

## LÓPEZ TORRES: A LOST OPPORTUNITY FOR JUDICIAL REFORM

### INTRODUCTION

In 1921, as a reaction to a system viewed as corrupt and ineffective, the New York Legislature moved from a primary system for selecting trial court judge nominees to a convention system.<sup>1</sup> This convention system, unique among the fifty states, has come under heavy attack during the past decade.<sup>2</sup> Ironically, many of the same faults critics identified in the primary system a century ago are now relevant to the convention system.<sup>3</sup> In *New York State Board of Elections v. López Torres*,<sup>4</sup> the Supreme Court held that the New York system is constitutional. The Court declined to extend First Amendment protection to judicial candidates who faced substantial burdens because of the inherent flaws in the New York convention system. By doing so, the Court passed by an opportunity to ensure that New York judges are not beholden to special-interest groups or backroom politicians.

As this Comment portrays, the Court's narrow characterization of New York's judicial convention system belies the reality of a system where political parties have become the de facto appointers of judges.<sup>5</sup> The convention system makes it virtually impossible for individuals not backed by their party's leaders to gain their party's nomination.<sup>6</sup> While an individual can appear on the ballot as an independent candidate after satisfying certain requirements, the reality of New York's one-party rule makes such an effort pointless.<sup>7</sup> "[T]he general election is little more than ceremony" for those individuals whose names appear next to the dominant political party on the ballot.<sup>8</sup> For these reasons, the convention

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1. *López Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161, 172 (2d. Cir. 2006), *rev'd*, 128 S. Ct. 791 (2008).

2. See, e.g., Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791, 791-97 (2004) (stating that New York has been the epicenter for a movement calling for reforms to judicial selection processes).

3. See *López Torres*, 462 F.3d at 171-72.

4. 128 S. Ct. 791, 801 (2008).

5. The Judicial Selection Task Force, *Recommendations on the Selection of Judges and the Improvement of the Judicial Selection System in New York State*, 62 THE RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 89, 98-99 (2007) [hereinafter *Task Force*].

6. See, e.g., Norman L. Greene, *What Makes a Good Appointive System for the Selection of State Court Judges: The Vision of the Symposium*, 34 FORDHAM URB. L.J. 35, 43-46 (2007) (detailing the significant obstacles faced by individuals not backed by their parties).

7. *López Torres*, 462 F.3d at 193-94.

8. *Id.* at 178.

system places an undue burden on these individuals and, in light of past Supreme Court decisions, is inconsistent with the First Amendment.<sup>9</sup>

Part I of this Comment details the basis for a constitutional challenge against a candidate-selection process and explains how New York's convention system operates. Part II summarizes the Court's opinion in *López Torres*, including the facts, procedural history, and opinions. Part III explores two topics: (1) the flaws of the Court's narrow portrayal of the New York convention system; and (2) alternatives to the convention system including the encouraging effects such alternatives would have. This Comment concludes that the Court's holding in *López Torres* was flawed due to the Court's unwillingness to examine the practical effects of the New York convention system.

## I. BACKGROUND

### A. *Constitutional Challenges to State Imposed Candidate-Selection Processes*

Under the First Amendment, a political party is free to choose any candidate-selection process that will, in its view, produce the best nominee.<sup>10</sup> However, these rights are limited when the State gives the party a role in the election process.<sup>11</sup> One such role the State gives a party is the privilege of having their candidates' names appear on the general election ballot with a party endorsement.<sup>12</sup> By extending this right, "the State acquires a legitimate governmental interest in assuring the fairness of the party's nominating process."<sup>13</sup> This interest gives the State the prescriptive power to set the candidate-selection process for all such parties.<sup>14</sup> However, the selection process that the State dictates is subject to First Amendment limitations.<sup>15</sup>

In *California Democratic Party v. Jones*,<sup>16</sup> the Supreme Court invalidated California's blanket primary system, which allowed citizens to vote in any party primary, regardless of their current party affiliation. The Court reasoned that the blanket primary violated the First Amendment by allowing non-party members to determine a party's nominee.<sup>17</sup>

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9. See Christopher S. Elmendorf, *N.Y. State Bd. of Elections v. Torres: Is the Right to Vote a Constitutional Constraint on Partisan Nominating Conventions?*, 6 ELECTION L.J. 399, 403-11 (2007) (discussing the burdens created by New York's convention scheme and the possible models to evaluate the severity of those burdens).

10. *N.Y. State Bd. of Elections v. López Torres*, 128 S. Ct. 791, 797 (2008).

11. *Id.*

12. *Id.* at 797-98.

13. In addition, a party's conduct may become state action that violates the Fifteenth Amendment. *Id.* at 798.

14. *See id.*

15. *Id.*

16. 530 U.S. 567, 586 (2000).

17. *Id.* (stating that the blanket primary system placed a severe and unnecessary burden on the rights of political association).

