

U.S. Supreme Court Case Preview

Did I-872 Take Washington State's Voters on an Unconstitutional Detour?: Partisanship in Primaries in *Washington v. Washington State Republican Party*

JOSEPH M. BIRKENSTOCK

INTRODUCTION

IN *WASHINGTON v. Washington State Republican Party*,¹ the Supreme Court will consider a constitutional challenge to the so-called "modified blanket primary." The "modified blanket primary" is the latest in a series of efforts in Washington state aimed at enacting a more open primary structure, and reducing or eliminating the role of political parties in nominating candidates for the general election. Voters in the state of Washington enacted Initiative 872 (I-872), the ballot measure creating the contested primary structure, by a wide majority in the 2004 general election.

Although aimed at enacting the kind of non-partisan primary envisioned in Supreme Court dicta from *California Democratic Party v. Jones*,² and yet alleged to be functionally similar instead to the blanket, partisan primary overturned in that case, the system put in place by I-872 effectively is neither. It is not a truly non-partisan system since each candidate can select a party "preference" to be listed on the ballot—nor is it a partisan system, however, at least as historically understood, since that partisan identification is not and does not claim to be the

result of an official party nomination. Rather, the party identification portrayed for a candidate on the I-872 ballot is merely the one-sided choice of the candidate, made without the party's consent and potentially even over the party's objection. This "half-partisan" approach is novel and creative, and it attracted the support of nearly 60 percent of the Washington electorate. But by allowing a candidate to unilaterally affiliate with a party, I-872 poses a significant challenge to the rights of political parties to define the scope of their own association.

PROCEDURAL POSTURE

The case comes before the Court on a petition for a writ of certiorari filed by the State of Washington. The petition names not only the state political parties as respondents—the Washington State Republican Party was a plaintiff-appellee below and the Democratic and Libertarian parties were intervenor plaintiff-appellees—but also names as a respondent the Washington State Grange itself, which sponsored Initiative 872 and was an intervenor defendant-appellant below.³

The author is a member in the political law practice at Caplin & Drysdale, Chtd., in Washington D.C., and formerly served as Chief Counsel of the Democratic National Committee. He wishes to thank Elizabeth Grossman, a 2007 summer associate at Caplin & Drysdale, for providing outstanding research assistance.

¹ See *Wash. v. Wash. State Republican Party*, 127 S. Ct. 1373 (2007).

² 530 U.S. 567 (2000).

³ See *Wash. v. Wash. State Republican Party*, petition for cert. filed, 2006 WL 3381604 (U.S. Nov. 20, 2006) (No. 06-713).

BACKGROUND

The path for I-872 was first laid out in the wake of the Court's 2000 opinion in *Jones*, which overturned an effort in California to implement a "blanket" primary. That blanket primary would have placed all candidates in the primary election on the same ballot, allowing all voters to choose candidates from any party. The candidate from each party who won the most votes in the primary would go onto the general election ballot as that party's "nominee."

Since this structure effectively prevented each of the California political parties from excluding non-members from the process of choosing that party's nominees, the Supreme Court held the California blanket primary unconstitutionally burdened the parties' associational rights. The State of Washington, meanwhile, had long been using a blanket primary virtually identical to the one litigated in California. Relying on *Jones*, the Ninth Circuit invalidated Washington's blanket primary in 2003.⁴ These developments set the stage for the Washington State Grange to introduce and win the enactment of Initiative 872.⁵

Under I-872, each primary election voter would be allowed to vote for any candidate on the ballot, regardless of both the voter's political party affiliation and the candidate's stated "party preference." The primary voter would not be limited to choosing among only those candidates identifying with one particular party, but would be permitted to vote for candidates for different offices indicating different party preferences. In this regard, the approach taken in I-872 generally resembles the blanket primary invalidated by the Supreme Court in *Jones*. The I-872 system, however, is different in two respects.

First, under I-872 a candidate would self-identify his or her partisan "preference." The candidate's party preference would then be indicated next to the candidate's name on the primary and general election ballots.⁶ Importantly, the candidate could choose to indicate his or her party preference on the ballot without the approval—and even contrary to the wishes of—the political party for which the candidate expressed his or her preference.

Second, under I-872 only the top two candidates—those receiving the greatest number of votes in the primary—advance to the general election, *regardless* of the partisan identification of those candidates. In this specific sense, the I-872 approach would operate more like Louisiana's "top two" system than like the blanket system addressed in *Jones*.⁷

As detailed below, this so-called "modified blanket primary" can be seen as something of a half-measure towards creating an entirely nonpartisan election process. The I-872 primary system serves to eliminate the role of the political parties in nominating candidates to affirmatively represent the party in the general election, but candidates may nevertheless align themselves with a party under I-872 by indicating their party "preference" on the ballot.

ANALYSIS

Determining the constitutionality of this approach will require the Supreme Court to consider what constitutes a "nonpartisan primary" pursuant to dicta in *Jones* indicating that blan-

⁴ See *Democratic Party of Wash. v. Reed*, 343 F.3d 1198 (9th Cir. 2003).

⁵ Formally known as the Order of the Patrons of Husbandry, the Grange is a farm-based fraternal and agricultural organization. See <<http://www.nationalgrange.org/about/history.html>> (last visited June 28, 2007). Although not a political party, the Washington State Grange has engaged very effectively in Washington politics through direct democracy, sponsoring and winning the passage of several ballot initiatives, including I-872. The Grange also sponsored Initiative to the Legislature No. 2, which first established Washington's blanket primary in 1935.

⁶ Note that the candidates' party preference indicated on the ballot may not be changed between the primary and general elections.

⁷ In Louisiana, all candidates for an office, regardless of party affiliation, are placed on one official primary ballot. If one candidate receives a majority of all votes cast in the primary, he or she wins the election and will assume office. If no candidate receives a majority of the votes in the primary, the two candidates who received the most votes in the primary, regardless of party affiliation, advance to a run-off general election. John C. Kuzenski, *The Four—Yes, Four—Types of State Primaries*, 30 PS: POLITICAL SCIENCE AND POLITICS 207 (June 1997). As noted above, in the California blanket system struck down in *Jones*, the candidate winning the greatest number of primary votes within each party advanced to the general election. See *Jones*, 530 U.S. at 570.

ket primaries are permissible as long as they do not “choose[] a party’s nominee.”⁸

Both the Supreme Court and the Ninth Circuit Court of Appeals have acknowledged that a political party has a fundamental associational interest in choosing the process through which it will identify its own standard bearer.⁹ States are not required to adopt partisan election processes—that is, states are not required to organize or fund the means by which a party chooses its nominee for the general election. Nor are states required to provide for automatic general election ballot access to such party nominees. But *California Democratic Party v. Jones* established that when a state does provide a mechanism for “winnowing” the list of candidates for the general election, it may not implement that mechanism in a way that removes a party’s control over the choice of its nominee by allowing non-party members to vote for a candidate that will become that party’s “standard bearer” in the general election. A state employing such a process will have unconstitutionally burdened the party’s association rights.¹⁰

The challengers to I-872 contend that Washington’s “modified blanket primary” burdens parties’ associational rights in a similar, but not identical way. They argue that, like the California blanket primary struck down in *Jones*, I-872 impermissibly infringes each party’s ability to identify its own candidates. Unlike in *Jones* however, the argument here is not principally that I-872 would allow non-members to vote for a given party’s nominees (although the blanket nature of the I-872 process would allow such cross-party voting), but that I-872 goes even further by not allowing parties to prevent even candidates openly hostile to their ideology and politics from claiming affiliation.

