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LEGAL DEVELOPMENTS

PRESERVING POWER IN PICKING JUDGES: MERIT SELECTION FOR THE NEW YORK COURT OF APPEALS

Luke Bierman*

Judicial selection may have generated more interest among judicial process scholars than any other area of concern.1 Much of this research concerns the effects of the national trend toward what commonly has been characterized as "merit selection of judges."2 Long promoted as a panacea to political considerations infecting judicial independence, integrity and quality, merit selection of judges found a home in Missouri more than fifty years ago and has since spread from the nation's midsection.3 Now used in some fashion by more than half of the states to select at least some judges, merit selection remains a favorite of governmental reformers who seek to promote fairness and quality on the bench.4

Examining this promise of professionalism and competence for almost thirty years, political scientists have come to some consensus about merit selection. For example, there appears to be general agreement that merit selection does not remove partisan political

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4 See Krivosha, supra note 2, at 128.

5 See, e.g., id. at 132 (proposing that the merit judicial selection process results in an independent and responsible judiciary).
considerations from the decision making process about who will become a judge. From the seminal examination of the Missouri Nonpartisan Court Plan to more recent reviews of the literature, judicial process scholars confirm that merit selection does not insulate the selection process from the effects of partisanship. Likewise, scholars seem to have settled on the conclusion that there are few differences in the characteristics of judges chosen under different selection systems.

These conclusions suggest that adoption of merit selection may be less about the quality of the judiciary than it is about important "issues of democratic theory." Concerns about how different selection processes account for the important attributes of "representation, access, and participation" have animated the work of researchers seeking to identify the dynamics underlying the judicial selection process generally and merit selection specifically. The studies reveal that imposing merit selection can alter prevailing patterns of interaction among those involved in choosing judges. As noted, the Missouri Nonpartisan Court Plan did not remove political considerations from the selection process; rather, partisan concerns were redirected from local decisions about judicial candidates to gubernatorial and bar determinations about nominating

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5 See, e.g., Dubois, supra note 1, at 33 (stating that there is a lack of evidence that the merit selection process has removed politics from judicial selection).
7 See, e.g., Larry L. Berg et al., The Consequences of Judicial Reform: A Comparative Analysis of the California and Iowa Appellate Systems, 28 W. POL. Q. 263, 274-78 (1975) (noting that the data does not support the contention that the selection procedure employed has an effect on the kinds of people chosen to hold office); Victor Eugene Flango & Craig R. Ducat, What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort, 5 JUST. SYS. J. 25, 39 (1979) (stating that there is no evidence "that different selection procedures produce differences in the characteristics of judges decisions or courts"). But see Bradley C. Canon, The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered, 6 L. & SOC'Y REV. 579, 579-80 (1972) (asserting that "there is a long and viable line of thought in America which more or less explicitly holds that formal recruitment processes do affect the characteristics" of judges); Herbert Jacob, The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges, 13 J. OF PUB. L. 104, 113 (1964) (stating that it is likely that differences in characteristics of judges are related to the selection process employed).
9 Id.
10 See Flango & Ducat, supra note 7, at 26-28.
President Carter's commitment to appoint judges on the basis of merit led to the development of nominating commissions for many federal judges. Through the use of these agents in the selection process, power over judicial selection was seen to have been redistributed between the President and Senate, with the former gaining authority at the expense of the latter. From these perspectives, merit selection serves as a tool capable of reallocating power, and thereby changing democratic influences in the inherently political process of choosing judges.

A contrary effect of merit selection also has been suggested. The strong interest in merit selection between 1958 and 1976 was explained as an effort by rural legislators to preserve judicial incumbents and thereby to prolong their own power and influence at a time when their tenure was at risk following the reapportionment decisions.

While doubt has been cast on this conclusion, the underlying premise retains some appeal. Those exercising control over judicial selection may seek to maintain their authority in the face of outside tensions infringing on the existing selection dynamic. The use of merit selection to continue established patterns of interaction in the judicial selection process may not be the usual

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11 See Watson & Downing, supra note 6, at 43-48.
13 See, e.g., Larry C. Berkson & Susan B. Carbon, The United States Circuit Judge Nominating Commission: Its Members, Procedures and Candidates 183 (1980) (concluding that although the nominating committee was effective, it was partisan); Alan Neff, The United States District Judge Nominating Commissions: Their Members, Procedures and Candidates 151 (1981) (stating that President Jimmy Carter's merit selection process redistributed power, giving the President more power in selecting judges); Larry Berkson, The U.S. Circuit Judge Nominating Commission: The Candidates' Perspective, 62 JUDICATURE 466, 466 (1979) (discussing the change in judicial selection implemented by President Jimmy Carter); Elliot E. Slotnick, Federal Appellate Judge Selection: Recruitment Changes and Unanswered Questions, 6 Just. Sys. J. 283, 291 (1981) [hereinafter Federal Appellate Judge Selection] (asserting that a less magnanimous motivation toward merit selection was a transfer of power from the Senate to the Presidency); Elliot E. Slotnick, The U.S. Circuit Judge Nominating Commission, 1 L. & Poly Q. 465, 491 (1979) [hereinafter U.S. Circuit Judge Nominating Commission] (stating that although politics is still a significant factor in judicial merit selection of federal judges, it is now "played to a greater extent . . . in the President's own ballpark").
14 See Marsha Puro et al., An Analysis of Judicial Diffusion: Adoption of the Missouri Plan in the American States, PUBLIUS, Fall 1985, at 85, 96 (concluding that rural legislators supported the adoption of merit selection process in order to preserve their power).
15 See Dubois, supra note 2, at 26 (suggesting that there are other reasons why there was strong interest in the merit selection process at this time).
investigative focus, but it is an analytical perspective that should not be summarily dismissed.