The Supreme Court has also invalidated state imposed selection processes for being unduly burdensome or exclusionary on candidates.<sup>18</sup> In particular, the Court has determined that candidates must have a reasonable opportunity to appear on the general election ballot.<sup>19</sup>

#### B. *New York's Judicial Candidate-Selection Process*

In New York, the State's trial court of general jurisdiction is the Supreme Court of New York.<sup>20</sup> Each of the State's twelve judicial districts elects Supreme Court Justices to fourteen-year terms.<sup>21</sup> The current method for selecting Supreme Court Justices follows a convention system first set forth in 1921.<sup>22</sup>

New York's convention system consists of a three-part process for electing Supreme Court Justices.<sup>23</sup> First, the State holds a primary election during which registered party voters select judicial delegates.<sup>24</sup> Next, these delegates attend a convention where they select their party's nominees.<sup>25</sup> The chosen nominees automatically appear on the general election ballot with their party affiliation next to their names.<sup>26</sup> Finally, the State holds a general election during which the voting public in each judicial district chooses its justices.<sup>27</sup>

Only political parties that received 50,000 or more votes in the most recent election for governor can make judicial nominations.<sup>28</sup> Judicial candidates who fail to gain their party's nomination, or whose party does not meet the 50,000-vote threshold, can gain access to the general election ballot by submitting required nominating petitions.<sup>29</sup> However, these independent candidates' names appear on the ballot with no party affiliation.<sup>30</sup>

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18. See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 804-06 (1983) (holding that an Ohio statute requiring an unreasonably early filing deadline was unconstitutional).

19. See *id.* at 801.

20. See N.Y. CONST. art. VI, § 7.

21. N.Y. CONST. art. VI, § 6 (a)-(c) (stating that N.Y. is divided into eleven judicial districts, with the ability to add more, and that the terms of the justices shall be fourteen years); N.Y. JUD. LAW § 140 (McKinney 2005) (stating that there are twelve judicial districts).

22. N.Y. State Bd. of Elections v. *López Torres*, 128 S. Ct. 791, 796 (2008).

23. See N.Y. ELEC. LAW §§ 6-106, -124, -158, 8-100(1)(c) (McKinney 2007).

24. *Id.* §§ 6-106, -124.

25. *Id.* §§ 6-106, -124, -158.

26. *Id.* § 7-104(5)(a).

27. *Id.* § 8-100(1)(c).

28. *Id.* § 1-104(3).

29. *Id.* §§ 6-138, -142(2).

30. See *id.* § 7-116(2).

## II. NEW YORK STATE BOARD OF ELECTIONS V. LÓPEZ TORRES

A. *Facts*

Petitioner Margarita López Torres won the Brooklyn Civil Court Judge election in 1992.<sup>31</sup> Subsequently, members of the Kings County Democratic Committee, who backed López Torres' nomination, directed López Torres to hire a person of their choosing for her court attorney.<sup>32</sup> After López Torres refused, Clarence Norman, the committee chair, informed López Torres that she would never become a Supreme Court Justice.<sup>33</sup> In 1995, another committee official, Vito Lopez, informed López Torres that if she hired his daughter as her court attorney, Lopez would ensure López Torres' nomination for an upcoming Supreme Court vacancy.<sup>34</sup> López Torres refused to fire her current court attorney and turned Lopez down.<sup>35</sup> From that point forward, López Torres received no support from the committee for a Supreme Court nomination.<sup>36</sup>

The lack of support from her party's leaders made it virtually impossible for López Torres to succeed in her pursuit of a Supreme Court nomination.<sup>37</sup> In 1997, López Torres attempted to secure her party's nomination for the Supreme Court in her judicial district.<sup>38</sup> Naively, López Torres thought she could petition for a nomination at her party's convention.<sup>39</sup> However, López Torres found that without the support of her party's leaders, such as Norman and Lopez, not a single delegate would propose her for nomination.<sup>40</sup> López Torres tried several times over the next seven years to gain her party's nomination.<sup>41</sup> Each time, because of her past conflicts with Norman and López, her attempt to gain her party's nomination failed.<sup>42</sup>

B. *Procedural History*

The Second Circuit affirmed the district court's holding that the New York convention system for judicial nominations was unconstitu-

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31. López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 178 (2d Cir. 2006), *rev'd*, 128 S. Ct. 791 (2008).

32. López Torres contacted a former employer of the applicant and received a less than favorable assessment. *Id.* at 179.

33. Norman told López Torres that she "did not understand the way it works." He went on to state that someday López Torres would want to become a Supreme Court Justice and the party leaders would "not forget this." Quite bluntly, Norman stated that without the committee's support, López Torres' Supreme Court nomination "will not happen." *Id.*

34. *Id.*

35. *Id.*

36. *See id.* at 179-81.

37. *See id.*

38. N.Y. State Bd. of Elections v. López Torres, 128 S. Ct. 791, 797 (2008).

39. López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 179 (2d Cir. 2006), *rev'd*, 128 S. Ct. 791 (2008).

40. *Id.*

41. *See id.* at 180.

42. *See id.* at 180-81.

tional.<sup>43</sup> The Second Circuit found that the system effectively transformed the process of electing justices into a scheme of de facto appointment by party leaders.<sup>44</sup> In making its determination, the court rejected the state's argument that First Amendment protections only apply to direct primaries as opposed to the indirect primaries New York employs.<sup>45</sup> The court went on to state that the First Amendment not only grants candidates access to a nominating process, but also affords a realistic opportunity to participate in the process.<sup>46</sup> Participation must be free from severe and unnecessary burdens.<sup>47</sup> The court also noted that exclusion from a nominating process does not necessarily have to be categorical in nature, but can result from the aggregation of otherwise valid election regulations.<sup>48</sup>

In holding the New York system unconstitutional, the Second Circuit found the system imposed severe burdens on candidates and was exclusionary in nature.<sup>49</sup> The court also held that an alternate means of access to the general election, namely access as an independent candidate, does not automatically render the system constitutional.<sup>50</sup>