Thus, the first question the Supreme Court must resolve here is whether, under I-872, a given candidate will effectively exit the primary election as a particular party’s “nominee” or “standard bearer.” In *Jones*, the California Election Code explicitly stated that the candidate of each party who won the greatest number of votes in the California blanket primary would be “the nominee of that party at the ensuing general election.”¹¹ The Court will uphold the Ninth Circuit and invalidate the ini-

tiative if it finds that the I-872 process operates similarly.

Proponents of I-872 argue that the Washington “modified blanket primary” is sufficiently distinguishable from the California blanket primary in the sense that it does not produce party nominees or standard bearers. This is so, they say, because the top two vote-getters advance from the primary to the general, regardless of their partisan affiliation, and because under I-872 candidates would merely be indicating a partisan “preference” on the primary ballot and would not be holding themselves out as the officially endorsed representatives of the party. Proponents argue that this expression of “preference” merely serves as a helpful signpost for voters that suggests the candidates’ political views and does not necessarily turn a candidate into a standard bearer. Supporters also argue that parties may still select and promote a standard bearer through private means independent of the state sponsored primary.

On appeal, however, the Ninth Circuit found that there is not a meaningful distinction between a party “preference” and a party “designation” or some other stronger indication of party affiliation.¹² The court also noted that a candidate may emerge from a primary election under I-872 as the only candidate bearing a particular party designation—and that this may occur whether or not the party wants to be associated with that candidate.¹³ “Party designation,” said the Ninth Circuit, “is a powerful, partisan message that voters may rely upon in casting a vote—in the primary and in the general election.”¹⁴ The Ninth Circuit held that the I-872 mechanism contains the “constitutionally crucial” flaw identified in *Jones*: “[n]ot only does a candidate’s expression of a party preference on the ballot cause the primary to re-

⁸ *Jones*, 530 U.S. at 585–86.

⁹ See, e.g., *Clingman v. Beaver*, 544 U.S. 581 (2005); *Jones*, 530 U.S. 567; *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986); *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Wash. State Republican Party v. Wash.*, 460 F.3d 1108 (9th Cir. 2006).

¹⁰ See *Jones*, 530 U.S. at 575–576.

¹¹ *Jones*, 530 U.S. at 570.

¹² *Wash. State Republican Party*, 460 F.3d at 1119.

¹³ *Id.* at 1118.

¹⁴ *Id.*

main partisan, but in effect it forces political parties to be associated with self-identified candidates not of the parties' choosing."¹⁵ As such, the Ninth Circuit found that the I-872 primary would place a severe and unconstitutional burden upon the political parties' associational rights.

Although the Ninth Circuit acknowledged the role that "party designation" plays as a factor in the decisions individual voters make in choosing for whom to vote, the court took the analysis no further. A more searching inquiry, and one more relevant to the issues presented by I-872, would ask whether voters put the same weight on a candidate's one-sided, self-identification of party preference as they would on the explicit endorsement provided when a party affirmatively and overtly holds a particular candidate out as its nominee.

To be sure, I-872 supporters argue that the self-identified partisan preference accommodates voters' legitimate interest in receiving relevant information about the candidates, and that I-872 makes clear that the "modified blanket" ballot allows only this "one-sided expression of preference." Opponents, however, argue not only that a party's endorsement of a particular candidate (and especially the lack thereof) is information that is also relevant to voters, but also that a long line of cases has firmly established the premise that a political party has a constitutional right to be protected from involuntary association with candidates they do not support.¹⁶

Like much constitutional litigation, it appears that the Court's determination of the appropriate standard of review may decide this case. The proponents of I-872 do not argue that, under strict scrutiny, the initiative serves a compelling state interest or that it is narrowly tailored. Instead, supporters have argued that the burden I-872 imposes on party associational rights is not severe enough to warrant strict scrutiny. As discussed above, however, the Ninth Circuit concluded that the indication of party preference on the I-872 primary ballot would severely burden political parties' associational rights under the U.S. Constitution.¹⁷ The court also stated that any compelling state interests that might exist could be served by a more narrowly tailored primary system, such

as a true nonpartisan primary, although it provided little analysis of these points.¹⁸

While proponents did not argue on appeal that I-872 served compelling state interests and did so in a narrowly tailored manner, the initiative's promoters did argue for the severability of the provisions found unconstitutional by the Ninth Circuit. In particular, supporters contended that the court should sever the party preference provisions of I-872, thereby judicially creating the purely nonpartisan primary envisioned in the *Jones* dicta. The Ninth Circuit held that the preference provision was not "volitionally" severable, however, because it could not be reasonably believed that I-872 would have passed without the party preference requirement. According to the court, removing all references to party preference would "transform a partisan primary into a nonpartisan one" and it was "not reasonable to believe" that voters would have passed I-872 if they had known it would result in nonpartisan primaries.¹⁹

Neither the proponents nor the opponents of I-872 offered evidence addressing this issue. It is worth noting, however, that if the voters desired a truly nonpartisan primary, they could have enacted one.²⁰ The voters in Washington state did not choose to eliminate partisan designations from the primary ballot. In fact, it is perhaps ironic that the proponents of I-872, whose stated goal was to increase voters' role in the democratic selection of elected officials, would seek to have appointed officials in the judiciary impose a purely nonpartisan primary process—even in the absence of evidence that such a process would have been democratically enacted by the same voters.

¹⁵ *Id.* at 1118–1119.

¹⁶ *See supra* note 9.

¹⁷ *See Wash. State Republican Party*, 460 F.3d at 1119.

¹⁸ *See id.* at 1123.

¹⁹ *Id.* at 1124.

²⁰ Note that even the Louisiana primary is not a strictly nonpartisan primary as traditionally defined, because if Louisiana candidates are registered members of a political party (pursuant to the rules of and therefore with the authorization of that party) they may list that party affiliation alongside their names on the primary and general election ballots. *See, e.g., id.* at 1112; Kuzenski, *supra* note 7 at 207.

Ultimately, the underlying concern in these “primary structure” cases is general election ballot access. General election ballot access is typically limited in order to avoid voter confusion caused by frivolous candidates and to forge consensus.²¹ The Supreme Court has repeatedly affirmed that states may enact electoral schemes that effectively privilege the two major parties. Specifically, the Court has found that limiting ballot access appropriately maintains the stability of our democratic electoral system by tempering party-splintering and factionalism and prevents voter confusion, deception, and frustration.²²

I-872 takes a different route towards the same destination intended by the blanket primary invalidated in *Jones*: taking political parties out of the business of “nominating” candidates to stand for general election and increasing the role that individual candidates and voters play. *Jones* established that a state cannot allow non-members to choose party standard bearers. I-872 attempts to meet the *Jones* test not by eliminating all links between parties and candidates, but by watering those links down in order to diminish—and arguably eliminate—the “standard bearer” character of candidates in the general election. A general election candidate produced by the I-872 process thus would not be anyone’s “nominee,” but rather simply the survivor of a winnowing

out process, notionally affiliated with any political party of his or her choice. The Supreme Court has been asked to decide whether such a structure is constitutional, but no matter what the Court holds, the argument will continue over whether it is preferable.

