, saying that the job was not "as exciting as I imagined."³¹ He left under a cloud, according to the New York Times, "just ahead of a likely official censure for improper transfer of campaign funds."³² In the attempt to replace Seddio, the machine went on to lose its second consecutive Surrogate race.³³

The pay-for-play political scandal and the Surrogate's Court races show just how New York's system of judicial elections operates to enrich political powerbrokers at the expense of those unfortunate enough to come under the court's purview. Political leaders see an open judicial slot as a way to increase campaign donations and potential shave some of that money off the top for their own benefit. This isn't the only problem with judicial elections in NY. New York politicians have also used judicial positions to subvert elections themselves.

Subverting Legislative Elections:

New York politicians have made it a habit of placing legislative officials in a judicial post as a "retirement" benefit.³⁴ In and of itself, this is not so unusual in America, where elected officials are frequently chosen for the bench after they serve in elected office. But due to New York's peculiar rules, these appointments have become something else entirely: A method to avoid the electoral process for other favored officials and pass down elective offices without the danger of actually facing the voters. This allows party leaders to hand select legislative and executive officials and ensure that these new elected officials are beholden to the party leaders themselves.

³¹ "Seddio steps down from bench after short stint," *Canarsie Courier*, May 17, 2007.

³² "Brooklyn Judge Probed. Allegedly gave Campaign Bucks to Pols," *New York Daily News*, March 22, 2006. "A Quiet (and Disquieting) Primary," *New York Times*, September 9, 2007.

³³ Jonathan P. Hicks, "Judges Lose Looms Large for Large for Party Chief," *New York Times*, September 20, 2007. A primary election to select a replacement was scheduled for September 2007. After a debate over a number of possible candidates, the Democratic Party leadership, now led by Assemblyman Vito Lopez, selected Civil Court Judge ShawnDya Simpson as their choice. In response, a new insurgent group emerged. This time, rather than being made of southern Brooklyn Democrats, it was composed of Northern Brooklyn leaders, who felt cut out of the process.³³ They nominated the loser of the 2005 election, Diana Johnson. A third candidate, who ran under the banner of reform, was kicked off the ballot. Once, again, despite the fact that both of the candidates were African-America, race played a role in the battle. But the major fight in the campaign was over the surprising issue of residency. Judge Simpson was alleged to be a resident of New Jersey, which was backed up by tax records and the fact that her children went to school in New Jersey. A Queens Judge ruled for Simpson and allowed her to stay on the ballot. Not that it mattered in the end. Johnson was victorious, garnering 60% of the vote

³⁴ See Erik Engquist "Brooklyn Politics: Judge Adele Cohen?" *Kings Courier*, March 7, 2005 for a list of some prominent elected officials who moved into the judiciary.

This end run around the primaries is accomplished in one of two ways:

In the first instance, a legislative official is nominated for the judiciary in the middle of his or her elected legislative term, thereby requiring the filling of his former seat by a special election. Unlike in some other states, there is no primary held for the special election.³⁵ Instead, a meeting of the local county committees, usually tightly controlled by political leaders, selects the party's candidate. A special election is then held, where voter turnout is almost always dramatically lower than at a regularly scheduled election and party loyalist can easily carry the day, is held.³⁶ One example of this strategy was in 1995-1996, when Brooklyn State Senator Martin Solomon was elected to the Civil Court, requiring a special election, won by Seymour Lachman, to fill that seat.³⁷

The second method may be unique to New York. The future judge uses the overwhelming advantage of incumbency to run and win the primary election for his or her old elected seat, short circuiting any possible primary challenge. The official doesn't even have to run – he or she can drop out after the primary deadline, so no other candidate can get in the race. Due to this method, the appointment effectively freezes the race for the replacement for the legislative or executive seat.

After the elected official is nominated by the judicial convention (as mentioned above, held two weeks after the primary), the elected official must resign the party's nomination for his legislative or executive seat in order to run for the judgeship.³⁸ There is no new primary election to fill the candidate vacancy. Instead, the county committee is allowed to appoint a replacement candidate for the elected official's race. In many parts of the state, with an effective one party rule, the new candidate has no problem winning the general election and establishing his own incumbency to perpetuate a lengthy career.

³⁵ See Matt Viser & Elliot Moskowitz "Tsongas Wins Primary for the 5th," Boston Globe, September 5, 2007 for a recent Massachusetts special election primary.

³⁶ Though the fact that special elections receive lower vote totals than regularly scheduled elections is almost axiomatic, I haven't been able to find an article that specifically discusses this phenomenon. In another context, I speculated that the lower vote totals, plus the fact that committed party voters are the ones most likely to show up in a special election, is one of the many reasons that recall elections are likely to succeed once they get on the ballot. Joshua Spivak, "The Perils of Special Elections," Washington Post, December 18, 2008 and Joshua Spivak, ""The Recall Boom" Campaigns & Elections" October 6, 2011.

³⁷ Somini Sengupta, "Ever the Loyal Democrat, Lachman Reaps His Reward," New York Times, January 28, 1996.

