Fix how NY selects judges

Our system enables political party manipulation and damages our courts

BY SOL WACHTLER

"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."

So wrote Supreme Court Justice Anthony Kennedy 10 years ago in a concurring opinion, holding that the Constitution did not prohibit New York State from selecting judges at conventions controlled by political leaders. That decision cited an earlier opinion by Justice Thurgood Marshall: "The Constitution does not prohibit legislatures from enacting stupid laws."

The state Supreme Court is not the highest court in New York, but it is the most important. It is a single trial court with branches in every county. We tend to think that state courts are inferior or subordinate to federal courts, but that is a false notion. It is the state courts that most profoundly affect our lives. New York courts hear more than 3 million cases a year: personal injury claims, trust and estate issues, marital disputes, custody cases, commercial disputes and almost all criminal cases. Yet most New Yorkers know nothing about their court system or how judges are chosen.

NY's 'stupid laws'

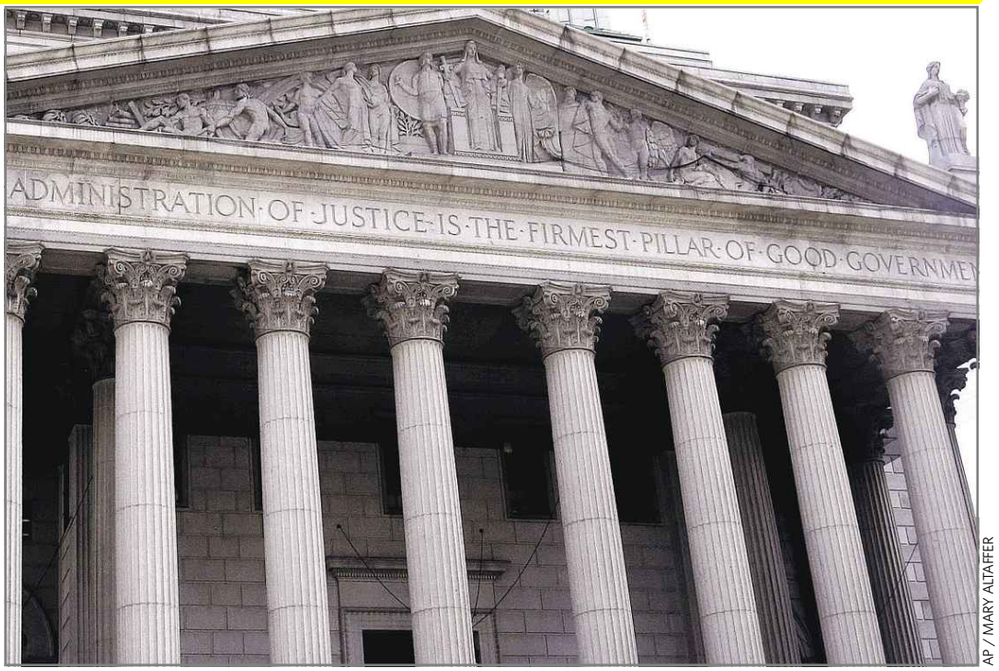
When our founders created the federal courts, they wanted judges to be as free as possible from political influence. They realized that the two other branches of government, the executive and legislative, would be elected by the people and be partisan in nature. But they felt that partisanship had no place in the checks and balances of a system that would include an independent and equal judicial branch. For this reason, federal judges were to be appointed. In those days, New York State judges also were appointed. James Madison said the state courts should be "independent tribunals of justice" and guardians of the people's rights, "an impenetrable bulwark against every assumption of power in the legislative or executive."

Still, in 1846, our State Legislature decided that our New York Supreme Court justices should be elected by popular vote. Writer Alexis de Tocqueville, in his travels around America in the early 1800s, took note of New York's selection of judges by popular vote and observed that, "These innovations will, sooner or later, have disastrous results."

When Tammany Hall and the Democratic Party dominated state politics, they pushed through New York's Constitution of 1921, which provided that our Supreme Court justices were to be nominated at political conventions. Because those conventions are controlled by political bosses, and the public usually votes on the party line, it meant that the political leaders had the power to choose the justices without the fear of a primary challenge. These were the "stupid laws" to which Justice Marshall referred.

A noted music critic once said that Wagner's music is better than it sounds. In contrast, the "election" of judges by the people is worse than it sounds. In reality, what appears to be a good idea amounts to a party boss-appointed system dressed up in electoral clothing. Only eight states allow partisan elections for judges, and none of those states permit the "fusion" nomination of judicial candidates — that is, judges being cross-endorsed by minor or splinter parties. The U.S. Supreme Court has declared that a law banning fusion voting is constitutional. If the independence of our judiciary is to be improved, that should become a legislative priority in New York.

For many years, leaders of the Democratic and Republican parties in the 10th Judicial District (Nassau and Suffolk) did a responsible job of choosing judicial candidates. No candidate would be nominated by either party unless that candidate was found "highly qualified" by the local bar association. Those leaders went further and agreed that if a jurist had served a full term and maintained a reputation of excellence, that jurist would receive nominations by both parties. Over time, most of the men and women who served as jurists in Nassau and Suffolk had bipartisan support for re-election. So their judicial careers no longer depended on the vagaries and demands of partisan politics. The only prerequisite for continued judicial service was their excellence as jurists.



AP / MARY ALTAFFER

The New York State Supreme Court building at 60 Centre St. in Manhattan.

A shift by Mondello

That practice was ended in 1985, when then-Nassau Republican Party chairman Joseph Mondello decided that neither he nor his counterpart in Suffolk County would continue the tradition of bipartisan endorsements for sitting judges. That meant, with the strength of the Republican Party that year, judges who had been originally elected on the Democratic line could not survive a partisan election.

Mondello was quoted as saying, "It's good for the judges; they meet people, and it improves their compassion." What he really meant was that electing judges loyal to the Republican Party was more important than retaining many superb jurists who had been elected on the Democratic line. Although I am a member of the Republican Party, I found the denial of an agreed-to bipartisan endorsement of sitting judges to be inappropriate and ill advised.

Some years later, minor parties, such as the Conservative, Independence, Working Family and Reform, began to manipulate fusion voting. By endorsing major-party candidates, they tipped the balance in selecting judges. By endorsing either a Republican or Democratic candidate, these parties could influence — even determine — who would become Supreme Court justices. This caused Mondello to realize that the practice of the two major parties, Republican and Democratic, cross-endorsing judicial candidates was not such a bad idea. His revised thinking led him to conclude that, "Cross-endorsements were necessary because we need quality judges."

The problem is that the current cross-endorsement practices, with the intrusion of fusion voting by minor parties, does not improve the quality of judges; it only increases the number of political bosses who can now pick our judges.

New York's highest court, the Court of Appeals, sensed the peril presented by splinter-party endorsements, and the increased disregard by the political leaders for the need to sustain an independent judiciary. It pressed for a constitutional amendment to mandate merit selection of judges to the state Court of Appeals, but the legislature and political leaders continued to block attempts to alter New York's system of "elections" for Supreme Court justices. By keeping this system and refusing to pass legislation to prevent fusion voting, New York has all but eliminated an independent judiciary.

A stark example is on Long Island, where the Independence and Conservative parties, which virtually stand for very little and have no sense of public responsibility, control judicial selection. Allowing this has diminished the independence of our judiciary and creates political barriers that are enough to discourage any lawyer from seeking judicial office.

De Tocqueville was right, New York's method of selecting judges has had "disastrous results."

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