### C. Majority Opinion

The U.S. Supreme Court granted certiorari to consider whether the New York convention system violates the First Amendment rights of prospective party candidates.<sup>51</sup> In a unanimous opinion written by Justice Scalia, the Supreme Court reversed the Second Circuit's decision.<sup>52</sup> The Court held that New York is free to use a convention system for selecting candidates and the First Amendment does not compel New York to use a different system.<sup>53</sup> The Court made three findings in determining that New York's judicial candidate-selection process is constitutional.<sup>54</sup>

First, the Court found the requirements the convention system imposed upon candidates reasonable.<sup>55</sup> Specifically, the requirement that a candidate collect five hundred valid party signatures from his or her dis-

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43. See *id.* at 208.

44. *Id.* at 200.

45. *Id.* at 186 (“[C]onstitutional protection attaches to all integral phases of the nominating process, regardless of whether the nomination is conferred directly by public ballot or indirectly by the votes of elected party officials.”).

46. *Id.* at 187.

47. *Id.*

48. *Id.* (“Further, while categorical race and sex-based exclusions undoubtedly violate the associational rights of voters and candidates, exclusions that result from a *complex of otherwise facially valid regulations* also may offend the First Amendment.”) (emphasis added).

49. See *id.* at 195-201, 208.

50. *Id.* at 194-95.

51. *N.Y. State Bd. of Elections v. López Torres*, 128 S. Ct. 791, 795 (2008).

52. *Id.* at 794, 801.

53. See *id.* at 801.

54. See *id.* at 798-801.

55. *Id.* at 798.

strict within a thirty-seven day timeframe was well within the scope of requirements the Court had previously upheld.<sup>56</sup> While prior Supreme Court decisions analyzing the reasonableness of primary election requirements involved the right to vote,<sup>57</sup> the Court noted that the same principles are applicable to the right to run.<sup>58</sup>

Second, the Court found the Constitution does not require that candidates receive a “fair shot” at securing their party’s nomination.<sup>59</sup> Although the Court recognized that the party leadership effectively determined the nominees, it refused to look beyond the bare requirements to “the manner in which political actors function under those requirements.”<sup>60</sup> Relying on an institutional-competency argument, the Court noted that determining what constitutes a fair shot is better left to the legislature and is an inappropriate constitutional question for judges.<sup>61</sup>

Third, the Court rejected the argument that the convention system was unconstitutional based upon the pervasiveness of New York judicial districts with one-party rule.<sup>62</sup> The Court focused only on the requirements to gain access to the general election ballot as an independent candidate, and found these requirements reasonable.<sup>63</sup> Any measures to make the general election more competitive, beyond reasonable access to the general ballot, were not constitutionally required.<sup>64</sup> The Court noted that one-party entrenchment had never been a basis for interfering with a candidate-selection process.<sup>65</sup>

#### D. *Concurring Opinions*

Justice Stevens’s short concurring opinion, in which Justice Souter joined, stressed that the Court’s opinion is not an endorsement of New York’s candidate-selection process.<sup>66</sup> Quoting Thurgood Marshall, Justice Stevens noted that “[t]he Constitution does not prohibit legislatures from enacting stupid laws.”<sup>67</sup>

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56. *Id.* at 798-99 (stating that the requirement for a five hundred signature petition in a thirty-seven day period is “entirely reasonable”).

57. *See* *Kusper v. Pontikes*, 414 U.S. 51, 52, 61 (1973) (holding an Illinois election law that prevented some individuals from voting in their party’s primary was unconstitutional); *Rosario v. Rockefeller*, 410 U.S. 752, 756, 762 (1973) (holding a New York election law placing temporal enrollment requirements on individuals to vote in a party’s primary was constitutional).

58. *N.Y. State Bd. of Elections v. López Torres*, 128 S. Ct. 791, 798 (2008).

59. *Id.* at 799.

60. *Id.*

61. *Id.*

62. *Id.* at 800.

63. *See id.* at 798, 800.

64. *Id.* at 800.

65. *Id.* at 800-01 (stating that the First Amendment “does not call on the federal courts to manage the market by preventing too many buyers from settling upon a single product”).

66. *Id.* at 801 (Stevens, J., concurring).

67. *Id.* (citation omitted).

Justice Kennedy's concurring opinion, in which Justice Breyer joined in part, is notable in that it comments on New York's use of elections to select judges.<sup>68</sup> Justice Kennedy noted that judicial elections require candidates to conduct campaigns and raise funds, which leaves the candidates open to influence by special-interest groups and political parties.<sup>69</sup> Justice Kennedy questioned whether this process was consistent with the desire for judicial independence and excellence.<sup>70</sup> He concluded, however, that as flawed as the New York system might be, the present suit did not permit the Court to intervene on constitutional grounds.<sup>71</sup>

### III. ANALYSIS

In its opinion for *López Torres*, the Court focused only on the bare requirements set forth by New York election law, thereby narrowly portraying the effects of the convention system on judicial candidates and the voting public. Specifically, the system places an undue burden on candidates seeking a nomination, effectively excluding them from both the nomination process and general election. As such, the Court incorrectly determined that the New York convention system was constitutional under the First Amendment. In doing so, the Court passed by an opportunity to compel New York to adopt an alternative candidate-selection process that protects First Amendment rights. This alternative could have far-reaching, positive effects on New York's judicial system.