Merit selection was adopted in New York in 1977 to replace a partisan elective system for choosing the members of the state's highest court, the Court of Appeals. The change to merit selection came following a series of highly contentious elections for seats on the prestigious court and was promoted as a way to enhance professionalism and integrity. After almost twenty years and fourteen appointments under New York's version of merit selection, an assessment can be made about how New York Court of Appeals judges are appointed, and whether the dynamics are markedly different from those prevailing under the elective system. From this assessment, employment of merit selection to perpetuate existing roles and norms within the judicial selection process is apparent.

I. THE DEVELOPMENT OF CONTROL BY PARTY LEADERS

New York's early judicial system was patterned after the English structure. The appellate function was performed by a body mirroring the House of Lords, composed of the Senate, the Chancellor and some judges, with the Governor appointing the latter officials. By the mid-19th century, however, this arrangement had fallen into disfavor for a variety of reasons, including caseload concerns and, in the era of Jacksonian democracy, the widespread appeal of accountability provided by popularly elected judges. With little opposition, the state Constitutional Convention of 1846 created a distinct high court with popularly elected judges; the Court of Appeals began functioning the next year. Although the court

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18 See U.S. Circuit Judge Nominating Commission, supra note 13, at 493-94.
18 See id. at 13.
20 See id. at 8-9.
21 See BERGAN, supra note 19, at 14-15 (discussing the overwhelming caseload in 1845); PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 98-99 (1996) (noting that the enactment of special laws "clogged the legislative process").
23 See BERGAN, supra note 19, at 19, 33; GALIE, supra note 21, at 105-06, 111-12.
underwent several changes over the next century, the selection of its judges by popular election remained intact.\footnote{See GALIE, supra note 21, at 125.} Indeed, New York citizens rejected a proposal for gubernatorial appointment of Court of Appeals judges by a 3 to 1 margin in 1873.\footnote{See BERGAN, supra note 19, at 94-95; GALIE, supra note 21, at 125.}

Despite the presence of a partisan election system for Court of Appeals judges, informal practices developed that tended to undermine popular selection.\footnote{See BERGAN, supra note 19, at 247 (discussing the practice of both parties nominating the same candidate thereby eliminating the choice of voters).} Following bitter campaigns for Chief Judge in 1896, 1913 and 1916, with the 1913 election considered particularly unseemly as sitting associate judges vied against one another for advancement,\footnote{See id. at 129-30, 247.} political leaders of the major parties reached agreement to support the senior associate judge for chief judge upon a vacancy.\footnote{See id. at 247; see also Swidorski, supra note 17, at 11-12 (discussing judicial selection in New York from 1846 to 1977).} This agreement by party leaders to cross endorse a chief judge candidate lasted until the 1970s and increasingly was applied to associate judge elections.\footnote{See Swidorski, supra note 17, at 11.} In the sixty-four general elections for seats on the Court of Appeals between 1896 and 1974, thirty-six or about 60% were uncontested. Of the fifty general elections for associate judge in this period, twenty-six or just over 50% were uncontested. In the seventeen general elections from 1950 until 1972, however, only four were contested, leaving more than 75% uncontested.\footnote{See id. at 11 (noting that the principal selectors in the early 20th century were political party leaders); see also Carl Swidorski, The Politics of Judicial Selection: Accession to the New York State Court of Appeals, 1950-1975 (1977) (unpublished Ph.D. dissertation, State University of New York (Albany)) (on file with author).}

Those responsible for essentially choosing Court of Appeals judges during this period were the characteristically strong governors, such as Democrats Alfred E. Smith and Franklin D. Roosevelt and Republicans Thomas E. Dewey and Nelson V. Rockefeller, and the party leaders who oversaw political activity when the other side held the Governor’s mansion.\footnote{See Swidorski, supra note 17, at 12 (listing other criteria including age, sex and political party).} In reaching decisions about candidates, the political leaders considered a variety of factors, including religion, geography, ethnicity, friendships and impact on other electoral contests.\footnote{See id.} Despite these kinds of considerations, the
political leaders during this period, when the court's national leadership and reputation were widely recognized, typically chose professionally competent, if not outstanding, candidates and the organized bar provided its support to those selected by the party leaders. Indeed, between 1950 and 1972, no major party candidate for the Court of Appeals was found “not qualified” by the New York State Bar Association or The Association of the Bar of New York City.

II. THE LOSS OF CONTROL BY PARTY LEADERS

The 1967 enactment of primary challenges and petition access for statewide elections provided the basis for undermining the control over judicial selection exercised by the political leadership and organized bar. Elections for judgeships on the Court of Appeals in 1972, 1973 and 1974 were characterized by primary elections and nontraditional candidates without political party or organized bar support. For example, in 1972, Nanette Dembitz won a primary against Democratic Party supported nominees to become the first woman candidate for the Court of Appeals; a lack of support from the bar and any organized party contributed to her eventual defeat in the general election. In 1974, Democrat Harold Stevens, who

