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## Help Wanted: Is There a Better Way to Select Judges?

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# Help Wanted: Is There a Better Way to Select Judges?

## **Cover Page Footnote**

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## HELP WANTED: IS THERE A BETTER WAY TO SELECT JUDGES?

*Luke Bierman\**

Fights over the courts, and how to select our judges, have been with us since our nation's birth.<sup>1</sup> The Declaration of Independence charged King George with making colonial judges dependent on him alone.<sup>2</sup> There were great debates in the Constitutional Convention and during the ratification process about how to select judges.<sup>3</sup> The Jacksonian Period saw a marked trend toward electing judges,<sup>4</sup> with the subsequent Progressive Era beginning a movement back toward appointment.<sup>5</sup> More recently, concerns about judicial elections, which range from judges raising increasingly large amounts of campaign money to the ethical problems associated with conducting campaigns, have prompted a variety of organizations including the League of Women Voters, the American Bar Association, and state-based reform advocacy groups to reconsider how best to improve judicial selection.<sup>6</sup> As the debate over the role of America's courts becomes increasingly shrill and

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1. CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 2 (2006) ("Bouts of court-directed animus have come and gone at generational intervals since the founding of the nation.").

2. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

3. See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton).

4. Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 AM. B. FOUND. RES. J. 345, 345.

5. See MICHAEL R. BELKNAP, TO IMPROVE THE ADMINISTRATION OF JUSTICE: A HISTORY OF THE AMERICAN JUDICATURE SOCIETY 33-61 (1992).

6. See G. Alan Tarr, *Politicizing the Process: The New Politics of State Judicial Elections*, in BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA (Keith J. Bybee ed., forthcoming 2007) (on file with the author). The Justice at Stake Campaign (of which I am a member of the Board of Directors) has organized almost fifty national and state organizations interested in supporting judicial independence with judicial selection reform as a primary issue of concern. See Justice at Stake Home Page, <http://www.justiceatstake.org> (last visited Oct. 16, 2006).

partisan,<sup>7</sup> the need for creative approaches to placing judges on the bench increases.

### I. INTRODUCTION

The morning of April 30, 2006, dawned unlike many in upstate New York. For one thing, it was brilliantly sunny with the promise of turning comfortably warm, a rare occurrence during the upstate spring. For another, it was my birthday, the annual reminder of not getting any younger. Finally, the classified job postings in the *Albany Times-Union* included an advertisement for a Justice of the New York Supreme Court, Third Judicial District. Of these three things, the latter was the most extraordinary in my estimation. Judges are not usually recruited in the want ads, along with pipefitters and mental health workers, drivers and chefs. Was New York, facing a crisis in its judicial selection system, up to something creative, interesting, and new in judicial selection?

The judicial want ad attracted my attention for several reasons. First, I was considering the job market in upstate New York, a region I have come to love and call home. Of course, upstate suffers many challenges including harsh weather, a stagnant economy, and diminishing numbers of young adults, none of which seem to offset its beauty, comfortable pace of life, affordable housing, and accessibility to the population centers and attractions of the Canadian and American Northeast. There are not many opportunities in upstate New York that compare to the senior-level law and policy research, teaching, and advocacy that I have been doing for the last decade. Second, I had spent a fair amount of time working with judges and the courts in upstate New York, clerking for two Appellate Division justices in the Third Department, where I also served as the court's Chief Attorney. Having also practiced in an upstate law firm and taught about law and policy, I know a little something about New York law, including not just the details and intricacies but also the big picture. I also know enough about the politics of New York to know the realities of how people generally become judges, something that a recent lawsuit brought to the public eye in

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7. See John G. Roberts, Chief Justice, U.S. Supreme Court, Remarks at Georgetown University Law Center and the American Law Institute's Conference on the State of the Judiciary: Fair and Independent Courts (Sept. 28, 2006), available at <http://www.law.georgetown.edu/news/documents/CoJ092906-roberts.pdf>; see also DEBORAH GOLDBERG, CRAIG HOLMAN & SAMANTHA SANCHEZ, JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000, at 6 (2002), available at <http://faircourts.org/files/JASMoneyReport.PDF> (judicial elections have become "nastier, noisier, and costlier").

a dramatic way—the legal challenge to New York’s convention system of choosing candidates had been successful.<sup>8</sup> Third, I had spent the past dozen or so years working on so-called judicial selection reform, helping craft an effort to reinvigorate merit selection of judges by looking at the weaknesses of electing judges and proposing some creative ways to select judges.

