Best judicial candidates need not apply -- and they don't

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(PhysOrg.com) -- Gubernatorial appointment of judges to New York's highest court -- a process many legal scholars and officials believe is better than popular election -- has choked off access for most of the best candidates the state has to offer, according to a legal scholar from the University at Buffalo Law School.

"Although New York's current method of selecting its [Court](#) of Appeals judges was designed to be wide open and based entirely on merit, the selection process, as it has actually evolved in practice, is neither," says election-law expert James A. Gardner, the UB Law School's Joseph W. Belluck and Laura L. Aswad Professor of Civil Justice and vice dean for academic affairs.

The selection process for the State Court of Appeals, Gardner says, is a perfect example of how gubernatorial appointment falls short of its objective, which is to find the best candidates to serve as the members of the state's highest and influential court, and keep politics out of the process.

Instead, the selection process has "degenerated into a fundamentally closed competition among a very small number of sitting judges of the intermediate state appeals court," says Gardner, who directs the law school's Jaeckle Center for Law and Democracy. "It's not judicial appointment. It's judicial promotion."

The process is closed off, very narrow-minded and discouraging to

highly qualified outsiders, Gardner says. He emphasizes the problem is with the process, not the candidates. State officials and a nominating commission unfortunately have subverted a reform designed to stop a previous proclivity that allowed patronage to influence judicial appointment, according to Gardner.

"It's true that the best candidates for judges often are overlooked or never make themselves available," Gardner says. "But the fundamentally closed competition for judicial appointment is a byproduct of the perversion of the process.

"Whereas Second Circuit appointees overwhelmingly have significant prior accomplishments in legal practice and executive branch service, the judges of the New York Court of Appeals are distinguished mainly for having worked their way up through the state judiciary," Gardner says. "Perhaps that is why the New York Judicial Nominating Commission received only 17 applications for Chief Judge of New York in 2008, when the position last became vacant."

Gardner points out that the alternative practice of selecting judges by popular election is frequently criticized because of the effect politics and fund-raising often play in who is nominated by their parties and who ultimately wins the election.

Gardner makes several suggestions for reform. The Nominating Commission should engage in more aggressive outreach to find better candidates, he says. He suggests that the commission restrict the number of names of sitting appellate judges it forwards to the governor. Gardner also recommends the Senate "begins to take seriously its constitutional role in the confirmation process and insist upon populating the court with independent-minded individuals from more varied backgrounds that better reflect the depth of legal talent in the state."