33 As Cardozo's court early in the century, the New York Court of Appeals regularly rendered decisions that had national impact on legal and societal issues. See, e.g., Palsgraf v. Long Island R.R., 162 N.E. 99, 99-101 (N.Y. 1928) (citing the infamous tort case regarding proximate cause and foreseeability of tortious conduct); Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 214-15 (N.Y. 1917) (stating that clothing manufacturer's "implied promise" to use reasonable efforts to derive profits in exchange for endorsement from designer formed a contract); MacPherson v. Buick Motor Co., 111 N.E. 1050, 1055 (N.Y. 1916) (holding manufacturer liable to persons injured as a result of automobile defects). The Court of Appeals' continued influence later in the century has been documented. See, e.g., Lawrence M. Friedman et al., State Supreme Courts: A Century of Style and Citation, 33 STAN. L. REV. 773, 791 (May 1981) (noting the influence Cardozo brought to the Court of Appeals); John Henry Merryman, The Authority of Authority: What the California Supreme Court Cited in 1950, 6 STAN. L. REV. 613, 667 (1954) (stating that California courts cite to New York cases more than any other state's opinions); John Henry Merryman, Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970, 50 S. CAL. L. REV. 381, 401 (1977) (noting that New York Court of Appeals' decisions are cited more than any other state's opinions).

34 See Swidorski, supra note 17, at 12.

35 See id.

36 See 1967 N.Y. Laws 716.


39 See Judge Dembitz Held Unfit by Bar Group for Appeals Court, N.Y. TIMES, Sept. 21, 1972, at 41 (noting that the New York State Bar Association gave Dembitz its first "not
had his party’s support and enjoyed an interim appointment as the first African-American Court of Appeals judge, was defeated in his party’s primary by Jacob Fuchsberg, a trial attorney who ran without party support after gaining a ballot slot by the petition route, and by Lawrence H. Cooke, who also enjoyed Democratic Party backing. Stevens, nonetheless, ran on the Republican ticket in the general election, but again was defeated by the Democratic candidates, despite Fuchsberg’s explicit disapproval by New York City’s organized bar.

The loss of control over selecting Court of Appeals judges by the political leadership and organized bar is perhaps best demonstrated by the 1973 election for Chief Judge. Charles Breitel, the senior associate judge, was nominated by the Republican Party. However, the Democrats, anticipating a large turnout of their adherents in that year’s New York City mayoral race, refused to abide by the sixty-year long tradition of cross-endorsing the senior associate for advancement. From a fractured Democratic Party convention, no less than three candidates for the party’s nomination emerged with enough support for a primary. Additionally, Fuchsberg had garnered enough petition signatures for a ballot spot and, despite opposition from political leadership and the organized bar, won the primary. In the general election, the organized bar and political organizations gave their support to Breitel, who won an expensive, media-oriented campaign.

qualified” rating).

See PHILIP ET AL., supra note 37, at 113-16 (discussing the 1974 Court of Appeals election).

See id. at 31-32, 83.

See id. at 40-65 (discussing Breitel’s campaign and stating that the days of cross-endorsement of a single candidate for chief judge were over).

See id. at 35-39 (discussing the Democratic Party’s nomination for Chief Judge and naming the four candidates for the primary as Fuchsberg, Weinstein, Murphy and Brownstein).

Fuchsberg received a “not qualified” rating from the State Bar Association. See id. at 31-32 (reporting that the New York State Bar Association Ratings Committee found Weinstein and Breitel “well qualified” and Brownstein and Fuchsberg “not qualified”).

See id. at 38 (stating Fuchsberg won the primary with 242,794 votes compared to Weinstein’s 242,039 votes, Murphy’s 213,735 votes and Brownstein’s 81,625 votes).

See id. at 83-84 (commenting that the members of Breitel’s camp were the New York State Bar Association, the Association of the Bar of the City of New York, and the New York County Lawyers Association).

See id. at 87-89 (noting Breitel’s numerous personal appearances and newspaper support and stating that Breitel won the election with 2,205,388 votes compared to Fuchsberg’s 1,880,522 votes and Left’s 219,314 votes); see also Swidorski, supra note 17, at 13 (stating that after 1972, campaigns for the Court of Appeals positions became expensive and television commercials were used increasingly).
III. THE SELECTION SCHEME IS CHANGED

The ability of candidates like Dembitz and Fuchsberg to challenge, with some substantial success, the candidates chosen by the political leadership and supported by the organized bar upset the established patterns of selecting Court of Appeals judges. The party leaders were no longer secure in their ability to determine the outcomes of Court of Appeals elections and the prospect of regularly having to spend large amounts of money, time and organization on these races loomed large. The organized bar’s capacity to lend support to the party leaders’ candidates was undermined by the success of judicial aspirants who it perceived as not qualified. Notwithstanding the fact that these challenges were entirely consistent with the democratic processes underlying popular elections that historically enjoyed strong public support, the political leaders and organized bar sought to reform the selection process that seemed to have spun out of their control.