With these things in mind, I considered the want ad. I knew that the ad was for an interim appointment authorized by the state constitution and made necessary because Justice Thomas Spargo had been removed from the bench by a ruling of the State Commission on Judicial Nomination.<sup>9</sup> Anyone appointed would serve only until an election was held to fill the full fourteen-year term of a Justice of the Supreme Court, an appointment lasting most likely only a matter of months.<sup>10</sup> I knew that if practice followed custom, Governor Pataki would appoint a loyal Republican lawyer who would run for election with cross endorsements from the major political parties after some agreements among party leaders about who would become Justices of the Supreme Court from within the Third District.<sup>11</sup> Of course, Pataki’s lame duck status could well affect the prevailing patterns of power in judicial selection. I was not naïve about these standard operating procedures, having lived through nominations and renominations of lawyers and judges I counted as colleagues and friends, having studied New York judicial selection as part of my doctoral dissertation, and having commented, lectured, and testified about this selection process for years.

Yet, I wondered, what if? What if this job ad offered a new way to recruit judges and Governor Pataki, seeking to add to a legacy as he mulls over a presidential run, was really employing a creative approach to attracting new and interesting judges to the bench? Perhaps Governor Pataki was thinking of innovative ways to diminish the partisan bickering over judges that had become com-

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8. *Lopez Torres v. N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212 (E.D.N.Y. 2005), *aff’d*, 462 F.3d 161 (2d Cir. 2006), *cert. granted*, 127 S. Ct. 1325 (2007). The Supreme Court granted review of *Lopez Torres* as this article was going to print.

9. *Matter of Spargo*, New York State Commission on Judicial Conduct, Mar. 29, 2006, *available at* <http://www.scjc.state.ny.us/Determinations/S/spargo.htm>.

10. N.Y. CONST. art. VI, § 21(a).

11. *See generally* New York State Comm’n on Gov’t Integrity, *Becoming a Judge: Report on the Failings of Judicial Elections in New York State* (May 19, 1988), *reprinted in* New York State Comm’n on Gov’t Integrity, GOVERNMENT ETHICS REFORM FOR THE 1990S: THE COLLECTED REPORTS OF THE NEW YORK STATE COMMISSION ON GOVERNMENT INTEGRITY 270 (Bruce A. Green ed., 1991) [hereinafter *Becoming a Judge*].

monplace in Washington and increasingly apparent in the states so as to present himself to the national electorate as someone who is willing to forge new ground for the public good. Perhaps Governor Pataki had come to realize that judges, the human representation of justice and the rule of law in a republican form of government that sets America apart from much of the world, are different from those selected to serve in the political branches and should be treated differently than legislators and other political appointees.<sup>12</sup> Perhaps he had seen the light and come to understand that the judiciary should not be a Republican or Democratic issue, a liberal or conservative issue, but an American issue. Maybe, just maybe, something different was going on here.

This possibility, that an ambitious political leader might seek distinction by rising above the increasingly harsh and partisan bickering over the role of judges in America and how we should select them, is appealing. It is well known that judicial selection attracts inordinate attention from public law scholars and others interested in the judiciary.<sup>13</sup> This attention has only increased over the past few years as more money flows into judicial campaigns and various politically ambitious constituencies seem to recognize that public policy can be affected by state supreme court decision-making.<sup>14</sup> During this time, those interested in changing judicial selection processes worked hard to develop new approaches, such as public financing of judicial campaigns, improved screening processes for merit selection, and safeguards for judicial elections.<sup>15</sup> Thus, there is no shortage of possible approaches to change judicial selection.