#### A. *The Flaws in the Court's Narrow Portrayal of the New York System*

By focusing only on the bare requirements set forth in New York election law, the Court did not consider the practical effects these requirements have on judicial candidates and the voting public. However, past Supreme Court decisions have taken the practical effects of election requirements into consideration, and based on those effects, held state election laws unconstitutional.<sup>72</sup>

By narrowly portraying the New York convention system, the Court failed to address several significant, unconstitutional effects of the system. Specifically, the Court erred in three ways: (1) it failed to address properly the aggregate effect of the requirements and the burden these requirements place upon candidates; (2) it ignored the exclusionary effect of New York's convention system on judicial candidates; and (3) it

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68. *Id.* at 801, 803 (Kennedy, J., concurring).

69. *Id.* at 803.

70. *Id.* (stating that a selection process that is open to manipulation, criticism, and serious abuse is unfair to the concept of judicial independence).

71. *See id.*

72. *See* *Bullock v. Carter*, 405 U.S. 134, 149 (1972) (holding that a Texas filing fee was unconstitutional because of the fee's effect on candidates); *see also* *Williams v. Rhodes*, 393 U.S. 23, 24 (1968) (holding that an Ohio election law was unconstitutional because of the law's effect on new political parties).

did not give sufficient weight to the convention system's effect on the independence and quality of New York Supreme Court Justices.

### 1. Significant Burden Placed on Individuals Seeking a Nomination

During the primary election phase of the New York convention system, candidates not backed by their party face obstacles so burdensome that success is virtually impossible.<sup>73</sup> Judicial candidates themselves do not take part in the primary elections.<sup>74</sup> Instead, "rank-and-file party members elect judicial delegates" who attend the party's convention and select the party's nominees.<sup>75</sup> Consequently, a judicial candidate must assemble a slate of delegates to run on his or her behalf, trusting these delegates will nominate him or her at the convention.<sup>76</sup>

Each judicial district within New York is comprised of between nine and twenty-four assembly districts.<sup>77</sup> Small subgroups of potential delegates run against each other in each assembly district.<sup>78</sup> In effect, the primary election consists of a series of contests between groups of delegates within each assembly district.<sup>79</sup>

To appear on the primary ballot, each delegate is required to gather five hundred valid signatures from party members residing in his or her particular assembly district within a thirty-seven day period.<sup>80</sup> Because signatures are often challenged, delegates "must realistically gather between 1000 and 1500 signatures to gain a primary ballot position."<sup>81</sup> Therefore, depending on the number of assembly districts in his or her judicial district, a judicial candidate is responsible for between 9,000 and 24,000 signatures to ensure his or her slate of delegates appears on the primary ballot.<sup>82</sup> Additionally, the primary ballot does not indicate the judicial candidate with whom each delegate is associated.<sup>83</sup> This has the effect of requiring judicial candidates to mount a separate voter education campaign for each assembly district.<sup>84</sup>

The aggregate effect of these requirements places a significant burden on candidates lacking support from their political party, even for

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73. See *López Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161, 172-75 (2d. Cir. 2006), *rev'd*, 128 S. Ct. 791 (2008).

74. *Id.* at 172.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* (citing N.Y. ELEC. LAW § 6-124 (McKinney 2007)).

79. *Id.*

80. N.Y. ELEC. LAW §§ 6-134(4), 136(2)(i) (McKinney 2007).

81. *López Torres*, 462 F.3d at 173 (stating that because each party member can sign only one petition, signatures are routinely and successfully challenged under the one-petition signature rule).

82. *Id.*

83. *Id.*

84. See *id.* (stating that the candidate must inform the primary electorate in each assembly district of which delegates are pledged to him or her).

those who possess significant public support.<sup>85</sup> However, candidates who are backed by their local party leadership “easily navigate the primary system with the benefit of the party’s pre-existing apparatus.”<sup>86</sup> Because of the burden placed upon candidates not backed by their party, the vast majority of primary elections are uncontested.<sup>87</sup> Thus, the majority of party-backed delegates run unopposed, are simply deemed elected, and do not even appear on the primary ballot.<sup>88</sup>

In past decisions, the Supreme Court has looked at the aggregate effect of election requirements in determining constitutionality. For example, in *Williams v. Rhodes*, the Court looked at the totality of the effect of Ohio’s election laws in determining whether the requirements were unconstitutionally burdensome on political parties seeking to appear on the state ballot.<sup>89</sup> To appear on the state ballot, Ohio election law required new political parties to collect a large number of signatures, file earlier than existing parties, and conduct a primary election that conformed to detailed and rigorous standards.<sup>90</sup> The Court noted that the laws made it virtually impossible for some political parties, regardless of how much popular support they had, to appear successfully on the state ballot.<sup>91</sup> In holding that the Ohio election laws were unconstitutional, the Court considered the aggregate effect of the requirements, rather than considering each bare requirement on its own.<sup>92</sup>

The New York system places a similar unconstitutional burden on candidates not backed by their party. López Torres enjoyed popular support from the public, but lacked her party’s support. As evidenced by her lack of success, and the lack of success of many other candidates not backed by their party,<sup>93</sup> the burden on these individuals is impossibly high.<sup>94</sup> The New York system has the practical effect of requiring candidates to collect up to 24,000 signatures in thirty-seven days and hold a separate voter education campaign in up to twenty-four assembly districts.<sup>95</sup> Taken together, the effects of these requirements make seeking a nomination impractical without the institutional support of a candidate’s party. Thus, the New York system places an unconstitutional burden on candidates not backed by their parties.