Task forces established by The Association of the Bar of the City of New York and the State Senate each suggested merit selection systems because, in the words of the state senator who headed his chamber’s study group, “There is a strong feeling that we’re not attracting the right type of individual to the bench.” Governor Hugh Carey formalized the proposal, which was supported by Breitel and a broad array of bar leaders and politicians, among others. After substantial negotiations over the precise form of “merit selection” for Court of Appeals judges produced agreement among legislative leaders, the voters in November of 1977 approved the constitutional amendment providing that Court of Appeals judges would be appointed by the governor, subject to the

48 See Swidorski, supra note 17, at 13 (noting that prior to 1972, vacancy elections were "quiet, sedate, relatively inexpensive affairs," yet post 1972, elections "generally were expensive, hotly-contested, and controversial").
49 See id.
50 See id.
54 See Tom Goldstein, Court Reorganization Troubles Supporters and Opponents Alike, N.Y. TIMES, Aug. 6, 1976, at A20; Court Deadlock Broken in Albany, N.Y. TIMES, Aug. 4, 1976, at 1.
advice and consent of the Senate, from nominations by a statewide nominating commission.55

IV. THE COMMISSION ON JUDICIAL NOMINATION

The Commission on Judicial Nomination (Commission) is a twelve member bipartisan body charged by the state constitution to evaluate aspirants for the New York Court of Appeals56 and recommend those found well qualified for judicial office by reason of "their character, temperament, professional aptitude and experience."57 Its members are appointed by the governor, the chief judge and legislative leaders to four year staggered terms.58 There are requirements to ensure lawyer and lay representation,59 and limits on the number of nominees that can be made for each vacancy.60

Although the literature suggests that the adoption of merit selection will alter the distribution of power among those responsible for choosing judges,61 the Commission system in New York retains characteristics much like those of the elective system.62 Political leaders select the Commission members, who have been described as the key to the merit selection process,63 much like the political leaders chose the candidates who would run in the usually un-

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55 See N.Y. CONST. art. VI, § 2 (McKinney 1982). In addition to state Constitutional provisions found in article VI, section 2, the New York Judiciary Law has several provisions governing the selection of Court of Appeals judges. See N.Y. JUD. LAW §§ 61-68 (McKinney 1983 and Supp. 1996). The discussion that follows omits specific citations to these provisions.
56 See N.Y. CONST. art. VI, § 2(c)-(d)(1) (McKinney 1982).
57 Id. § 2(c).
58 See id. § 2(d)(1)-(2). The governor and chief judge each appoints four members of the Commission and the Assembly Speaker, Assembly Minority Leader, Senate Majority Leader and Senate Minority Leader each appoints one member of the Commission with the staggered appointments meaning that there are three appointments each year (one each by the governor, chief judge and one of the legislative leaders in rotation). See id.
59 See N.Y. JUD. LAW § 62(1) (McKinney 1983) (outlining that the Commission shall consist of an equal number of people who are members of the bar and who are not members of the bar).
60 See id. § 63(1)-(2) (stating that the Commission on Judicial Nomination shall recommend three to seven names to the governor).
61 See supra notes 8-13 and accompanying text.
62 See Sydney H. Schanberg, Only Four Who Qualify?, N.Y. TIMES, Dec. 21, 1982, at A29 (indicating that the merit system is still influenced by political life just as the elective system was prior to 1978); see also Mario M. Cuomo, Justice System Must Reflect Rich Diversity of New York, N.Y.L.J., May 3, 1993, at S1 (maintaining that the present Commission system is not producing an objective selection of court system judges).
63 See ALLAN ASHMAN ET AL., THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS 22 (1974) ("The judicial nominating commission is the cornerstone of the merit selection plan.").
contested elections.\textsuperscript{64} The leaders' influence is apparent from the backgrounds of the thirty-five people who served on the Commission through 1993, when the most recent appointment to the Court of Appeals was made. At least seventeen of those who served on the Commission can be characterized as having significant involvement in partisan political activities through elective or appointive public office, or in political campaigns or organizations.\textsuperscript{65} For example, Commission members have included a former governor, a former New York City mayor, former state legislators, heads of state executive agencies and political campaign officials and contributors.\textsuperscript{66}

The organized bar has been able to support the political leaders through its strong representation on the Commission. Of the nineteen attorneys serving on the Commission through the end of 1993, at least sixteen were from large metropolitan law firms with strong bar organization ties, had been public officials, or had held both positions.\textsuperscript{67} The Commission membership's bias toward Manhattan, the center of New York state law and politics, also has been recognized.\textsuperscript{68} With this membership, the Commission reflects an orientation favoring the political leadership and organized bar.

\textsuperscript{64} See Swidorski, \textit{supra} note 17, at 13 (referring to New York’s election law prior to 1967, when political party decisions regarding the selection of candidates could not be challenged).


\textsuperscript{66} See Titone, Simons, McLaughlin, Gelfand Named, \textit{Cuomo to Pick From 4 Judges for Seat on Court of Appeals}, \textit{N.Y.L.J.}, Dec. 16, 1982, at 1 (hereinafter \textit{Cuomo to Pick From 4 Judges}) (listing the Commission members and their respective backgrounds); see also Sack, \textit{supra} note 65, at 36L (noting that one of the Commission members was a campaign finance director).

\textsuperscript{67} See \textit{Court of Appeals Candidates' List, supra} note 65, at 1-2 (listing the Commission members and noting the respective law firms or public official positions held by ten members); \textit{The Judicial Nominating Commission, supra} note 65, at 1-2 (listing the Commission members and the respective firms and/or political experience of the seven members).