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12. See Luke Bierman, *Courts are Different*, League of Women Voters of the United States, League E-Voice Newsletter (Mar. 2006), <http://www.lwv.org/AM/Template.cfm?Section=home&template=/CM/HTMLDisplay.cfm&ContentID=4751>, to be reprinted in *STATE AND LOCAL GOVERNMENT 2006-2007* (Congressional Quarterly Press) (forthcoming 2007) (discussing well recognized differences between judges and other public officials).

13. See, e.g., Philip L. DuBois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 Sw. L.J. 31 (1986).

14. See, e.g., Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1 (chronicling changes in state high court elections and decision making); Adam Liptak, *Case Studies*, N.Y. TIMES, Oct. 1, 2006, at A23 (focusing on Illinois and West Virginia Supreme Court elections); see also Roy Schotland, *New Challenges to States' Judicial Selection*, in *BACKGROUND PAPERS FOR FAIR AND INDEPENDENT COURTS: A CONFERENCE ON THE STATE OF THE JUDICIARY 139*, (T. Alexander Aleinikoff, Judith Areon & Lance Liebman eds., 2006).

15. See generally Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851 (2002) (discussing merit selection reforms and alternative approaches to ensuring judicial independence).

The judicial reform arena lacks political leadership, as there have been a number of defeats for those advocating change, especially regarding merit selection.<sup>16</sup> After all, disrupting existing patterns of political power and patronage offers little political payback for an ambitious political leader.<sup>17</sup> But such a leader might receive some positive attention for tackling this thorny issue in new and creative ways.

So, on this April 30, with the sun bright and the date reminding me of the passage of time, I indulged myself and did what many self-respecting, constitutionally eligible judicial aspirants, facing the *realpolitik* of the situation, might not have done: I resolved to answer the ad in the paper with an application to be a Justice of the Supreme Court, Third Judicial District, just like any other job. And believe me, having been rejected for lots of jobs over the years, I knew a thing or two about applying for jobs, judicial or otherwise.

## II. JUDGES ARE DIFFERENT, SO WHY DO WE TREAT THEM THE SAME?

The American republic, an experiment in self governance, was built upon several principles including democratic representation, checks and balances, and separation of powers. This latter principle, referred to as an “invaluable precept in the science of politics,”<sup>18</sup> posits that there are three separate but equal branches of government that exercise power according to the processes and procedures laid out in the Constitution.<sup>19</sup> While the first part of this dogma is explicitly provided for in the Constitution—the three branches are established and provided areas of authority in the first three Articles—the precise nature of how power is exercised is not explicitly stated in our charter<sup>20</sup> and remains to this day a work in progress.<sup>21</sup> It is, nonetheless, beyond debate that separation of

16. *See id.* at 852 (noting merit selection ballot proposal defeats in every county in Florida).

17. *See* Luke Bierman, *Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*, 60 ALB. L. REV. 339, 340-41 (1996).

18. THE FEDERALIST NO. 47, at 262 (James Madison) (J.R. Pole ed., 2005).

19. *See* U.S. CONST. arts. I-III; *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 150-61 (1969) (discussing the historical significance of the separation of powers principle).

20. *See* WOOD, *supra* note 19, at 604-08.

21. *See* *Morrison v. Olson*, 487 U.S. 654, 696 (1988) (holding the independent counsel does not encroach on the executive's power because the executive branch retains sufficient control over the independent counsel to make certain the President can still perform his constitutional duties); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)

powers exists as a powerful force in the structure of American government. We may debate the precise contours of that separation but it undoubtedly exists. Indeed, the Framers characterized the nature of our federal government as republican in nature,<sup>22</sup> and conceived of separate institutions sharing different powers.<sup>23</sup> This is evident because if we were to vest legislative powers in the executive or vice versa, the principle of separation of powers underlying our concept of republican government would be invoked to strike down that configuration.<sup>24</sup> This has happened regularly in the course of our history, which some might see as a tug of war for primacy between the Congress and the President as reflected in our current controversies over the extent of executive power.<sup>25</sup>

As part of the agreement among “We the People,” the Constitution explicitly provides the legislative, executive, and judicial powers, respectively, to Congress, the President, and the Supreme Court and such other courts as Congress establishes.<sup>26</sup> The judicial power, ceded to an independent, equal branch consisting of courts, was forged as a check against the potential excesses of the other branches, for “there is no liberty, if the power of judging be not separated from the legislative and executive powers.”<sup>27</sup> The selection of federal judges, requiring nomination by the President and confirmation by the Senate, generally comports with republican principles that the Framers established in our form of government.<sup>28</sup> This methodology for judicial selection offers a benchmark for a republican form of government against which others must be measured.