³⁸ One example that I personally worked on is mentioned in Frank Lombardi, "Albany Vet has Eye on Judgeship," New York Daily News, September 24, 1996. I could not find a mention of the peculiarity of this arrangement surrounding the Frank Barbaro appointment, which allows the next elected official to avoid a primary campaign. This method of replacing candidates on the ballot by nominating them for the judiciary did receive some attention in 1982. Harold Baer Jr. was running for Lt. Governor on the Liberal Party line, with Mario Cuomo running for Governor. After Cuomo won the Democratic Party nomination, Baer was nominated for a state Supreme Court Judgeship (on the Liberal line), in order for the party to replace Baer with the Democratic Party's Lt. Governor candidate Alfred DeBello. Due to some errors by the Democratic machine in Manhattan, Baer actually ended up winning the judicial race. (In the interest of disclosure, I worked for Baer as a summer law intern in 1999 at the federal court). See "Liberals Prepare for Musical Chairs: Will Need to Swap Guv Nominee Ross' Lieutenant if She Wins Dem Primary," Crain's NY Business, May 19, 1998, and Ronald Smothers, "Manhattan Liberals Win Supreme Court Race," New York Times, November 4, 1982.

This subversion method just received a big splash of publicity as it occurred in 2015, when Bronx District Attorney Robert Johnson was nominated for a judgeship in September. The nomination came under heavy criticism as an anti-democratic way of Johnson avoiding the voters.³⁹ But that was actually the less important part of the equation. Due to the timing of Johnson's resignation, the Democratic County Committee was able to select Judge Darcel Clark as Johnson's replacement. There was no primary and no opposition. Clark was basically handed the single most important county-wide job without any possible vote.⁴⁰ The party leaders even got the added benefit of choosing a replacement for Clark.

It is not clear how often these appointments resulting in no full primary election happen, but in my brief experiences in politics, I was personally connected to three of them⁴¹. So either I somehow found myself as a very low level employee at the center of judicial issues in New York politics or it happens all the time.

What we see if that judiciary is not just a political patronage operation or a reward for political service. Instead, New York's political leaders have used the particular quirks of the judicial election law to subvert democracy and prevent voters from having a real say at selecting other positions.

The Hope for Reform

Even with this atrocious record, and despite former Governor Elliot Spitzer's campaign goal of reforming the judiciary in the wake of the Norman scandal, there was no real effort made to fix the problem.

As can be seen by the legislature's addition of another Surrogate seat following the Feinberg scandals, and by the recent Bronx District Attorney appointments, the political system does not seem willing or able to push through any real reforms. They frankly believe that no one notices. Instead, they seem to be looking to further mine the system for their own benefit.

The chance of reform happening absence the extraordinary measures of a Constitutional Convention are remote. Fordham Dean John Feerick, who was appointed to a chair a committee on judicial elections by New York Chief Judge Judith Kaye, threw some cold water on the idea on the idea of radical change appointing judges:

³⁹ Rebecca Davis O'Brien, "Judicial Elections Get New Scrutiny," Wall Street Journal, September 27, 2015.

⁴⁰ Kate Pastor, "Bronx District Attorney Candidate Defends Her Nomination by Democratic Leaders," October 1, 2015; Also "Bronx Coup: end-running democracy to replace a DA," New York Post, August 25, 2015

⁴¹ I worked on the campaign and on the staff of Senator Lachman (the founder of the Carey Institute), I worked on the campaigns of Judge Barbaro and Assemblyman Colton and during law school, I served as a summer law clerk for then Federal District Court Judge Harold Baer.

“More recently, I have been chairing a commission appointed by Chief Judge Kaye with a mandate of promoting and enhancing confidence in judicial elections in this state. When she asked me to chair this commission in the fall of 2002, she said, ‘Don't get hung up with appointive systems and changing the elective system and the idea of amending the New York State Constitution, because you know there's no support for that.’”⁴²

Feerick and Kaye were undoubtedly right. State legislative leaders are not making any changes so long as they gain a great benefit from the judicial elections process. A state Constitutional Convention is the perfect moment for a change.

The most widely touted reform is to junk the system of electing judges and make the judiciary an appointive office. This system has its positives, as the widely-respected Court of Appeals shows, as well as its downsides, including concerns about the appointments of pure political hacks by Governors and legislative leaders.

A more modest option would be to follow through on Judge Gleeson's suggestion and remove the judicial conventions and at the very least allow real primaries to take place. Further reforms could limit or prevent the appointment of already nominated elected officials from receiving a judicial selection in the time period between the last days of the primary campaign and a vote. This would at least prevent politicians from using judicial elections as a method of subverting other elected races, like the Bronx DA.

Ending the embarrassing and detrimental throttlehold local politicians held over judicial selection is a leap forward for a better government. It is not the end of this battle – and candidates should now be called on to provide their solutions for the problem – but it is a good start.

⁴² John D. Feerick, “Why We Seek Reform in Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges,” 11 *Fordham Urban Law Journal*, 2006, p. 4