\textsuperscript{68} See William C. Thompson, \textit{How Manhattan Stole the Judiciary}, \textit{N.Y.L.J.}, Dec. 9, 1993, at 2 (explaining that the Commission on Judicial Nomination is effectively handled by ensuring a majority of its members are from Manhattan).
that can be seen as continuing the prevailing dynamics of judicial selection under the elective system. 69

V. THE GOVERNOR

Under the elective system, the governor played an important role in choosing the candidates for the Court of Appeals who ultimately would be nominated and likely cross-endorsed. 70 That central role has been explicitly legitimized through the appointment power under merit selection. 71 The governor now not only designates from among the nominees who will become a Court of Appeals judge, but also names four of the twelve members of the Commission on Judicial Nomination. 72 This combination of authority over different stages of the appointment process provides the governor with a substantial opportunity to direct, if not control, selection. 73

Indeed, the experience under merit selection in New York suggests that the governor's role may transcend simply choosing from among the nominees forwarded by the Commission. 74 Governor Mario M. Cuomo, who made eleven of the fourteen appointments under merit selection through 1994, made no secret of his objective to enhance diversity on the Court of Appeals. 75 During his initial gubernatorial

69 See Swidorski, supra note 17, at 15 (noting that professional legal organizations are more influential under merit selection).
70 See id. at 12 (noting that political leaders used a screening process to select Court of Appeals candidates).
71 See id. at 13 (explaining that a bipartisan screening committee constituting the Commission on Judicial Nomination "makes recommendations for Court of Appeals vacancies to the governor who must appoint one of the individuals recommended").
72 See id.
73 See James Dao, Cuomo Choice for Top Court is Woman, 51, N.Y. TIMES, Dec. 2, 1993, at B1 (indicating that Governor Cuomo's political concerns were a major factor in controlling who he nominated to the court); Sack, supra note 65, at 36L (setting forth the governor's ability to change the composition of the Nomination Committee).
74 See Michael Oreskes, Cuomo Seeking More Candidates to Fill Vacancy on Appeals Court, N.Y. TIMES, Dec. 16, 1982, at B4 (stating that although Governor Cuomo pledged to appoint a woman to the court, there was not a woman among the names submitted by the Commission); Sack, supra note 65, at 36L (noting that the governor's desire to appoint a specific person may be severely restricted by the Commission).
75 See Cuomo, supra note 62, at S1 (maintaining that in order to restore the public trust of minorities in our justice system, it is necessary that the minorities participate in the system itself); Mario M. Cuomo, Thoughts on the State Judiciary, N.Y.L.J., Jan. 23, 1995, at 2 (stating that choosing candidates to represent the diversity of the general public was one of his aims). See also Dao, supra note 73, at B1 (indicating diversity is a goal of Governor Cuomo); Sack, supra note 67, at 36L (expressing Governor Cuomo's "pride not only in the quality of the court he has assembled, but also in its diversity"); Gary Spencer, Ciparick Named to Court of Appeals, N.Y.L.J., Dec. 2, 1993, at 1 (noting that one's race and color will not disqualify them
campaign, Cuomo promised to appoint a woman and later advocated the propriety of ethnic, racial and political balance on the court. The Commission’s failure to include a woman among the nominees for Cuomo’s first appointment caused the governor significant anguish. The next vacancy less than a year later produced, for the first time, two women among the nominees, even though Cuomo had appointed only one Commission member by that time. Cuomo’s commitment to ethnic and racial balance was satisfied through his later appointments of African-Americans and an Hispanic, recounted in Table A, as well as Italian-Americans. Cuomo’s successes in meeting his agenda for the Court of Appeals suggest the governor’s continued influence in the selection process under merit selection.

The governor’s ability to influence the nomination process can be seen more clearly in the Commission’s multiple nominations of women and African-Americans only when an appointment of these nontraditional aspirants occurred. For example, vacancies in 1983 and 1993 produced the only multiple nominations of women and it was only for these vacancies that women were appointed. A 1992
vacancy resulting from the resignation of the court’s only African-American judge saw the only multiple nominations of African-Americans with the eventual appointment of one of these nominees.81 These nomination patterns may be coincidental but they comport neatly with Cuomo’s stated objectives regarding diversity—the governor seemed to be provided with nominees who satisfied the particular goals associated with a particular vacancy. Such nominations seem to indicate that the governor enjoys a capacity to affect the merit selection process beyond simply exercising the power of appointment, which is consistent with the governor’s role under the elective process.

VI. THE SENATE

New York’s use of Senate confirmation, rather than the retention election usually associated with merit selection, is indicative of the continued control by the political and bar leadership.82 Notwithstanding the fact that incumbents are almost always supported in retention elections,83 the State Senate has exercised its constitutional role of advice and consent in a way that is even more reliable in ensuring the appointee reaches the state’s high bench. Despite the Republican Party’s control of the Senate since the adoption of merit selection, this body has shown little opposition to the fourteen appointments made by Democratic governors through 1994.84 Indeed, it was not until the fourteenth appointment under merit selection that there was a single vote opposing the confirmation of an appointee.85 The State Senate Judiciary Committee confirmation hearings have been rather sedate affairs, with the Senators typically congratulating

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81 See Gary Spencer, Cuomo Names Smith for Appeals Court, N.Y.L.J., Aug. 25, 1992, at 1 (stating that Smith was one of two African-American judges nominated by the Commission).
82 See Swidorski, supra note 17, at 14-15 (noting that the New York State Senate must confirm gubernatorial nominees, but that despite reformer’s expectations, politics is still a part of the merit system).
83 See, e.g., William K. Hall & Larry T. Aspin, What Twenty Years of Judicial Retention Elections Have Told Us, 70 JUDICATURE 340, 342 (1987) (“[F]ewer than 50 trial court judges have been defeated in retention bids over a span of nearly 50 years . . . .”).
84 See Gary Spencer, Conservative Look to 1994 Rulings, N.Y.L.J., Oct. 3, 1994, at S2 (noting that before Judge Ciparick’s confirmation hearing, not a single vote had been cast against any of the thirteen Court of Appeals judges appointed since 1979).
85 See id. (noting that twenty-five out of fifty-nine senators voted against Judge Ciparick’s confirmation).
the appointee and hailing his or her qualifications without any searching inquiry into the appointee’s background. Although testimony against appointees has been given on five occasions, four of these instances involved general complaints about the judicial system. Only once has there been serious opposition against and negative votes cast for an appointee, which were related solely to the appointee’s decision as a trial judge in an abortion case rather than her credentials and qualifications. The absence of any serious public examination of the nominee by the Judiciary Committee in its confirmation deliberations has come despite sharp divisions on the Court of Appeals over such fundamental issues as freedom of expression, criminal justice, personal privacy, and the extent to which the state constitution should be interpreted differently than its federal counterpart. These disputes could have formed the basis for serious examination of the nominee’s qualifications and positions.