States, no less than the federal government, must comport with republican principles in establishing and executing their governmental systems.<sup>29</sup> Thus, states must comport with the fundamental tenets of separation of powers, which we know—notwithstanding

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(concluding that it is unconstitutional for Congress to reserve for itself the power to remove an executive officer, in this case the Comptroller General, as that is a power vested in the executive).

22. THE FEDERALIST NO. 39 (James Madison).

23. See generally LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW (6th ed. 2005).

24. See *supra* notes 20-21 and accompanying text.

25. See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773-76 (2006) (discussing the constitutionality of the President enacting military tribunals during times of war).

26. U.S. CONST. arts. I-III; see generally WOOD, *supra* note 19.

27. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 18, at 413 (quoting MONTESQUIEU, SPIRIT OF LAWS).

28. See *supra* note 22 and accompanying text.

29. See U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).



that there is no explicit provision recognizing this principle in the federal constitution—are fundamental to republican principles and are even explicitly provided for in some state constitutions.<sup>30</sup> Faithful to the separation of powers principles, the role of the judiciary in the states, consistent with its role in the federal government, is to serve as a check on the legislature and executive.<sup>31</sup> Failing to serve that role in the states, the judiciary would fail to be the coequal participant in the republican form of government contemplated for the states by Article IV, Section 4 of the Constitution.<sup>32</sup>

The purpose of the check derives from recognizing that legislatures and executives can overextend their influence and infringe on rights and liberties.<sup>33</sup> In other words, unrestrained majorities can go too far when the legislature and the executive impose their wills on others in contravention of the greater good as agreed to in a constitution.<sup>34</sup> Under our republican system, applicable to both the states and the federal government, it is the judiciary, an independent branch of government able to decide cases without fear or favor, that serves to constrain the majority.<sup>35</sup> We know this because, as we have seen, the judicial power exists distinct from the legislative and executive powers and is granted to the judiciary in the context of separate institutions exercising different powers.<sup>36</sup> As such, the judiciary, and the judges who discharge the judicial

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30. See WOOD, *supra* note 19, at 450-53; see also Peter M. Shane, *Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence*, 61 LAW & CONTEMP. PROBS. 21, 28-29 (1998).

31. See WOOD, *supra* note 19, at 453-63; see also Shane, *supra* note 30, at 21-25.

32. For example, while the legislative power can be exercised by a unicameral body as in Nebraska, it seems fairly evident that if Nebraska committed legislative, executive, and judicial functions to that legislature, we would have little difficulty concluding that such a configuration does not satisfy the commonly understood attributes of a republican form of government as contemplated by constitutional demands. The Federalist No. 47 (James Madison), *supra* note 18, at 261 (“The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”). Accordingly, separation of powers as the mechanism for providing opportunities to check the coequal branches is elemental as a *sine qua non* of acceptable, indeed constitutional, systems of governance under the contemplation of American forms of republican government. See Philip B. Kurland & Ralph Lerner, *The Founders’ Constitution*, ch. 10, <http://press-pubs.uchicago.edu/founders/documents/v1ch10I.html> (last visited Oct. 16, 2006).

33. See THE FEDERALIST NO. 51 (James Madison).

34. See WOOD, *supra* note 19, at 602-06.

35. See THE FEDERALIST NO. 78 (Alexander Hamilton); see also *Marbury v. Madison*, 5 U.S. 137 (1803) (reinforcing the separation of powers principle).

36. See WOOD, *supra* note 19, at 453-63.

power, must be different from the other two branches and those who discharge legislative and executive powers.