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85. *See id.* at 174-75.

86. *Id.* at 175.

87. *See id.* (stating that between 1999 and 2002, four counties did not field a single contested delegate race).

88. *Id.* (“This kind of invisible, automatic ‘election’ is the norm rather than the exception.”).

89. *See Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

90. *See id.* at 27.

91. *Id.* at 24.

92. *See id.* at 38.

93. *See López Torres*, 462 F.3d at 174.

94. *See id.*

95. *Id.* at 197.

## 2. Exclusionary Effect of the Requirements on Judicial Candidates

In *López Torres*, the Court determined that the requirements for a delegate to get on the primary ballot were not exclusionary.<sup>96</sup> By not considering the practical effects of the New York system, the Court ignored its exclusionary nature. Just as it has when considering the burden election requirements place on candidates, the Supreme Court has also taken the practical effects of election requirements into consideration when analyzing whether the requirements are exclusionary.

In *Bullock v. Carter*, the Court analyzed the constitutionality of a Texas filing fee for primary elections.<sup>97</sup> Instead of simply examining the specific dollar amount required by Texas law, the Court looked at the effect the fee had on particular candidates.<sup>98</sup> The Court noted that candidates lacking both personal wealth and affluent background are in every practical sense precluded from seeking their party's nomination.<sup>99</sup> As such, the Court held that the fee was exclusionary.<sup>100</sup> Additionally, the fee had the effect of substantially limiting the voters' choices during the primary election.<sup>101</sup>

In practice, the New York election scheme has a similar exclusionary effect. As detailed above,<sup>102</sup> the lack of support of their party's leaders essentially excludes candidates from their party's nomination process. Just as the filing fee in *Bullock* had the practical effect of excluding candidates lacking particular resources, the New York scheme has the practical effect of excluding candidates who refuse to play the game with their political party.

The exclusionary nature of the New York system goes beyond just the primary election. Once the party delegates are determined, the nominating convention takes place. No debate or competition takes place at the nominating convention.<sup>103</sup> The vast majority of nominations are by unanimous voice vote.<sup>104</sup> Because the vast majority of nominations are uncontested, many delegates choose not to attend the nominating convention.<sup>105</sup> Consequently, delegate absentee rates have been as high as

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96. See *N.Y. State Bd. of Elections v. López Torres*, 128 S. Ct. 791, 798 (2008).

97. *Bullock v. Carter*, 405 U.S. 134, 135 (1972).

98. See *id.* at 143.

99. *Id.*

100. See *id.* at 143-44 (stating that the Texas scheme had a real and appreciable *impact* on particular candidates) (emphasis added).

101. See *id.* at 149.

102. See *supra* notes 73-88, 93-95 and accompanying text.

103. *López Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161, 178 (2d Cir. 2006), *rev'd*, 128 S. Ct. 791 (2008).

104. *Id.* (stating that between 1990 and 2002, over ninety-six percent of nominations went uncontested).

105. *Id.* ("Not only were the conventions devoid of debate and competition, they were fleeting. Over a 12-year span, conventions statewide averaged a mere 55 minutes in length. In 1996, the Second Judicial District's convention lasted 11 minutes but yielded eight nominations.").

sixty-nine percent.<sup>106</sup> Candidates whose slate of delegates was unsuccessful at the primary election have no chance of securing the nomination independently at the convention.<sup>107</sup>

Candidates nominated at the convention appear on the general election ballot with their party designation.<sup>108</sup> For those candidates associated with the majority political party, the general election is “little more than ceremony” due to one-party rule in most judicial districts.<sup>109</sup> During a twelve-year period ending in 2002, in eight of the state’s twelve judicial districts, almost half of the Supreme Court Justice elections were uncontested.<sup>110</sup> In the Sixth Judicial District during this period, the uncontested rate was ninety-one percent.<sup>111</sup>

When the Court examined whether the general election was exclusionary, it looked only at the requirement to gain access to the general election ballot as an independent candidate, not at the practical effect of trying to do so.<sup>112</sup> The Court stated that a candidate’s interests are protected as long as the candidate has “an adequate opportunity to appear on the general-election ballot.”<sup>113</sup> The Court did not address the domino effect the New York system has on candidates not backed by their parties. In reality, candidates not backed by their party are not able to secure a nomination and thus cannot appear on the general election ballot with their party designation.<sup>114</sup> Without a party designation, candidates cannot win the general election.<sup>115</sup> In effect, the system excludes certain types of candidates during the general election, just as it does during the primary and convention phases, by making success impossible.

The Court has also expressed concern over the exclusionary effects of requirements when they “limit the field of candidates from which voters can choose.”<sup>116</sup> In examining these effects, the Court has stated, “it is essential to examine in a realistic light the extent and nature of their impact on voters.”<sup>117</sup> While the New York system may not directly limit the field of candidates in the general election, it does effectively limit the field of candidates during the nominating convention.<sup>118</sup> Thus, the sys-

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106. *Id.*

107. *See id.* at 176-77.

108. *See* N.Y. State Bd. of Elections v. López Torres, 128 S. Ct. 791, 802 (2008) (Kennedy, J., concurring).

109. *López Torres*, 462 F.3d at 178.