Address reprint requests to:
Joseph M. Birkenstock

E-mail: JMB@Capdale.com

²¹ Not everyone agrees that these are the actual reasons general election ballot access is limited—and some argue that limiting such ballot access generally does more harm than good. See Richard L. Hasen, *Entrenching The Duopoly: Why The Supreme Court Should Not Allow The States To Protect The Democrats And Republicans From Political Competition*, 1997 SUP. CT. REV. 331, 342–344, 355–366 (1997); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 649, 668–687 (1998); Richard Winger, *How Many Parties Ought To Be on the Ballot?: An Analysis of Nader v. Keith*, 5 ELECTION LAW J. 170, 172–173, 177–185 (2006); see also Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 882–883 (2006).

²² See, e.g., *Timmons v. Twin Cities Area New Party* 520 U.S. 351 (1997); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986).

U.S. Supreme Court Case Preview

N.Y. State Bd. of Elections v. Torres: Is the Right to Vote a Constitutional Constraint on Partisan Nominating Conventions?

CHRISTOPHER S. ELMENDORF

INTRODUCTION

IN EARLY CASES such as *Gray v. Sanders*,¹ *Bullock v. Carter*,² and *Rosario v. Rockefeller*,³ the Supreme Court indiscriminately extended its nascent constitutional jurisprudence concerning voting rights and ballot access to primary and general elections alike. The Court gave little indication that it thought the general/primary distinction was of any moment, so long as state action was present.⁴ Then again, in none of the primary election cases did political parties assert that the challenged laws served their associational interests.⁵

The Court subsequently confirmed that political parties do have a constitutionally protected stake in candidate nomination procedures. The parties' right to choose their own "standard bearers" provided the central rationale for denying an independent voter's challenge to Connecticut's law excluding independents from partisan primaries;⁶ conversely, when the leadership of the Republican Party of Connecticut sought to open its primary to independent voters, party rights necessitated the invalidation of the very same law.⁷ The Court

also invoked a political party's right to choose its standard bearers to exempt the National Democratic Party from Wisconsin's open primary law,⁸ and to cut short California's brief experiment with blanket primaries.⁹

¹ 372 U.S. 381 (1963).

² 405 U.S. 134 (1972).

³ 410 U.S. 752 (1973).

Indeed, the Court seemed not to have given this question more than a moment's thought. In only one of the three cases did the Court even entertain the idea that voting rights and ballot-access precepts might apply differently to primary than to general elections (assuming the existence of state action)—and the Court dismissed this proposition with a single sentence. See *Bullock*, 405 U.S. at 146–47 (1972). The relevant passage from *Bullock* is excerpted in the text accompanying note 60, *infra*.

⁵ Cf. Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181, 2192 (2001) (noting that in the "early primary ballot access cases . . . the party appears as a disinterested observer to the litigation"). Persily makes this observation about *Bullock* and a successor case, *Lubin v. Panish*, 415 U.S. 709 (1974), but it is equally true of *Rosario*, which involved a dispute between a citizen and the state over a "time deadline" for enrollment to vote in the primary election. In *Gray*, by contrast, the Democratic Party was a party to the lawsuit; however, there was no suggestion that the challenged mechanism for aggregating votes served the Party's associational interests.

⁶ *Nader v. Schaffer*, 417 F. Supp. 837, *aff'd* 429 U.S. 989 (1976).

⁷ *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

⁸ *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981).

⁹ *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

Christopher S. Elmendorf is Professor of Law, University of California at Davis. The author thanks Daniel Lowenstein for his incisive editorial suggestions, David Tuck and Tony Valizan for their research assistance, and Erin Murphy for library support.

This brings us to *N.Y. State Bd. of Elections v. Torres*,¹⁰ a case whose legal ramifications could prove as far reaching as its facts are peculiar. Over the objection of several political party organizations,¹¹ which had intervened to assert associational interests in the challenged regime, a federal district court and the Second Circuit struck down New York's hybrid primary-convention system for nominating candidates for the office of Supreme Court Justice.¹² Taking their cue from *Bullock*, the district court and the Second Circuit reasoned that just as states must give "reasonably diligent" independent candidates a fair chance at general election ballot access,¹³ so too must the states afford "reasonably diligent candidate[s] who lack[] the support of a massive apparatus controlled by party leadership" a fair shot in partisan nomination proceedings.¹⁴

The upshot of this decision is that even *non-electoral* methods of nominating candidates—conventions, caucuses, and the like—may be constitutionally suspect if they result in party insiders wielding too much power over the selection of the party's general-election standard bearers. Yet if the Supreme Court were to adopt the reasoning of the political party intervenors and vacate the decision below on party-rights grounds, the party organizations could find themselves with a novel, constitutionally protected interest in choosing candidates without regard to the wishes of bona-fide party members. There are, to be sure, any number of narrower bases on which the Supreme Court could affirm, reverse, or vacate the decision of the Second Circuit. Even a narrow decision, however, may well illuminate important questions about how the Roberts Court will approach the threshold, scrutiny-level-determining "burden" inquiry in electoral mechanics cases, as well as the design of remedies.

THE DISTRICT COURT AND SECOND CIRCUIT OPINIONS

In New York, Supreme Court Justices are elected from twelve judicial districts, each comprised of part or all of nine to twenty-four assembly districts. Since 1921, major-party nominees for Supreme Court Justice have been

selected using a hybrid regime of elections and conventions. The first stage is a partisan primary, at which voters in each component assembly district elect delegates to their party's nominating convention for the judicial district. Delegates so elected then meet in convention to choose their party's nominees.

This arrangement is unusual. As the district court observed, "New York is one of 39 states that elect some or all of their judges of trial courts of general jurisdiction," yet no other state uses a "convention system" to select its judicial nominees.¹⁵ Moreover, of the 33 states that elect general jurisdiction trial judges in contestable elections,¹⁶ all but New York "give challenger candidates who lack the backing of party leaders an opportunity to be placed directly on a primary election ballot by filing a notice, gathering a reasonable number of signatures, paying a filing fee, or fulfilling some combination of these requirements."¹⁷

However impenetrable a major-party "challenger candidate" for Supreme Court Justice might find it, New York's election-convention regime is apparently quite open *at its two electoral junctures*. Thus, any party member who wants to be a judicial delegate can earn a place on the primary ballot by submitting 500 valid signatures from party members residing in her assembly district. At the general election, judicial candidates unable to secure a major party's nomination have the options of running as in-

¹⁰ In the district court and Second Circuit, the case was entitled *López Torres v. N.Y. State Bd. of Elections*, but the U.S. Supreme Court, in its order granting certiorari, dropped "López" from the plaintiff's surname.

¹¹ The New York County Democratic Committee and the New York Republican State Committee intervened as defendants to argue that the challenged law served their associational interests. In the Second Circuit, the Republican National Committee also chimed in, filing an amicus brief.

¹² *López Torres v. N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212, *aff'd* 462 F.3d 161 (2006). The Supreme Court of the State of New York is the state's trial court of general jurisdiction; the state's uppermost appellate tribunal is known as the Court of Appeals.

¹³ See *Storer v. Brown*, 415 U.S. 724 (1974).

¹⁴ 411 F. Supp. 2d at 244.

¹⁵ *Id.* at 215.

¹⁶ The remaining states that provide for the election of trial judges employ only retention elections.