It has been suggested that the State Senate’s performance in these matters reflects its deference to the work by both the Commission on Judicial Nomination and the executive in ensuring that nominees and appointees are well qualified in accordance with the constitutional requirement. Because of the intensive screening and investigations that are performed by the Commission and the governor in nominating and appointing judicial candidates to the state’s high court, the State Senate may be left with little to debate

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86 See Gary Spencer, Polite, Friendly Senators Likely to Confirm Smith Swiftly, N.Y.L.J., Sept. 21, 1992, at 1 (quoting Judge Kaye about whom the senators made “wonderful speeches” before a unanimous confirmation).
87 See id. Testimony in opposition was offered during the Senate Judiciary Committee hearings that were held following the appointments of Lawrence H. Cooke, Joseph W. Bellacosa, Judith S. Kaye (to be chief judge), Howard A. Levine and Carmen Beauchamp Ciparick; the author’s reading of these hearing transcripts reveals that only the latter hearing involved more than general criticisms of various aspects of the legal and judicial system.
88 See John M. Bagyi, Comment, Carmen Beauchamp Ciparick: The Court of Appeals’ Voice of Compassion, 59 ALB. L. REV. 1913, 1914 n.12 (1996) (noting that the efforts to block Carmen Beauchamp Ciparick’s nomination were due to her decision in a case holding that the state constitution protected a woman’s right to an abortion).
89 Rather than recite the lines of cases reflecting the courts’ disagreements, the development of these splits have been recounted elsewhere. See, e.g., Vincent Martin Bonventre, Court of Appeals—State Constitutional Law Review, 1990, 12 PACE L. REV. 1 (1992); Vincent Martin Bonventre, State Constitutional Adjudication at the Court of Appeals, 1990 and 1991: Retrenchment is the Rule, 56 ALB. L. REV. 119 (1992).
90 See Spencer, supra note 86, at 2 (quoting senators and Court of Appeals judges who praised the screening committee and Governor Cuomo’s “very good judgment”).
or seriously consider. However, the failure of this deliberative body to exercise its constitutional responsibilities as part of the checks and balances in the nomination and appointment process in a more demanding way may underscore the continuation of the predominant role played by the political leadership and organized bar, as represented in the Commission, by the governor and by the Senate, in the merit selection process.

VII. THE NOMINEES AND JUDGES

The continued prominent influence of the political leadership and organized bar under merit selection also is evident in the nominees and judges emerging from this selection process. For example, the first three appointments under merit selection went to individuals who had been candidates for the Court of Appeals with party and bar support under the elective system. Not only were the same kinds of people being supported for selection under the different selection processes, but the exact same people were being selected. This reflects at least some continuity in the dynamics of the selection process despite the alteration in format.

The continuity in the dynamics of the selection process can be seen from other perspectives. Despite the emphasis placed on diversity by Cuomo, and apparently by the Commission as well, in offering at least some demographically diverse nominees to the governor for appointment, about 90% of the ninety-two nominations by the Commission through 1994 went to whites and males, and almost the same proportion of the forty different nominees during this time.

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91 See id. (noting the exhaustive investigation conducted by the nominating commission and the governor prior to a Senate confirmation hearing).
92 See Swidorski, supra note 17, at 14-15 (noting that politics remain in judicial selection, despite the implementation of merit selection).
93 See id. at 14 (noting that the merit system did not significantly change the caliber of candidates).
94 See id. Two of these three appointments can be explained by other factors. For example, because Matthew Jasen's appointment followed the expiration of his fourteen year term as an elected Court of Appeals judge, retention consideration might have been present. Because Lawrence Cooke's appointment to chief judge was during his fourteen year term as an elected associate judge, considerations associated with leadership might have been implicated. The third appointment went to Bernard Meyer, who had been defeated for the Court of Appeals in 1972. Notwithstanding the other possible explanations, the continued recognition and acceptance of the exact same individuals through different selection processes seem to reflect some similarities in those processes.
95 See id. (discussing the first three merit appointees as "strong candidates ... under the previous selection systems").
were white and male, as recounted in Table B. The commitment to
diversity apparently did not carry through to the nominees generally
and the high proportions of white and male nominees can be
interpreted as an effort to focus attention on the few nominees who
more comfortably satisfied the diversity objective. In this way, the
Commission and governor were acting like the political and bar
leaders under the elective system who were able to select particular
candidates for advancement at particular times.