Because judges are public officials with powers different from legislators and executives, they must be afforded the accoutrements of office that will allow them to succeed in executing their responsibilities. After all, it is the judicial power that is accorded to judges, not the legislative or executive power.<sup>37</sup> These powers are different, as are the public officials selected to exercise them. Legislators must be close to their constituents, hear their concerns, respond to their wishes, and develop proactive policy agendas that fulfill those constituents' expectations. Executives likewise must be near their constituents so that policies can be implemented in a manner that responds to the needs of the public. Judges, however, should be insulated from those demands and pressures so that the judicial power can be exercised in a manner distinct from the legislative and executive powers.

A key distinguishing characteristic is that judges have some obligation of impartiality, something not expected of legislators or executives, who are selected through popular election precisely because of their partiality as reflected in their commitments to particular policy choices supported by factions in the electorate.<sup>38</sup> Judges acquire legitimacy not through the sword or the purse like the executive or the legislature, but through their ability to command respect with wise and fair decision-making. Judges must be free from the politician's obligations to the public in order to retain their legitimacy and thus to be able to serve as the necessary and effective check on an unrestrained majority in the legislature or executive.<sup>39</sup> If the judge has, like the politician, a responsibility to fulfill the electorate's expressed preferences, then she is no different from, and serves no different role than, the legislator or executive. The judge in our republican form of government must serve a very different role.<sup>40</sup> As explained by Alexander Hamilton in THE FEDERALIST NO. 78, it is her judgment that promotes respect and accords legitimacy.<sup>41</sup> Think Solomon.

Thus, the judicial process proceeds in ways quite apart from legislative or executive processes. For example, the judicial process

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37. U.S. CONST. art. III, § 1.

38. See generally RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978).

39. See *Republican Party of Minn. v. White*, 536 U.S. 765, 797-804 (2002) (Stevens, J., dissenting).

40. THE FEDERALIST NO. 78 (Alexander Hamilton).

41. *Id.*

follows rules of procedure that are vastly different from legislative and executive processes, as seen in the rules of evidence, formalities of conduct, and rationales in decision-making. Judges may only consider certain kinds of evidence, while legislators and executives can assess vast arrays of different kinds and qualities of reports, studies, and opinions. Judges are strictly limited in their communications to parties before them, in contrast to the extensive lobbying that characterizes the legislative and executive branches. Judges are expected to justify their decisions, usually in writing and consistent with time-worn expectations about following precedent and format, while legislators and executives are not subject to similar expectations.

To ensure that the judge's distinct role in a republican government, characterized by separated branches with different responsibilities, is recognized and realized, the judge must be selected by a means different from the legislator and executive. By distinguishing the selection method, the different roles and responsibilities can be clarified. Likewise, the functions associated with the different roles and responsibilities of the judge can only be accomplished if different selection systems are employed. Indeed, using the same selection systems for the judiciary as those used for the legislature and executive would serve the purpose of having judges selected with the same motivations and goals, which do not promote the judicial functions contemplated by republican government.

Selecting judges through popular electoral processes presents the distinct likelihood that those judges will perform their duties with an eye toward the electorate's expectations, so that the judge as an electoral candidate gains the support of a sufficient number of voters to be re-elected. Decisions in cases involving highly visible and contentious issues offer stark choices for judges facing the wrath of voters, who lack a high level of understanding about the judiciary<sup>42</sup> and participate in judicial elections at lower rates than the already low rates in elections for legislators and executives.<sup>43</sup> Moreover, at

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42. See A.B.A., *JUSTICE IN JEOPARDY*, REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY 27-28 (2003) [hereinafter *JUSTICE IN JEOPARDY*]; see also *Becoming a Judge*, *supra* note 11, at 271-88 (discussing the additional hurdle of attaining party support before the partisan nomination process and the importance of maintaining party and voter support through the re-election process).

43. See *JUSTICE IN JEOPARDY*, *supra* note 42, at 27-28. Two factors explain minimal participation in judicial elections: low voter turnout and voter "roll-off." *Id.* at 28. A number of states report turnout rates below twenty percent. *Id.* While in voter "roll-off," "voters go to the polls and cast ballots for political branch candidates at the top of the ballot but decline to vote in judicial races at the bottom of the ballot." *Id.*

least some judges themselves believe that accepting campaign contributions affects their rulings.<sup>44</sup> Indeed, studies provide credible evidence that elected judges resolve cases differently as an election approaches, reflecting decisions that comport with the electorate's expectations, akin to how legislators and executives "bring home the bacon."<sup>45</sup> These factors suggest that elections are antithetical to the concept of judicial impartiality that underlies the difference between the political branches and the judiciary in a republican system of government.