110. *Id.*

111. *Id.*

112. *See López Torres*, 128 S. Ct. at 800.

113. *Id.*

114. *See supra* notes 73-88, 93-95, 108 and accompanying text.

115. *See supra* notes 108-11 and accompanying text.

116. *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972) stating that restrictions that limit voters’ choices are of a primary concern).

117. *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

118. *See supra* notes 82-88, 94-95 and accompanying text.

tem has an appreciable impact on voters by limiting the general ballot to candidates that each party has sanctified.

### 3. The Effect on the Independence and Quality of New York Supreme Court Justices

The New York system also has a negative effect on the independence and quality of New York Supreme Court Justices.<sup>119</sup> While these negative effects alone may be insufficient to deem the New York system unconstitutional, they warrant consideration with regard to the overall effect of the system on the public.<sup>120</sup> Because the Court did not consider the practical effects of the New York system, it failed to give any weight to these judicial independence and quality concerns.

As detailed above,<sup>121</sup> the New York convention system results in party leaders effectively determining who will become a Supreme Court Justice. As noted by the Commission to Promote Public Confidence in Judicial Elections,<sup>122</sup> the system “vests almost total control in the hands of local political leaders . . . .”<sup>123</sup> The Task Force on Judicial Diversity<sup>124</sup> further noted that because of one-party rule, “most often this nomination is tantamount to election.”<sup>125</sup>

Knowing success is impossible without their party leaders, candidates feel the need to be responsive to their party in order to obtain and retain their positions.<sup>126</sup> This increased level of political pressure affects a judge’s decisions and thus judicial independence.<sup>127</sup> After all, judicial independence can only exist if there is immunity from outside political pressures in the resolution of individual cases.<sup>128</sup> López Torres was denied a nomination because she refused to hire a particular law clerk. Likely, political parties will make further demands once individuals get on the bench.

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119. See Zeidman, *supra* note 2, at 803-29.

120. See Pamela S. Karlan, *Judicial Independences*, 95 GEO. L.J. 1041, 1046 (2007) (stating that if elections “introduce random volatility and noise into the selection or retention of judges, they are certainly a bad thing.”).

121. See *supra* note 5 and accompanying text.

122. New York State’s Chief Judge Judith S. Kaye created the Commission to Promote Public Confidence in Judicial Elections in 2003. The New York State Commission to Promote Public Confidence in Judicial Elections, <http://law.fordham.edu/commission/judiciaelections/main.ihtml> (last visited October 30, 2008). The Commission was charged with determining how to better improve voter participation in the judicial election process. The Commission included judges, academics, public servants, and private practitioners. *López Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161, 172-76 (2d. Cir. 2006), *rev’d*, 128 S. Ct. 791 (2008).

123. *López Torres*, 462 F.3d at 181.

124. Created by Governor Mario Cuomo in 1991 to study minority representation in the New York judiciary. *Id.*

125. *Id.*

126. See Zeidman, *supra* note 2, at 826-27.

127. *Id.* at 825.

128. Richard B. Saphire & Paul Moke, *The Ideologies of Judicial Selection: Empiricism and the Transformation of the Judicial Selection Debate*, 39 U. TOL. L. REV. 551, 559-60 (2008).

Additionally, otherwise qualified candidates may choose not to pursue a judgeship because they are not politically savvy or are unwilling to play the political game.<sup>129</sup> This affects the overall quality of Supreme Court Justices since the “qualities of a [politically savvy] campaigner may be very different from those of a good judge.”<sup>130</sup>

#### B. *Alternative Judicial Candidate-Selection Processes*

Although the Court did not force New York to change its convention system, change nevertheless seems likely.<sup>131</sup> There are a number of alternative candidate-selection processes available should New York abandon the current system. While none of the alternatives address all of the concerns with judicial selection, two alternatives are a marked improvement over New York’s current system. If New York opts to maintain judicial elections, the current convention system could be reformed. If judicial elections are deserted, a commission-based appointive system may be the best alternative.

##### 1. Reformed Convention System

Although the New York convention system is flawed, it does not need to be completely abandoned. If New York is determined to continue electing Supreme Court Justices, reforms could be made to the current convention system to address the concerns outlined above. These reforms, however, should be limited. For example, there would be several problems with moving from the current system to a primary-only election model. A primary election would force candidates to raise large sums of money and conduct campaigns, just as the convention system does.<sup>132</sup> In fact, the costs and burdens of running a district-wide primary campaign would likely be “more daunting” than under the convention system.<sup>133</sup>

Keeping these concerns in mind, the Judicial Selection Task Force<sup>134</sup> has proposed reforms to the current convention system.<sup>135</sup> While the Task Force prefers a commission-based appointment system, it recognizes that reforms may be needed before the New York State Constitution can be amended.<sup>136</sup> The Task Force’s proposal consists of several changes to the current system.

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129. Zeidman, *supra* note 2, at 826.

130. *Id.*

131. *See, e.g.*, Greene, *supra* note 6, at 41-47 (explaining the political climate in New York after the district court and Second Circuit decisions); *see also* Zeidman, *supra* note 2, at 829-31.

132. Task Force, *supra* note 5, at 108.

133. *Id.*

134. The Judicial Selection Task Force was created by the Association of the Bar of the City of New York in March of 2006. The Task Force’s mission was to make recommendations on improving the judicial selection system in New York State. *Id.* at 91.

135. *Id.* at 107-16.

136. *Id.* at 107.