The preference for particular nominees at particular times is
apparent from another perspective. Unlike the electoral process,
where candidates generally ran once and moved on if unsuc-
cessful,\textsuperscript{96} repeat nominees under merit selection have been rather
common.\textsuperscript{97} For the first fourteen vacancies under merit selection,
several aspirants have been nominated as many as four, five, six,
even nine times without selection.\textsuperscript{98} Most judges, however, have
been appointed on their first or second nomination; eleven of the
fourteen appointments through 1994 were of first or second time
nominees. Only one judge was appointed after being nominated
more than four times.\textsuperscript{99} Although this pattern may reflect the
lower financial and professional costs involved in seeking ap-
pointment rather than election, it also suggests that merit selection
is practiced by advancing a particular person to fill a particular goal
at a particular time. In this way, merit selection seems to be
practiced in much the same way that electoral selection was
practiced. These similarities suggest that the different selection
processes are exercised in remarkably similar ways.

Another notable factor is the prominence of prior judicial ex-
perience among the credentials of nominees and appointees (Table
C). Although elected Court of Appeals judges also tended to rise

\textsuperscript{96} For example, in the general elections for twenty-two Court of Appeals seats between 1954
and 1974 only three candidates ran more than once (not counting candidates seeking
reelection).

\textsuperscript{97} See Wise & Adams, supra note 80, at 1 (noting that five out of the seven candidates
proposed to the Governor had previously been recommended for the Court of Appeals by the
Commission).

\textsuperscript{98} See id. (listing candidates who have been recommended for the Court of Appeals between
two and eight times without being selected); see also Nicholas Goldberg, Cuomo Selects Judge,
NEWSDAY (New York), Aug. 13, 1993, at 18 (stating that Levine had been recommended by the
Commission six times, but had never been selected by the governor).

\textsuperscript{99} See Goldberg, supra note 98, at 18 (stating that Howard A. Levine, who had previously
been nominated six times by the commission, was selected by Governor Cuomo to sit on the
state's highest court); Appeals Judge Ogd, NEWSDAY (New York), Sept. 8, 1993, at 18 ("The
state Senate unanimously confirmed Howard Levine's nomination yesterday for a seat on New
York's Court of Appeals . . . .").
through the judiciary, there were numerous instances of judges elected without judicial experience, including such prominent examples as Stanley Fuld, Hugh Jones, Adrian Burke and Kenneth Keating.\textsuperscript{100} Among the appointed judges, only Judith Kaye came to the Court of Appeals without judicial experience and her elevation to chief judge came after a decade on the court.\textsuperscript{101}

To be sure, the preference for career judges may reflect professionalization of the judiciary, but it also may be that judicial experience has become a \textit{sine qua non} for advancement to the state high court. For example, shortly before his nomination and appointment to the Court of Appeals, Joseph Bellacosa was appointed a state trial judge while serving as the court system's chief administrative officer,\textsuperscript{102} even though there was no requirement that this official be a judge.\textsuperscript{103} Apparently, the judicial credential was thought sufficiently important for the governor to appoint and the Senate to confirm Bellacosa as a state judge. This appointment effectively eliminated one judgeship during a time of increasing caseloads in New York because Bellacosa did not execute the powers of that judicial office. The ability of the governor and the Senate to enhance the credentials of a Court of Appeals aspirant so as to improve acceptability to the Commission indicates how the political leadership influences merit selection, as it did electoral selection.\textsuperscript{104} Bellacosa's failure to gain nomination by the Commission upon applications for earlier vacancies when he did not enjoy these credentials reinforces this possibility.


\textsuperscript{101} See Nicholas Goldberg, \textit{Top Judge Nominated Replacement for Wachtler: Appeals Judge Judith Kaye}, \textit{Newsday} (New York), Feb. 23, 1993, at 7 (noting that Judith Kaye, who had no judicial experience when she came to the Court of Appeals, was nominated by Governor Cuomo to serve as chief judge after ten years on the court).

\textsuperscript{102} See Ron Davis, \textit{Cuomo Appoints 7th Appeals Judge}, \textit{Newsday} (New York), Jan. 6, 1987, at 4 ("Bellacosa has been the chief administrative judge of the state court system and a state [court of claims] judge since 1985."); Anthony M. DeStefano, \textit{Judge's Hero is Holmes—But Not Oliver Wendell}, \textit{Newsday} (New York), Mar. 11, 1987, at 37 (noting Judge Bellacosa had been chief administrative judge of the state court system and a state court of claims judge prior to his appointment to the Court of Appeals).

\textsuperscript{103} Indeed, Bellacosa's successor as chief administrator, Matthew Crosson, never was made a judge. See Gary Spencer, \textit{Search Panel for Administrator Seeks Advice}, \textit{N.Y.L.J.}, Apr. 23, 1993, at 1, 2 (stating that Mr. Crosson and Mr. Bellacosa "were not sitting judges when they were selected" to be chief administrator).

\textsuperscript{104} See Swidorski, supra note 17, at 14-15 (noting that political influence is present in the merit selection system, as it was in the election system).
The use of judicial experience as an indicator of suitability for the Court of Appeals may suggest the judiciary's professionalization, but also offers yet another means by which those judicial aspirants who are unacceptable to the political leaders and organized bar could be eliminated from serious consideration. Because of the local partisan emphases in choosing lower court judges in New York, opportunities for women and racial and ethnic minorities to serve in the lower judiciary have been limited, with improvement occurring only slowly and modestly. The use of judicial experience as an indicator of suitability for selection may mean that serious consideration has been given to only certain nontraditional aspirants—those who previously had garnered sufficient support from local party leaders to have been selected to serve in the lower echelons of the judiciary. From this perspective, the appointment of Court of Appeals judges under merit selection has been accomplished through the exercise of control by the political leadership and organized bar, precisely those who controlled the process in the earlier used elective system.