¹⁷ 411 F. Supp. 2d at 215.

dependents with 4,000 signatures, of seeking the nomination of a minor party, or of launching a write-in campaign.¹⁸ For the district court and Second Circuit, however, this openness was beside the point. Both courts agreed that for purposes of adjudicating Ms. López Torres's constitutional challenge, a court must gauge the scrutiny-level-determining "burden" of New York's system from the point of view of the "reasonably diligent candidate [for major-party nomination for Supreme Court Justice] who lacks the support of a massive apparatus controlled by party leadership."¹⁹ In so holding, both courts noted that general elections for Supreme Court Justice are often uncompetitive.²⁰

A "challenger candidate," the district court observed, could compete for her party's nomination for Supreme Court Justice by electioneering or by lobbying. As an electioneer, she could try to wrest control of the convention by slating candidates in the judicial delegate primaries. As a lobbyist, she could try to persuade other convention delegates of the merits of her candidacy. In practice, however, neither option was "a realistic route to nomination."²¹

The electioneering strategy was deemed impractical because of the large number of delegate-candidates a judicial candidate would need to recruit; the difficulty of gathering the requisite number of signatures for each slate of delegate-candidates across the 9–24 assembly districts that make up each judicial district; the limited (37 days) time period for signature gathering; and various technical requirements for valid signatures, on account of which candidates had to gather 2–3 times the nominally required number in order to forestall legal challenges.²² On top of this, any judicial candidate who managed to slate delegates in each of the assembly districts that comprise her judicial district would face the unenviable task of explaining to voters that her delegate-candidates were supporters of her judicial candidacy—a task made difficult because "unlike presidential delegates, New York's judicial delegates cannot signify on the primary ballot an allegiance to a specific candidate."²³ As the district court quipped, "to say that challenger candidates 'only rarely' succeed in getting their own slates of delegates on the ballot across the ju-

dicial district gives euphemism a bad name. It never happens."²⁴

What then of the lobbying alternative to electioneering? The court thought it no more viable. Part of the problem was the brevity of the time interval between the election of delegates and the convening of the convention.²⁵ The greater impediment, however, was local party leaders' de facto control over delegate decisionmaking.²⁶ Party leaders stacked the nominating convention with delegates who had "strong ties" to them.²⁷ (Though stacking the convention was nearly impossible for outsider judicial candidates, it was easy enough for party leaders to do "by including [their preferred delegates] on omnibus petitions on which signatures are obtained for other candidates seeking other offices."²⁸) At the convention itself, party leaders tacitly procured votes for their preferred judicial nominees by offering to support or threatening to withdraw support for the delegates' future, party-related ambitions.²⁹ The proof was in the eating. In the First District, no Democrat had ever been nominated for Supreme Court Justice over the objection of Herman Farrell Jr., the Democratic County Leader since 1981. In the Second District, from the 1960s onward, "[n]o one 'recommended' by [the Kings County Democratic Party] organization ha[d] failed to obtain the nomination."³⁰ (Much of the evidence before the district court focused on these two judicial districts, both heavily Democratic.)

In sum, Judge Gleeson held, the burden on challenger candidates trying to secure their

¹⁸ Brief for the Appellants at 14, *N.Y. State Bd. of Elections v. López Torres*, 462 F.3d 161 (2006) (No. 06-0635-CV).

¹⁹ 411 F. Supp. 2d at 244.

²⁰ The district court found that from 1990–2002, "76% of the general elections across the state . . . were either uncontested or uncompetitive." *Id.* at 231.

²¹ *Id.* at 229.

²² *Id.* at 217–23.

²³ *Id.* at 220.

²⁴ *Id.* at 248 (quoting *Storer v. Brown*, 415 U.S. 724, 742 (1974); other internal quotation marks and citations omitted).

²⁵ *Id.* at 224–25.

²⁶ *Id.* at 223–40.

²⁷ *Id.* at 223.

²⁸ *Id.* at 221.

²⁹ *Id.* at 223–37.

³⁰ *Id.* at 233.

party's nomination was "severe." Under the severe/lesser burden framework that the Supreme Court has prescribed for electoral mechanics cases, strict scrutiny was therefore in order.³¹ Applying strict scrutiny, the court rejected defenses of the nomination regime based on the state's interest in advancing the political parties' associational interests; in assuring geographic and racial diversity on the bench; and in "protecting the independence of sitting judges from the potential conflicts of interest inherent in soliciting political contributions and from the sways of public opinion."³² As for remedies, Judge Gleeson concluded that the "least intrusive course," pending a legislative fix, was "to require a direct primary election, the nomination mechanism currently in place [in New York] for numerous elective judicial posts."³³

The Second Circuit approved of the district court's burden analysis, voicing agreement with the lower court's "challenger candidate paradigm," its factual findings, and its inferences from those findings.³⁴ The circuit court also concurred that the state's justifications for the law could not withstand strict scrutiny, and saw no problem with Judge Gleeson's remedy.

WHAT TO WATCH FOR AT THE SUPREME COURT

The Supreme Court could run with *Torres* in any number of directions. Of the many issues served up by the case, however, three have particularly far-reaching implications, and it is these I shall focus on here. First, how does the fundamental right to vote bear on partisan nomination proceedings? Second, in electoral mechanics cases, to what extent does the Court's threshold, scrutiny-level-determining inquiry into burdens on voting or associational rights license open-ended judicial inquiry into the actual or anticipated effects of the challenged regime, as opposed to a more formal, presumption-guided inquiry? Third, what principles should guide the design of remedies when a candidate-selection process has been found unconstitutional due to the cumulative effect of numerous requirements, each of which may be individually innocuous, and a shortage of competitive general elections?

The right to vote and nomination proceedings

Torres is nominally a case about candidates' rights. The district court and Second Circuit mustered ballot-access precedents as authority for their decisions. Yet lurking very near the surface of this case are foundational questions about the nature of the fundamental right to vote. This is so because candidates' rights of ballot access are bound up with voters' right to cast a "meaningful" ballot, i.e., a ballot that presents the voter with a reasonable range of choices.³⁵

To be sure, the accretion of ballot-access precedents has made it possible to resolve many such cases without seriously engaging questions about the nature of the right to vote. But *Torres* is a not an ordinary ballot-access case. It tees up novel questions about access to partisan nominating conventions. These ques-

³¹ For more on this framework, see Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics, Part I: Explanations and Opportunities*, 156 U. PA. L. REV. (forthcoming 2007), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=980079>.

³² 411 F. Supp. 2d at 250-55.

³³ *Id.* at 256.

³⁴ 462 F.3d at 195-201. Along the way, the Second Circuit held that for purposes of appellate review, the "clear error" standard applies "to the District Court's ultimate finding of severity" as well as to "the findings underlying that determination." 462 F.3d at 195. The first proposition is doubtful, given that the "ultimate finding of severity" determines whether the state's justifications for the challenged regime must pass strict scrutiny or lenient review. That said, the Second Circuit appeared to be in full agreement with the district court's "ultimate finding of severity" and probably would have sustained it even on *de novo* review.