Likewise, voters in judicial elections may act in ways contrary to our expectations for the judiciary in republican government. Voters typically act retrospectively and review a candidate's record to assess the reliability of that person to deliver on the voter's expectations,<sup>46</sup> or look for clues if the candidate's past provides little information about the likely future rulings of a candidate.<sup>47</sup> In deciding how voters should choose among judicial candidates in an election, a retrospective analysis is precisely the wrong approach to apply in a republican form of government when voters select the public official who must remain independent of expectations and impartial when making difficult choices. To fulfill their role as a check in the republican system of government, judges must be free to function without regard to voters' expectations and assessments. The judges must decide without fear or favor, without pandering to the electorate. If concerns over how voters treat judicial candidates in an upcoming election skew judicial decision-making, the judicial function is altered, if not entirely debased, to a degree that compromises the judiciary's role as an effective check in a republican form of government.

The ruling in *Republican Party of Minnesota v. White*<sup>48</sup> frees judicial candidates from the shackles of traditional judicial ethics guidelines and permits them to campaign in ways akin to legislative

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44. See *id.* at 25.

45. See generally Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004). This article develops and tests "a theory specifying the conditions under which trial judges will alter their sentencing behavior to improve their electoral prospects." *Id.* at 248.

46. See generally MORRIS P. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* (1981).

47. See PAUL M. SNIDERMAN, RICHARD A. BRODY & PHILIP E. TETLOCK, *REASONING AND CHOICE: EXPLORATIONS IN POLITICAL PSYCHOLOGY* 164-78 (1991) (discussing levels of voter information in relation to electoral choice).

48. 536 U.S. 765, 788 (2002) (holding that certain restrictions on judicial speech relating to elections violate the First Amendment).

and executive candidates. The recent increase in judicial campaign fundraising and expenditures, and the concomitant decline in civility apparent in judicial campaign practice and rhetoric, reflect the ominous trend of judicial races becoming more like those of executives and legislators.<sup>49</sup> And if political promises, as noted by Justice Scalia in *White*, are essentially valueless and unbelievable,<sup>50</sup> then allowing judges to make those claims places them on the same footing as legislators and executives. This puts the judiciary in the same role as the other political branches, which is antithetical to the judiciary's role as independent arbiter among the branches as contemplated by the republican form of government organized under the Constitution.

In contrast, a judicial selection process without a popular election must comport with republican norms, because the Constitution prescribes presidential nomination and senate confirmation for the federal judiciary. The federal constitution undoubtedly establishes a republican form of government,<sup>51</sup> so states adhering to the process delineated for federal judicial selection certainly pass the test. Of course, only a few states mimic the federal process while the rest employ varying processes.<sup>52</sup> Could it be that most states violate a basic principle of republicanism?<sup>53</sup>

Notably, at the time of the Constitution's ratification, no state elected its judges by popular referendum.<sup>54</sup> The great wave of judicial elections arose in the period of Jacksonian Democracy, perhaps to ensure judicial independence by providing judges with direct authority from, and direct accountability to, the public.<sup>55</sup> This approach to judicial selection was preeminent until the Progressive Era when Roscoe Pound and other reformers sought to

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49. See generally source cited *supra* note 27. These are "ominous trends" if one accepts that "liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments." THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 18, at 413.

50. See *White*, 536 U.S. at 780 (stating that political promises are "the least binding form of human commitment").

51. See *supra* notes 18-37 and accompanying text.

52. See American Judicature Society Home Page, [http://www.ajs.org/selection/select\\_stateselect.asp](http://www.ajs.org/selection/select_stateselect.asp) (last visited Oct. 14, 2006) (delineating state selection processes).

53. After all, some thirty-nine states use elections to select at least some of their judges. THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 235 (2003 ed., vol. 35).