First, each judicial district would be divided up into judicial convention districts, for the purpose of nominating justices.<sup>137</sup> These convention districts would be grouped into eight geographic regions.<sup>138</sup> Within each region, a judicial qualification commission (JQC) would be established.<sup>139</sup>

JQCs would consist of twenty-one members.<sup>140</sup> These members would include executive, legislative and judicial government representatives, as well as a mix of community members from inside and outside the legal profession.<sup>141</sup> JQC members would be limited to serving on the committee for no more than three consecutive years.<sup>142</sup>

Potential judicial candidates would be required to submit their qualifications to the JQC.<sup>143</sup> The JQC would then determine the three most qualified candidates for the first vacancy.<sup>144</sup> The next two most qualified candidates would then be recommended for each additional vacancy.<sup>145</sup> However, if an incumbent were to seek reelection, and the JQC determined that the incumbent was highly qualified, he or she would be the JQC's only recommendation for the vacancy.<sup>146</sup>

Delegates to each party's convention would still be selected by a primary election.<sup>147</sup> However, the signature requirement to appear on the primary ballot would be decreased.<sup>148</sup> More importantly, delegates would be allowed to identify the candidate they have pledged to nominate, thereby removing the need for candidates to run multiple voter education campaigns.<sup>149</sup>

Prior to both the primary and general election, the JQC would publish a judicial voters' guide, complete with biographical information on each candidate who submitted his or her qualifications.<sup>150</sup> The guide would also include the JQC's recommendations for each judicial vacancy.<sup>151</sup> The Task Force notes that these reforms retain several flaws of

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137. *Id.* at 112 (stating that each judicial convention district would consist of two or three assembly districts).

138. *Id.*

139. JQCs would not be limited to reviewing the qualifications of only Supreme Court Justices. They would also review candidates for District and City Courts, the Civil Court of the City of New York, the Surrogate and County Courts, and the Family Court outside of the City of New York. *Id.*

140. *Id.*

141. *Id.* (stating that each JQC should broadly represent the community within its region, including race, ethnicity, gender, religion, and sexual orientation as diversity factors).

142. *Id.* at 113.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 113-14.

148. *Id.* at 114 (stating that delegates would need two hundred signatures at most).

149. *Id.*

150. *Id.* at 114-15.

151. *Id.* (stating that the guide would indicate in each candidate's biographical entry whether the candidate was rated most qualified, highly qualified, or unqualified).

the current system.<sup>152</sup> However, the Task Force recognizes that a commission-based appointive system, which would require an amendment to the New York State Constitution, could take time to implement.<sup>153</sup> As such, reforms to the current system could alleviate some of the concerns in a more timely fashion.

## 2. Moving Away from Judicial Elections

### a. The Concern with Judicial Elections

As pointed out by Justice Kennedy in his concurring opinion, “the Framers did not provide for election of federal judges, [but] most states have made the opposite choice, at least to some extent.”<sup>154</sup> While states have the authority to hold elections for state judges, there are many concerns in relation to judicial elections.<sup>155</sup> The most common concerns involve the reality of what candidates must do to win judicial elections.<sup>156</sup> This includes the costs and combative nature of elections, as well as the concern that judges will decide cases based upon what is popular, and not based upon the law and facts.<sup>157</sup>

In addition, there is an expectation among the public that judges should be as independent and impartial as possible.<sup>158</sup> However, the “need to raise campaign funds, among other things, threatens the appearance (or fact) of impartiality.”<sup>159</sup> Independence also suffers when political leaders control elections, which is an occurrence New York’s convention system facilitates. These elective systems elevate party favorites and value party loyalty over the quality of the candidate.<sup>160</sup> The need for

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152. *Id.* at 109-11 (stating that even under the reformed system candidates would still face burdens and costs).

153. *Id.* at 111.

154. *N.Y. State Bd. of Elections v. López Torres*, 128 S. Ct. 791, 803 (2008) (Kennedy, J., concurring).

155. See David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 269 (2008) (stating that competitive judicial elections undermine the capacity of state courts to safeguard nonjudicial elections and public values); Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2204-05 (2006) (describing several concerns including the possibility that elected judges are more likely to be biased against out-of-state residents). *But see* Carolyn Dineen King, *Current Challenges to the Federal Judiciary*, 66 LA. L. REV. 661, 667 (2006) (arguing that the appointive system for federal appellate judges conveys to the public “the notion that the Judiciary is yet another political branch of government, a kind of stepchild of the other two branches . . . and when the Judiciary is perceived as a stepchild of the political branches of government, the separation of the three branches of government is impaired.”).

156. See Pozen, *supra* note 155, at 267-68, 278.

157. See *id.* at 277 (stating that elected judges will tend to be more sensitive to popular opinion); Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1081 (2007) (“Judicial elections have become nastier, nosier, and costlier.”).

158. See *López Torres*, 128 S. Ct. at 803 (Kennedy, J., concurring).

159. Greene, *supra* note 6, at 38. See also Marilyn S. Kite, *Wyoming’s Judicial Selection Process: Is it Getting the Job Done?*, 34 FORDHAM URB. L.J. 203, 203 (2007) (“Public perception of political influence on the judiciary, whether through money or political affiliation, undermines the citizenry’s confidence in the integrity of the system.”).