³⁵ The Supreme Court appears to derive candidate rights from voter rights. In *Bullock v. Carter*, 405 U.S. 134 (1972), for example, the Court said that while it had "not attached such fundamental status to candidacy as to invoke a rigorous standard of review," strict scrutiny of the candidate filing fees at issue was nonetheless appropriate because the fees "substantially limited [voters'] choice of candidates [in a manner that] obvious[ly] fall[s] more heavily on the less affluent segment of the community." *Id.* at 144. A decade later, in *Clements v. Fashing*, 457 U.S. 957 (1981), a four-Justice plurality reiterated that candidacy was not a "fundamental right," and that the constitutionality of candidate restrictions therefore depends on "the nature and extent of their impact on voters." *Id.* at 963 (quoting *Bullock*, 405 U.S. at 143). A decade after *Fashing*, in *Burdick v. Takushi*, 504 U.S. 428 (1992), the Court again connected ballot access with voting rights, holding that the burden of a write-in voting ban was necessarily "light" if the state provided reasonable means of ballot access to independent and third-party candidates. *Id.* at 441.

tions will be hard to answer without thinking deeply about the contours of the right to vote—and of the rights of political parties.

The Court's decision in *Torres* is likely to privilege one of five models for applying the right to vote to the nomination stage, thereby setting the course for future judicial involvement in this area.³⁶ I shall refer to these, respectively, as the Election Is An Election model, the Nominations Must Be Like Elections model, the Safety Valve model, the Offsetting Party Rights model, and the Competition-As-Fulcrum model. All are doctrinally available, though some are more available than others. The balance of this section briefly conveys the conceptual gist and doctrinal status of each.

Model 1: An Election Is An Election.³⁷ Under this model, the right to vote bears on candidate nomination proceedings at electoral junctures in the nomination process, but not otherwise. At every electoral juncture, the whole panoply of safeguards for the fundamental right to vote spring into action. These include the “one person, one vote” principle;³⁸ the “no exclusions from the core electorate” principle;³⁹ and the “meaningful vote for a candidate of one’s choice” principle.⁴⁰ The only difference between primary and general elections lies in the composition of the core electorate: for purposes of general elections, this body consists of all adult, non-felon, resident citizens of the jurisdiction in question; in partisan primaries, it (arguably) consists of such citizens who are bona fide supporters of the candidate or party for whom they seek to vote.⁴¹

The Election Is An Election model probably requires reversal of the Second Circuit's decision. As noted above, New York's procedure for selecting Supreme Court Justices is open to insurgent candidates at its two electoral stages.⁴² The problem for insurgents comes at the convention stage, and conventions, being non-electoral, are exempt from judicial scrutiny on the Election Is An Election model.

There is ample precedent for this model. The Supreme Court generally treats the right to vote as a springing or contingent right: states are under no justiciable obligation to make any public office elective, but once an office is made elective, the state must allocate and weight the franchise in accordance with the Supreme

Court's voting-rights precedents.⁴³ This results in some oddities. To illustrate, imagine a regional metropolitan government whose governing body consists of equal numbers of representatives from each constituent jurisdiction. Assume that the populations of the constituent jurisdictions vary by more than 10%.⁴⁴ This regional government would be unconstitutional if the representatives were directly elected, yet permissible if the representatives were appointed by the elected governing body of each constituent jurisdiction.

Just as representation in a regional government may be allocated “unfairly” if the representatives aren't directly elected, so too, one might think, may power in a candidate nomination process be allocated unfairly if that power isn't wielded through direct elections. Under the Election Is An Election model, the state may not privilege political party organizations by, for example, authorizing party of-

³⁶ These models are alluded to, with varying degrees of clarity, in the lower courts' opinions in *Torres* and in the petitions and briefs to the Supreme Court.

³⁷ I borrow my name for this model from Justice Ginsburg who, dissenting in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), objected to the majority's “unilocular, ‘an election is an election,’ approach” to applying the First Amendment to judicial elections. *Id.* at 805.

³⁸ See *Reynolds v. Sims*, 377 U.S. 533 (1964).

³⁹ See *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969).

⁴⁰ See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Burdick v. Takushi*, 504 U.S. 428 (1992).

⁴¹ *Cf.* *American Party of Texas v. White*, 415 U.S. 767, 785–86 (1974) (holding that the state may limit citizens to participating in one nominating proceeding for the office in question—i.e., voting in one party's primary, or signing one independent candidate's petition, etc.); *Rosario v. Rockefeller*, 410 U.S. 752, 760–62 (1973) (recognizing strong state interest in preventing “raiding” at the nomination stage).

⁴² See *supra* text accompanying notes 18–19.

⁴³ Although the Court has nominally left open the possibility that certain public offices must be elective, see *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10 n. 9 (1982), no Justice has attempted to develop this idea since the failed efforts of Douglas, Fortas, and Warren in the mid-1960s. See *Avery v. Midland County, Tex.*, 390 U.S. 474 (1968), and *Hadley v. Junior College Dist. of Metro Kansas City, Mo.*, 397 U.S. 50 (1970), both of which reject as unworkable the legislative/administrative distinction that Douglas, Fortas, and Warren had argued for in earlier cases.

⁴⁴ The Court has recognized a 10% “safe harbor” for most deviations from perfect population equality at the state and local government level. See *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983).

ficials to cast extra votes in a primary election, but the state remains perfectly free to privilege the party leadership by adding non-electoral, leadership-dominated stages to the nomination process.

Proponents of this model may draw strength from *Gray v. Sanders*⁴⁵ and *Rosario v. Rockefeller*,⁴⁶ two primary-election precedents that arguably presume something like the Election Is An Election model. In *Gray*, a case about the unequal weighting of primary votes, the Court ran through the laundry list of protections for the ballot that it had recognized in general-election cases and then pronounced, “these rights must be recognized in any preliminary election that in fact determines the true weight a [general election] vote will have.”⁴⁷ What the Court meant by “true weight” is somewhat obscure. The Court may have been referring to any preliminary election that determines who will be the ballot-qualified candidates at the general election; then again, the Court’s view of the case perhaps was colored by the fact that at the time the Georgia Democratic primary was dispositive of the general election outcome. In *Rosario*, which upheld certain advance-enrollment requirements for voting in partisan primaries, the Court discussed and distinguished a number of seminal general election precedents without even mentioning, let alone relying upon, the general/primary distinction.

It should be noted, finally, that although the Election Is An Election model looms large in the Supreme Court’s jurisprudence, there are a handful of decisions that cut against it.⁴⁸ One of the outlier decisions, *Wells v. Edwards*,⁴⁹ could prove germane to *Torres*. *Wells* summarily affirmed a district court ruling that judicial elections are exempt from the one person, one vote principle because “[j]udges do not represent people, they serve people.”⁵⁰ It is thus conceivable, though to my mind unlikely, that the Supreme Court will dispose of *Torres* on the ground that the “candidate of choice” component of the right to vote, much like the “one person, one vote” component, is simply inapplicable to judicial elections.