54. See MARY L. VOLCANSEK & JACQUELINE LUCIENNE LAFON, JUDICIAL SELECTION: THE CROSS-REVOLUTION OF FRENCH AND AMERICAN PRACTICES 22, 75-76 (1988).

55. See generally Hall, *supra* note 4.

end partisan corrupt judicial elections.<sup>56</sup> Today multimillion dollar judicial campaigns frequently mirror the worst of the legislative and executive elections. While this observation does not reflect overt corruption, it undermines the judiciary's traditional and expected role as a check in the republican form of government. These multimillion dollar judicial campaigns erode the public's perception of the judiciary and its functional institutional differences from the political branches, to the detriment of the functioning of the republic.<sup>57</sup> Shifting away from judicial elections thus makes organizational sense and may even be constitutionally required. But an ad in the newspaper?

### III. WHAT'S THE NEWSPAPER GOT TO DO WITH IT?

Political scientists might say that selecting judges through popular election reflects the pluralist instincts of American life, whereby many interests come together and compete in the marketplace of politics for primacy.<sup>58</sup> They might also say that selecting judges through conventions or appointment reflects an elitist approach that puts decision-making in the hands of a few powerful and often unaccountable people.<sup>59</sup> A newspaper ad recruiting judges, on the other hand, may reflect an amalgam of interests, offering pluralist impulses by reaching out to the masses while retaining control in the hands of the politically powerful. But the curious combination of selecting judges, some by appointment even if only temporary, some by election, and some by faux election because the choices may be limited through cross endorsements, seems vaguely out of touch with the purposes underlying the judiciary and its place in the republican system of government with which all states must comport. I wondered, though, what it would be like if the ad reflected a legitimate and open hiring process and a judge was hired pursuant to the dynamics of human resources practice, just like any other job.

First, there would need to be a job description. This task sounds easy but many law review pages, books, reports, and other efforts have been expended trying to define the preferred characteristics of a judge. Of course intelligence, fairness, integrity, temperament, and many other attributes have been agreed to, but their precise

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56. See BELKNAP, *supra* note 5, at 8-21, 26.

57. See generally JUSTICE IN JEOPARDY, *supra* note 42.

58. See, e.g., THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2d ed. 1979).

59. See, e.g., C. WRIGHT MILLS, THE POWER ELITE (1956).

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definitions in this context have proven more difficult to articulate. Indeed, the changing role of the judicial officer, as trials have become less frequent and decision-making more collaborative,<sup>60</sup> might make consensus over the job description even more elusive. Likewise, as we become more comfortable with the recognition that judges exercise some policy-oriented responsibilities, the credentials and experiences of the judicial officer may be different from someone who simply follows principles of *stare decisis* and applies rules of procedure while presiding over a trial.<sup>61</sup> And even if we can agree on a job description, who deserves to be in the hiring process? The public for whom the judge ultimately works? The governor? The legislature? The bar? A search committee could be large indeed.

Then, assuming that the job description was agreed upon and following the appearance of the classified job ad, applications would follow. The signals provided by a job ad in the classified section might well promote greater interest in the position, by suggesting that an appointment process other than politics as usual was underway.<sup>62</sup> As letters from applicants arrived, an administrative assistant would compile the files of candidates. No doubt some would be incomplete, missing the required résumé or cover letter, and these would be placed in the bottom of the pile. Some midlevel employee, maybe in the governor's counsel's office (again, who rightfully should be involved in the search process?), would make a first review of the files, culling out those who clearly were not qualified constitutionally or professionally. The files might be organized in order of qualification, with the more experienced and interesting candidates near the top and those with less compelling credentials and experiences buried below.

Then, a more senior level staffer, the governor's counsel perhaps (shouldn't others with interest in the search be involved in the process?), would review the files of the top candidates, identifying a short list of five, more or less. Reaching this point might take as long as several months or as short as a few days, although with this interim appointment, speed should be a virtue. Phone interviews, maybe a half hour long, with the top candidates would follow. A couple of these candidates would be chosen for interviews during which a list of references would have to be checked. Interviews

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60. JUSTICE IN JEOPARDY, *supra* note 42, at 47-50.