160. Greene, *supra* note 6, at 38.

an independent judiciary cannot be overstated. Such a concern has long been a part of politics in the United States.<sup>161</sup>

Many of these concerns have been validated. A report prepared by Professor Steven Zeidman,<sup>162</sup> which compared the relative quality of appointed and elected judges in New York, found that elected judges “far surpass their appointed colleagues in incidents of judicial discipline.”<sup>163</sup> In addition, Professor Zeidman found that elections result in a less diverse judiciary.<sup>164</sup>

#### b. Commission-Based Appointments

In reaction to these concerns, several groups have advocated that New York move away from judicial elections to commission-based appointments.<sup>165</sup> The groups suggest that commission-based appointments would remove political considerations from judicial selection as much as possible and increase the quality of state judges.<sup>166</sup> The groups advocate the formation of commissions, consisting of government and community members, which would make merit-based recommendations for judicial appointments.<sup>167</sup>

For example, the Judicial Selection Task Force suggests that New York create JQCs, similar to the ones discussed above, which would make recommendations to the Governor for state judicial appointments.<sup>168</sup>

During a symposium held at Fordham Law School in 2006, participants made several suggestions for commission-based appointments.<sup>169</sup> Participants stressed that the commissions should be as diverse as possi-

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161. See THE FEDERALIST NO. 78, at 527 (Alexander Hamilton) (Jacob E. Cook ed., 1961) (stating that the independent spirit of judges is essential to the faithful performance of their duties).

162. Steven Zeidman is an Associate Professor at CUNY School of Law. Zeidman, *supra* note 2, at 836 n.1.

163. *Id.* at 809. But see Michael E. DeBow, *State Judicial Selection: Once More Unto the Breach*, 9 ENGAGE 128, 128 (2008), available at [http://www.fed-soc.org/publications/pubID.696/pub\\_detail.asp](http://www.fed-soc.org/publications/pubID.696/pub_detail.asp) (follow “State Judicial Selection: Once More Unto the Breach” hyperlink) (“There is a large body of social science research on state supreme courts and it shows that there is no real, observable difference between the judges chosen in merit selection states, and those chosen in other states.”).

164. Zeidman, *supra* note 2, at 817 (stating that when examined on a statewide basis, elections produce a disproportionately white judiciary).

165. See, e.g., Greene, *supra* note 6, at 41 (stating that the best permanent solution would be to move away from judicial elections to a merit-based appointment system); Task Force, *supra* note 5, at 93 (“[T]he Task Force firmly reiterates the Association’s long-standing position in favor of a commission-based appointive system.”).

166. See Zeidman, *supra* note 2, at 834; Mark S. Cady & Jess R. Phelps, *Preserving the Delicate Balance Between Judicial Accountability and Independence: Merit Selection in the Post-White World*, 17 CORNELL J.L. & PUB. POL’Y 343, 345 (2008).

167. See Zeidman, *supra* note 2, at 831-32.

168. Task Force, *supra* note 5, at 103-08.

169. The symposium’s purpose was to guide the reform of judicial selection processes. Participants included political scientists, lawyers, law professors, and judges from various states. See Greene, *supra* note 6, at 36-37.

ble with respect to race, political affiliation, and legal specialty.<sup>170</sup> They also suggested that the commission proceedings be open to the public to avoid secrecy and public distrust of the process.<sup>171</sup> However, one participant cautioned that excessive openness might drive away some candidates.<sup>172</sup>

Professor Zeidman has also outlined a commission-based appointment system. Like several other groups, he suggests that the nominating commission be as diverse as possible.<sup>173</sup> He notes that the more diverse the commission, “the more likely it is to produce a representative and high quality judiciary.”<sup>174</sup> The commission would identify, recruit, interview, evaluate, and recommend candidates to the appointing authority.<sup>175</sup> The appointing authority, likely a designated executive, would choose from the recommended candidates within a specified time frame.<sup>176</sup> Professor Zeidman also advocates that states move away from retention elections and instead charge the nominating commission with recommending whether an existing judge be retained.<sup>177</sup>

#### CONCLUSION

By ignoring the significant practical effects of the New York convention system, the Court incorrectly held that the system was constitutional. Although the Court stated that it had not focused on “the manner in which political actors function under . . . [election] requirements,” past decisions are inconsistent with that assertion.<sup>178</sup> In reality, the New York system places significant burdens on candidates, excludes candidates not backed by their party, and endangers the independence and quality of the judiciary.

The Court declined an opportunity to push New York towards a judicial selection process that would benefit both judicial candidates and the public. Such alternatives would increase the quality and diversity of the judiciary while raising the public’s confidence in the judicial system. The importance of such judicial reforms cannot be underestimated. As Justice Kennedy stated, “[t]he rule of law, which is the foundation of freedom, presupposes a functioning judiciary respected for its independ-

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170. *See id.* at 49.

171. *Id.* at 56-58.

172. *Id.* at 60 (stating that discussions within the commission should remain private, while names of finalists should be publicized).

173. Zeidman, *supra* note 2, at 831-32.

174. *Id.* at 832.

175. *Id.*

176. *Id.*

177. *Id.* at 833 (stating that the commission would recommend whether to reappoint the judge based upon judicial performance evaluations and reviews).

178. *N.Y. State Bd. of Elections v. López Torres*, 128 S. Ct. 791, 799 (2008).

ence, its professional attainments, and the absolute probity of its judges.”<sup>179</sup>

*Justin Schneider\**

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179. *Id.* at 803 (Kennedy, J., concurring).

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