Model 2: Nominations Must Be Like Elections. This model requires that proceedings for the selection of ballot-qualified general election

candidates display certain properties characteristic of elections, whether or not the nomination process is electoral. The *Torres* petitioners accuse the district court and Second Circuit of having adopted this model, arguing that “no true convention system could be constitutional” under the lower courts’ challenger-candidate paradigm.⁵¹ Conventions by definition “place[] delegates between voters and candidates,” the argument goes, depriving challengers of their putative “right [per the lower courts’ opinions] to circumvent party structure and appeal directly to rank-and-file members.”⁵² In my view, the petitioners exaggerate the lower courts’ position—but only slightly. The logic of the lower courts’ opinions leaves room for any nomination process in which the party leaders who choose nominees have their choices ratified by an adequately representative group of party members in a forum where outsider candidates can contest the leadership’s slate. The paradigmatic example of such a process is the direct primary election with liberal ballot access, but convention or caucus regimes could also pass muster so long as (1) party-member participation isn’t systematically skewed toward persons who favor the party leaders’ slate (compare the electoral ideal of 100% turnout by eligible voters), and/or (2) the convention or caucus is structured so as to prevent the leadership from securing members’ support with personal favors (compare the secret ballot).

If applied to the entire universe of elections in the United States, the Nominations Must Be Like Elections model would indeed be radical.⁵³ To the best of my knowledge, no federal

⁴⁵ 372 U.S. 368 (1963).

⁴⁶ 410 U.S. 752 (1973).

⁴⁷ 372 U.S. at 380.

⁴⁸ See, e.g., *Ball v. James*, 451 U.S. 355 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973); *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff’d* 409 U.S. 1095 (1973).

⁴⁹ 409 U.S. 1095 (1973).

⁵⁰ 347 F. Supp. at 455.

⁵¹ *Petition for a Writ of Certiorari* at 15, *N.Y. State Bd. of Elections v. López Torres*, No. 07-766. See also *id.* at 8–9.

⁵² *Id.* at 8.

⁵³ Cf. Persily, *supra* note 5, at 2207–09 (explaining “first principle” that “the Constitution does not require political parties or states to run nomination processes by primary election”).

court—except for the lower courts in *Torres*—has ever struck down a state-prescribed system of nomination by convention on the ground that it was insufficiently akin to an ordinary primary election.⁵⁴ If limited to circumstances where the general election is non-competitive between the major parties, the Nominations Must Be Like Elections model would not be quite so revolutionary. But even that application would represent a notable extension of the Supreme Court’s election law jurisprudence.⁵⁵

Model 3: Safety Valves. Unlike the previous models, this model and the next two disaggregate the right to vote into component parts. What we might term the dignitary or equal-citizenship components (such as the prohibitions on racial and perhaps economic discrimination) apply with full force to nomination proceedings. But the “candidate of choice” component has a different fate. If it applies at all to the nomination stage, it applies only selectively, or with diminished force. What differentiates the Safety Valve, Offsetting Party Rights, and Competition-As-Fulcrum models is their respective bases for circumscribing the “candidate of choice” entitlement.

The Safety Valve model holds that third parties and independent candidates enjoy constitutionally protected ballot access so that the electorate can blow off steam at the polls and send a coordinated signal to the major parties whenever a substantial segment of the electorate is dissatisfied with the party establishment. Applying the Safety Valve model, it can be argued that because New York does not prevent dissatisfied factions from breaking with their parent party and qualifying a competing Supreme Court candidate for the general election ballot (e.g., as an independent or under the banner of a third party), the insider dominated major-party nomination track is constitutionally unobjectionable.⁵⁶ Compare *Burdick v. Takushi*,⁵⁷ where the Court reasoned that because Hawaii provided adequate general-election ballot access for third-party and independent candidates, the state’s ban on write-in voting at the general election effected only a “light” burden on “the right to vote for the candidate of one’s choice.”⁵⁸

The lower courts in *Torres* rejected the *Bur-*

dick analogy, however, pointing to language in *Bullock* that is even more squarely on point.⁵⁹ Here is *Bullock*’s critical passage:

[A]ppellants rely on the fact that the filing-fee requirement is applicable only to party primaries, and point out that a candidate can gain a place on the ballot in the general election without payment of fees by submitting a proper application. . . . Apart from the fact that the primary election may be more crucial than the general election in certain parts of Texas, we can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the burdens of the filing fees imposed by state law.⁶⁰

Bullock accepts the principle that otherwise unconstitutional restrictions at the primary/

⁵⁴ There is one district court opinion, *Campbell v. Bysiewicz*, 242 F. Supp. 2d 164 (D. Conn. 2003), that can be read as an application of the Nominations Must Be Like Elections model. However, the convention at issue in *Campbell* served the dual purpose of selecting the party’s principal candidate, and screening would-be party challengers to that candidate. Challengers who passed the screen (which entailed garnering support from 15% of the convention delegates) were entitled to compete against the principal candidate in a partisan primary. Because of the convention’s ballot-access function with respect to an ensuing partisan primary, the result in *Campbell* is consistent with the Election Is An Election model (in that the state had provided for an election—the partisan primary—without reasonable means of ballot access).

⁵⁵ See the discussion *infra* of Model 5: Competition-As-Fulcrum.

⁵⁶ Had New York erected significant barriers to such forms of dissent, it would have been open to the plaintiffs to argue, under the Safety Valve model, that the state must either open up the major-party route to nomination or else liberalize independent and third-party access to the general election ballot.

⁵⁷ 504 U.S. 428 (1992).

⁵⁸ 504 U.S. at 441. The premise of the *Burdick* analogy is that so long as the state provides a safety valve in the form of a reasonable opportunity for voters unsatisfied with major party nominees to rally with like-minded citizens and qualify their candidate of choice as an independent or as the standard bearer of a third party, any further limitation on voting for one’s candidate of choice—be it a write-in voting ban, or a cumbersome, outsider-thwarting major-party nomination procedure—is constitutionally unobjectionable.

⁵⁹ See 462 F.3d at 193–95.

⁶⁰ 405 U.S. at 146–47.

nomination stage can be saved by accommodations at the general election, while rejecting one proposed application of that principle. The Court presumed, in effect, that voters would suffer a severe burden if required to vote against their party of choice in order to support their candidate of choice at the general election. If the recent decision in *Clingman v. Beaver*⁶¹ is any indication, however, the Court may be ready to revisit this presumption. A six-Justice majority in *Clingman* held that a state law disallowing political parties from inviting registered members of other parties to vote in the former party's primary imposed only a "minor" burden on the excluded voters, because to vote in the inviting party's primary these voters merely had to "file a form [changing] their registration."⁶² One might well suppose that a legal regime which merely forces citizens to "vote against their generally preferred party" in order to support their candidate of choice effects even less of a burden than a regime which requires citizens to "register against their generally preferred party" to do the same thing.⁶³

It is worth mentioning that the Court could adopt the Safety Valve model without backing away from the result in *Bullock*. *Bullock* could be recast as an early, inaptly theorized case concerning a narrow class of "severe in kind" burdens on the right to vote, which warrant strict scrutiny wholly apart from their practical effects.⁶⁴ This reading does violence to some of the language in *Bullock*,⁶⁵ but it would bring coherence to a number of puzzling cases that do away with express financial or property-ownership conditions on participation at various stages of the political process.⁶⁶

Model 4: Offsetting Party Rights. This model begins with the well-established premise that both the citizen's right to vote and the political party's right to associate are implicated by candidate nomination proceedings. The model further allows that along some dimensions, the citizen's voting interest may trump the party's associational interest. (The *Torres* petitioners freely acknowledge, for example, that political parties must respect the citizen's interest in not being subject to discrimination on the basis of race or economic status in electoral matters.⁶⁷) Along other di-

mensions, however, the party's interest in the process of choosing its standard bearer partially or even completely offsets the citizen's interest in participating in that choice. For example, the party may well have an offsetting interest in partisan nomination proceedings sufficient to defeat the citizen's participation interest if the citizen belongs to another party.⁶⁸ But the *Torres* petitioners go further, arguing that "the party" (i.e., the party organization) has a constitutional interest in the structure of nomination proceedings that can offset the participation interest of enrolled party members.⁶⁹

⁶¹ 544 U.S. 581 (2005).