61. *Id.*

62. *Id.* at 60-65; see also *Becoming a Judge*, *supra* note 11, at 291 (noting the value of reaching out to nontraditional judicial aspirants).

with the senior staffer (who are the appropriate members of the search committee?) would lead to identification of a final candidate who might return for a final interview with the governor before the job is offered, a nomination is made, and confirmation is concluded. For jobs of this caliber, the whole process could take six months or a year. Employment of a search firm might speed things up a bit, although it could also slow things down. Time would be of the essence in light of the temporary nature of the appointment.

In writing this scenario I am struck by the absence of political party leadership in the process. That absence is a significant deviation from the current judicial selection process, whether elective or appointive in nature.<sup>63</sup> If the judiciary is supposed to differ from the political branches, it may be reassuring to see that the political leaders are left out of the scenario posited.<sup>64</sup> Under our current conception of judicial selection in the states, however, such a scenario is, to state it simply, preposterous. Our current debate over appointment or election does not get us very far toward alternative models, as we know from both the federal and state experiences that partisan political factors insinuate themselves in judicial selection processes generally.<sup>65</sup> Asking for alternatives that depart from that paradigm may be asking too much.

At a recent symposium at Fordham Law School, I posited a system of state judicial appointment that is akin to the federal system, consistent with the dictates of republican principles. I was met with consternation of a kind usually reserved for those giving long talks right before the cocktail hour, even though I was proposing essentially the system that has worked, albeit not without periodic controversy, for federal judges for almost 225 years.<sup>66</sup> More creativity is clearly needed. More openness to new approaches is needed. Perhaps ads in the newspaper are not the answer to innovation in judicial selection, but we need to think outside the proverbial box. Perhaps we need to pay more attention to the American Bar Association's working group on pre-judicial education that looks at how to adapt educational programs and credentialing systems for judicial aspirants to the American traditions of

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63. See generally RICHARD A. WATSON & RONDAL G. DOWNING, *THE POLITICS OF THE BENCH AND BAR* (1969).

64. See *Becoming a Judge*, *supra* note 11, at 277-88 (describing the pervasive nature of partisan leaders in the judicial selection process).

65. See Liptak & Roberts, *supra* note 14, at A1.

66. See, e.g., GEYH, *supra* note 1.



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judicial selection, thereby melding traditional judicial selection models within the American tradition with formal academic training.<sup>67</sup> Perhaps an internship model, as with the medical profession, offers some fresh ideas for different models of state judicial selection. What is clear is that we have to pay a bit more attention to the purposes underlying the judicial branch in a republican form of government and ask ourselves how to construct selection systems that comport with those goals if we are to break free of the standard conundrum of appointment or election.

**IV. A JOB APPLICATION LIKE ANY OTHER JOB APPLICATION**

So, my letter of application for appointment to the interim vacancy in the position of Supreme Court Justice, Third Judicial District, was sent and no doubt filed somewhere, probably lost in some bureaucracy like Arlo Guthrie's fingerprints after the Thanksgiving Day Massacre.<sup>68</sup> After all, I am a pretty nontraditional judicial aspirant in the traditional politically-oriented judicial selection process. As I write and edit this Essay, almost six months after sending the letter of application, I have heard nothing.<sup>69</sup> I guess I shouldn't be surprised. Jobs are not typically filled quickly—six months is nothing when applying for a job. In this way, I guess the classified ad approach to recruit judges is like any other job. And we should not be treating a judgeship like any other job because in our system of republican government the judiciary is different.

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67. A white paper is available from the American Bar Association Standing Committee on Judicial Independence. *See generally* A.B.A. Study Group on Pre-Judicial Education, Report of the Study Group on Pre-Judicial Education (Feb. 12, 2005) (on file with author).

68. ARLO GUTHRIE, *Alice's Restaurant Massacre*, on ALICE'S RESTAURANT (Warner Bros. 1967).

69. And apparently no other applicants heard anything either. No appointment has been made and the Third Judicial District Nominating Conventions recently met and cross endorsed a Democratic lawyer with long family ties to the Albany County Democratic Party for the Spargo vacancy. Carol DeMare, *Judge Hopefuls Get GOP Backing*, ALB. TIMES UNION, Sept. 26, 2006, at B1.

