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Free: Perspective - Supreme Spotlight on a 'Stupid' System

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It is not every day that a U.S. Supreme Court justice writes a separate one-paragraph opinion merely for the purpose of pointing out that, as a matter of policy, a state law is "stupid." That is remarkable enough, but when the law in question governs the third branch of government in a state that is the world's 11th largest economy, such bluntness should not be ignored.

Last week, the U.S. Supreme Court upheld New York's byzantine process for selecting trial judge nominees, concluding that the scheme does not violate the First Amendment. Justice John Paul Stevens concurred in that judgment, but wrote separately "to emphasize the distinction between constitutionality and wise policy." Pointing to "glaring deficiencies" in New York's opaque, exclusionary system, Justice Stevens, joined by Justice Souter, stated:

But as I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: "The Constitution does not prohibit legislatures from enacting stupid laws."

New York is one of 33 states that elects its general jurisdiction trial court judges in contestable elections. Every single one of the other 32 states allows candidates to compete for their party's nomination (or a place on a nonpartisan election ballot) by filing notice, paying a small fee, or gathering signatures directly among party voters. Not so in New York.

Although the state Constitution guarantees that "the justices . . . shall be chosen by the electors [i.e., the voters] of the judicial district in which they are to serve," justices are selected through a complex de facto appointment system controlled by political party leaders. Predictably, patronage is prioritized ahead of the People.

The case of *López Torres v. New York State Board of Elections* arises from the last remnant of a bygone era. For a century, local party machines across America controlled who could sit as a trial judge. It was often a feast for corruption and a way to keep minorities and others not beholden to the power structure off the bench. A century of progressive reform efforts have stripped party leaders of that power in nearly every jurisdiction. In New York, party bosses are no longer even allowed to choose low-level civil employees.

Yet, in the words of Governor Eliot Spitzer, New York's unique system remains "the last vestige of real patronage in the political party structure." Recognizing that sad fact, and its far sadder consequences for the quality of New York's bench, an extraordinary coalition of reformers, prosecutors, civic leaders, minority groups, bar leaders, former judges and leaders of the bar joined the plaintiffs in seeking affirmance of lower court rulings that had held the scheme unconstitutional. Those efforts proved unsuccessful.

The push for reform, however, will continue. Many leaders, including Mr. Spitzer, think a commission-based appointment process is ultimately the best solution. Others, such as Senate Judiciary Chair John DeFrancisco, prefer elections with actual access and accountability. In short, reasonable people disagree as to the question of elections versus appointments. Unfortunately, New York's conventions represent the worst aspects of both systems and the attributes of neither. On that count, Mr. Spitzer and Mr. DeFrancisco not only agree, but are in good company.

For example, an amicus brief filed by the City of New York, the New York State and City Bar Associations, and the Fund for Modern Courts, described New York's scheme as "the worst of all worlds" in which unaccountable leaders "base their choices on political loyalty and party credentials, rather than on professional judicial qualifications."

Disinterested conservatives and liberals agree. According to political scientists Norman Orenstein of the American Enterprise Institute and Thomas Mann of the Brookings Institute, "As in the former Soviet Union where voters had a 'choice' of a single candidate picked by the ruling Communist Party, voters in New York's Supreme Court primary enjoy all of democracy's ceremonies without any of its substance." It may make one's head spin, but under the Court's decision last week, such a falsehood does not violate the First Amendment.

Prospectively as before, reform efforts will pose not a clash of red versus blue, but rather of insiders versus everyone else. Because fiefdoms are rarely surrendered voluntarily, the plaintiffs are considering further litigation options, including the possibility of a claim under the New York State Constitution. We hope such options will be unnecessary.

To that end, another concurring opinion by Justice Anthony Kennedy, and joined by Justice Stephen Breyer, stated that if New York's system does not "produce both the perception and the reality of a system committed to the highest ideals of the law" the system "ought to be changed and to be changed now."

New York's system fails to produce either that perception or that reality. Accordingly, and to borrow from Justice Stevens, failing to fix it would be, in a word, "stupid."

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