⁶² 544 U.S. at 591.

⁶³ To be sure, the line of reasoning developed in this paragraph undersells the true burden that insider-dominated nomination schemes create for "outsider factions" of party-affiliated voters. This is so because the candidate of choice for the outsider faction may be unwilling to enter the general election as an independent or third-party candidate, given the structural disadvantages that minor parties and independents face under a regime of single-member districts and first-past-the-post elections. But the Supreme Court has been unconcerned with this type of structural burden on third parties and independents. See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 60 (1997) (explaining that burden of fusion ban on minor party was "not severe" because, inter alia, the ban left the New Party free to compete with major parties for the allegiance of mutually preferred candidates of choice).

⁶⁴ See Elmendorf, *supra* note 31, at 22–26.

⁶⁵ The result in *Bullock* nominally reflects the Court's effort to "examine in a realistic light the nature of the [challenged requirements'] impact on voters," 405 U.S. at 143, but this account of the decision is hard to take seriously in the wake of *Lubin v. Panish*, 415 U.S. 709 (1974) where the Court, relying on *Bullock*, struck down a trivial filing fee.

⁶⁶ In addition to *Bullock* and *Lubin*, these cases include: *Quinn v. Millsap*, 491 U.S. 1989 (1989); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977); *Hill v. Stone*, 421 U.S. 289 (1975); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Turner v. Fouche*, 396 U.S. 346 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

⁶⁷ *Petition for a Writ of Certiorari at 19 n. 2, N.Y. State Bd. of Elections v. López Torres*, No. 07-766. Cf. Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750 (2001) (elaborating functional theory of political party autonomy subject to antidiscrimination side-constraints).

⁶⁸ See *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

⁶⁹ Similar arguments were advanced—unsuccessfully—against state-mandated primaries in the late 19th and early 20th centuries. See Adam Winkler, *Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886–1915*, 100 COLUM. L. REV. 873 (2000).

There are strong and weak versions of this argument. The strong version holds that if the party wishes to use a candidate selection mechanism that conflicts with the citizen's (and party member's) desire to vote or lobby for her candidate of choice in nomination proceedings, the citizen has no basis for constitutional complaint.⁷⁰ The weaker version allows that the party-affiliated citizen does have a constitutionally protected interest in supporting her candidate of choice in nomination proceedings, but that, in light of the party's countervailing interest, the correct "burden" metric (for scrutiny-level purposes) in cases brought by voters or challenger candidates is a net rather than gross measure: the burden on voters due to the difficulty of nominating their major-party candidate of choice, less the burden the party would suffer if forced to adopt a less-preferred nomination procedure.⁷¹ In cases involving presidential nominating conventions, the D.C. and Fourth Circuits used the net burden method, and found the parties' interest to predominate.⁷² But in none of those cases did the party assert an interest in a nomination mechanism that freezes out challenger candidates with substantial grassroots support.

The D.C. and Fourth Circuit cases may also be distinguished on the ground that the regulations at issue were adopted by a political party's governing body. In *Torres*, by contrast, most elements of the hybrid primary-convention regime were mandated by state statute.⁷³ This complicates the application of the Offsetting Party Rights model, for how can it be said that New York's judicial nomination regime better serves a political party's associational interests than would the district court's direct-primary remedy, unless a body authorized to make policy on behalf of the party has stated its preference for the former?⁷⁴ Even if one is willing to presume that the litigating position of a political party's "state committee" represents an authoritative expression of party policy,⁷⁵ it is not altogether clear how to apply the Offsetting Party Rights model in *Torres*. The New York Republican State Committee intervened to defend the law but its Democratic counterpart did not. Ought the district court to have processed the constitutional challenge along two tracks, applying lenient review to the

state's use of the hybrid regime for purposes of Republican judicial nominations (because of offsetting party rights), and strict scrutiny on the Democratic side (where no offsetting right had been asserted by the relevant organ of the party)? One can only hope that the Supreme Court will address these issues if it adopts the petitioners' spin on the Offsetting Party Rights model.

I should note one further point about the Offsetting Party Rights model. Though this model, like the Safety Valve model, could be employed to vacate or reverse the Second Circuit's decision, the two models have strikingly different implications for the future. The Safety Valve model circumscribes judicial intervention in the political process, leaving states with broad leeway to design and rework candidate nomination procedures as the states see fit. The Offsetting Party Rights model—at least in the petitioners' formulations—rests on a newly expanded understanding of the scope of the major parties' constitutionally protected interest in selecting "their" candidates of choice. A shield in the present case, this interest could just as

⁷⁰ Provided, of course, that the selection mechanism does not discriminate impermissibly (on the basis of race, economic status, etc.). For an even more aggressive take on the party rights position—one that apparently would not allow for an antidiscrimination constraint—see Brief of Amici Curiae the Cato Institute et al. in Support of None of the Parties, *N.Y. State Bd. of Elections v. Torres*, No. 07-766.

⁷¹ Petition for a Writ of Certiorari at 24-29, *N.Y. State Bd. of Elections v. López Torres*, No. 06-766.

⁷² *Ripon Society, Inc. v. Nat'l Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (en banc); *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998); *Bachur v. Democratic Nat'l Party*, 836 F.2d 837 (4th Cir. 1987).

⁷³ The principal exception is that New York allows the political parties to choose the number of delegates for judicial nominating conventions. See N.Y. ELEC. LAW § 6-124 (McKinney 2006).

⁷⁴ Cf. Daniel Hays Lowenstein, *Associational Rights of Major Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1777-87 (1993) (exploring dilemma of "Who gets to speak for 'the party'?" in party-rights litigation, and remarking on the Supreme Court's "embarrassing" failure to take this issue seriously in the seminal case of *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989)).

⁷⁵ Cf. Persily, *supra* note 70, at 793 ("The functional theory presented here grants the party organizations near-absolute First Amendment rights to determine who can vote in their primaries.").

easily be deployed as a sword in the next.⁷⁶ For example, imagine a case brought by the Republican State Committee challenging New York's use of direct primaries for offices other than Supreme Court Justice. The Party could argue that it would prefer to use the hybrid primary-convention regime for these offices too, and that New York's disallowance of this "severely" infringes on the Party's associational interests.⁷⁷

Model 5: Competition-As-Fulcrum. This model uses the competitiveness of general elections to mediate the competing interests of voters and the state (or the party organization) at the candidate-nomination stage. To the extent that the general election is competitive as between the major parties, the citizen's interest in voting or lobbying for her candidate of choice at the nomination stage is weak. Absent general election competition, the balance of interests is reversed. The thinking here is that energetic competition for general election votes should lead the major parties to support or adopt responsible methods for nominating candidates. Without salutary pressure from competitive general elections, however, party insiders are much more likely to use the nomination process to pursue their own interests, or their idiosyncratic visions of the common good.

The district court and Second Circuit in *Torres* both emphasized the lack of competitive general elections in many judicial districts.⁷⁸ In some districts this was due to an overwhelmingly Democratic or Republican electorate. In others, competitive general elections were precluded by reciprocal cross-nomination of Democratic and Republican candidates.