VIII. CONCLUSION

Adoption of merit selection for judges often is accompanied by claims that partisan politics will be avoided and that the quality of the bench will be improved. Researchers generally have found these

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105 See N.Y. STATE COMM’N ON GOVT’ INTEGRITY, BECOMING A JUDGE: REPORT ON THE FAILINGS OF JUDICIAL ELECTIONS IN NEW YORK STATE 13-14 (May 19, 1988) (noting the political party control over the judicial election system).

106 See N.Y. JUDICIAL COMM. ON WOMEN IN THE COURTS, 1993 ANNUAL REPORT OF THE NEW YORK JUDICIAL COMMITTEE ON WOMEN IN THE COURTS, (Nov. 26, 1993); N.Y. STATE COMM’N ON GOVT’ INTEGRITY, supra note 108, at 41-42 (noting that “[w]hile some progress has been made,” women and minorities are still not fairly represented on the bench); N.Y. JUDICIAL COMM. ON WOMEN IN THE COURTS, FIVE YEAR REPORT OF THE NEW YORK JUDICIAL COMMITTEE ON WOMEN IN THE COURTS, (June 1991); N.Y. STATE JUDICIAL COMM’N ON MINORITIES, 1 REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, Executive Summary, 94-95 (Apr. 1991) (concluding that “minorities are underrepresented on the bench”); N.Y. STATE TASK FORCE ON JUDICIAL DIVERSITY, REPORT OF THE NEW YORK STATE TASK FORCE ON JUDICIAL DIVERSITY 2-4 (Jan. 29, 1992) (noting the lack of racial diversity and commenting on the low percentage of women on the New York State Supreme Court benches); N.Y. TASK FORCE ON WOMEN IN THE COURTS, UNIFIED COURT SYSTEM, REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS 244-48 (Mar. 31, 1986) (noting the underrepresentation of women in New York’s highest judicial posts); Gary Spencer, Problems, Progress for Women in Courts, N.Y.L.J., May 15, 1996, at 1, 1-2 (noting that despite the advancement of women in the court system, there are still obstacles).

107 See Flango & Ducat, supra note 7, at 33 (comparing the prior experience of judges based on the type of selection system used).
claims to be without much support. Nonetheless, implementation of merit selection has been identified as an effective way to alter prevailing patterns of interaction among the actors in the judicial selection process. By promoting new and different institutional relationships, merit selection has presented itself as an effective mechanism to redefine the democratic factors underlying the choosing of judges.

The experience in choosing judges for New York's high court presents a rather different vantage on the merit selection process. The adoption of merit selection for the New York Court of Appeals can be attributed to the political leadership and organized bar seeking to maintain their longstanding influence in selecting judges when confronted with losing that role because of independent popular impulses in an electoral system. Merit selection seems to have provided the opportunity to preserve existing roles and relationships in the selection process. As researchers expand their assessments of judicial selection protocols and underlying institutional relationships, the possibility that merit selection can be fruitfully employed not merely to alter, but also to maintain existing patterns of interaction among the participants involved in choosing judges, poses an interesting challenge to one of the premises associated with adoption of merit selection.
**TABLE A**

**NUMBER OF NEW YORK COURT OF APPEALS JUDGES WITH SELECTED DEMOGRAPHIC CHARACTERISTICS**

<table>
<thead>
<tr>
<th>Elected Judges</th>
<th>Appointed Judges</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Women</strong></td>
<td>0</td>
</tr>
<tr>
<td><strong>Hispanics</strong></td>
<td>0*</td>
</tr>
<tr>
<td><strong>African-Americans</strong></td>
<td>0</td>
</tr>
</tbody>
</table>

* It has been suggested that one elected Court of Appeals judge was Hispanic; Benjamin Cardozo was a Sephardic Jew whose family originated from the Iberian Peninsula. See John M. Bagyi, *Carmen Beauchamp Ciparick: The Court of Appeals’ Voice of Compassion*, 59 ALB. L. REV. 1913, 1914 n.10 (1996) (citing Vincent M. Bonventre, *The High Court Remade: New Judges Leave Their Mark*, EMPIRE S. REP., Mar. 1994, at 59; Jeffrey A. Segal, *Cardozo Was First*, NEWSDAY (New York), Dec. 20, 1993, at 77).

**TABLE B**

**SELECTED DEMOGRAPHIC CHARACTERISTICS OF THOSE NOMINATED TO THE NEW YORK COURT OF APPEALS**

<table>
<thead>
<tr>
<th>Nominations N=92</th>
<th>Nominees N=40</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Whites</strong></td>
<td>83 (90%)</td>
</tr>
<tr>
<td><strong>Males</strong></td>
<td>81 (88%)</td>
</tr>
</tbody>
</table>

**TABLE C**

**PRIOR JUDICIAL EXPERIENCE OF THOSE NOMINATED AND APPOINTED JUDGES TO THE NEW YORK COURT OF APPEALS**

<table>
<thead>
<tr>
<th>Nominations N=88**</th>
<th>76 (86%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nominees N=39***</td>
<td>32 (82%)</td>
</tr>
<tr>
<td>Appointments N=14</td>
<td>13 (93%)</td>
</tr>
<tr>
<td>Judges N=13</td>
<td>12 (92%)</td>
</tr>
</tbody>
</table>

** Although there have been ninety-two nominations, the judicial experience of individuals with four nominations could not be determined.
*** Although there have been nominations of forty individuals, the judicial experience of one individual could not be determined.