That said, it would be a striking development if the Supreme Court resolves *Torres* in a manner that makes the district court's findings on general election competitiveness doctrinally relevant. Until now, the Court has accorded significance to "one party rule" mostly in cases concerning Democratic primaries in the Deep South during the first half of the 20th century, where one party rule had been indisputably established for decades. Several Justices have hinted that they would limit the one-party-rule holdings to those circumstances,⁷⁹ which would be tantamount to denying them present-

day significance. In other cases, such as *Bullock*, it was the logical possibility of one-party dominance, rather than record evidence of such dominance, that figured in the Court's deployment of voting rights precepts at the nomination stage. If the Court rests its *Torres* decision on factual findings concerning uncompetitive general elections, this would imbue the one-party-rule cases with a new and different life. It might also bespeak a fresh willingness to base judicial intervention in electoral mechanics cases on fuzzy standards concerning the actual effects of challenged regulations—a subject I shall take up next.⁸⁰

Form, function, and the character of the scrutiny-level-determining inquiry into burdens

In addition to explaining how the right to vote bears on candidate nomination proceedings, the Supreme Court's decision in *Torres* may illuminate what the Court presently understands to be the appropriate *kind* of inquiry for judges to make for purposes of setting scrutiny levels in electoral mechanics cases. It is well settled that in such cases,⁸¹ courts are to make a threshold inquiry into "burdens" on voting and associational rights. Laws that ef-

⁷⁶ Some would regard this as a healthy development. See, e.g., Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131 (2005); Persily, *supra* note 67.

⁷⁷ And even deployed as a shield, the petitioners' formulation of the Offsetting Party Rights could have implications that would trouble some prominent defenders of party autonomy. Nathaniel Persily has argued, for example, the party rights should not extend to "limit[ing] members' rights to run in the primary," see Persily, *supra* note 5, at 2210–13, yet the *Torres* petitioners have asserted a party interest that extends to hindering certain members from competing for the party's nomination.

⁷⁸ See 411 F. Supp. 2d at 230–31, 248; 462 F.3d at 178, 193.

⁷⁹ See, for example, the dissent of Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia) in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996).

⁸⁰ To be sure, the Competition-As-Fulcrum model need not be implemented through fuzzy standards. It is open to the Court to promulgate, as it were, both a particular, quantitative measure of general election competitiveness, and a cutoff point at which general elections will be deemed uncompetitive.

⁸¹ The Court has defined "electoral mechanics" to include "the registration and qualifications of voters, the selection and eligibility of candidates, [and] the voting process." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992), quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

fect a “severe” burden receive strict scrutiny; laws whose burden is minimal receive lax, rational-basis-like review.⁸²

But there is something paradoxical about this body of law. The nominal test seems to commend judicial inquiry into the actual effects of challenged regulations. (How else could one say whether the magnitude of a regulatory burden is severe or minor?) Yet as I have elsewhere explained at length, the Supreme Court has typically avoided such inquiries in electoral mechanics cases.⁸³ Rather, “the Court sets scrutiny levels mainly on the basis of formal inquiries into the type of burden created, simple proxies for impact, and legislative purposes.”⁸⁴ There is, in short, an important disparity between what the Court *says* and what it *does* in this area of law.⁸⁵

Taking the Supreme Court’s rhetoric at face value, some lower courts have adopted an all-things-considered, effects-oriented approach to the severe/lesser burden question. There is no better illustration of this than the sequence of ballot-access decisions within the Second Circuit culminating in *López Torres*.⁸⁶ Invoking these precedents and quoting *Bullock*, the Second Circuit in *López Torres* explained the task before it thus:

The Supreme Court has underscored that in assessing the extent to which a given set of candidate restrictions burdens First Amendment rights, our review is neither formalistic nor abstract. Instead, we must turn a keen eye on how the electoral scheme functions in fact; indeed, “it is essential to examine in a realistic light the extent and nature of [the scheme’s] impact on voters.”⁸⁷

Consistent with this understanding, the lower courts deemed “severe” the burden of New York’s primary-convention scheme on the basis of testimony and other submissions concerning, inter alia: (1) various practical difficulties with gathering the requisite number of qualified signatures in the designated time period; (2) the number of assembly districts in which a challenger candidate would need to field delegates in order to have a fair chance of assembling a majority at the convention; (3) the

challenge of voter education in delegate primaries without ballot notations identifying the would-be delegates’ preferred judicial candidates; (4) local party bosses’ de facto control over delegate decisionmaking; and (5) the absence of successful challenger candidates in recent decades.⁸⁸

Torres thus presents the Supreme Court with a very clean opportunity either to embrace or to reconsider and limit the plain meaning, as it were, of the Court’s own doctrinal framework for electoral mechanics cases. I would be quite surprised if the Court gave its unqualified approval to the Second Circuit’s “neither formalistic nor abstract” approach. Electoral cases are politically sensitive; on the line is the judiciary’s reputation for partisan neutrality and even-handedness. Because of this, and because characterizing a burden as “severe” or “not severe” is typically outcome-determinative, the Supreme Court has good reason to be leery of open-ended approaches to the threshold question.

The Court has at least three plausible options if it wants to avoid giving its imprimatur to the Second Circuit’s methodology. First, the Court could adopt a model of voting rights at the nomination stage that would render the lower courts’ burden analysis immaterial—for example, the Election Is An Election model. Alternatively, the Court could adopt a model under which the lower courts’ burden analysis is, in principle, relevant—but operationalize the model in a manner that makes empirical inquiry into the workings of the political process largely unnecessary. To illustrate, the Court could adopt the Offsetting Party Rights model, and then conclude that because constitutionally protected interests lie on both sides, judi-

⁸² See generally Elmendorf, *supra* note 31, at 14–21.

⁸³ *Id.* at 19–58.

⁸⁴ *Id.* at 8–9.

⁸⁵ I am indebted to Rick Hasen for this pithy formulation of my thesis.

⁸⁶ See *Rockefeller v. Powers*, 917 F. Supp. 15 (E.D.N.Y.), *aff’d* 78 F.3d 44 (2d Cir. 1996); *Molinari v. Powers*, 82 F. Supp. 2d 57 (E.D.N.Y. 2000); *Campbell v. Bysiewicz*, 242 F. Supp. 2d 164 (D. Conn. 2003); *López Torres v. N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212 (E.D.N.Y.), *aff’d* 462 F.3d 161 (2d Cir. 2006).

⁸⁷ 462 F.3d at 184 (*quoting* *Bullock*, 405 U.S. at 143).

⁸⁸ 462 F.3d at 196–201; 411 F. Supp. 2d at 216–30.

cial review should be deferential whenever voters or candidates challenge a nomination mechanism that party organizations favor (absent discrimination on the basis of race, economic status, etc.).

A third, particularly interesting possibility is that the Supreme Court will offer qualified approval for the lower courts' approach to the burden question, while limiting the domain for such inquiries to cases in which certain simple and relatively objective "danger signs" call into doubt the usual presumption of permissibility associated with electoral mechanics. Justice Breyer introduced the danger signs metaphor in his recent plurality opinion in *Randall v. Sorrell*,⁸⁹ a case about campaign contribution limits. Although the Court's campaign finance and electoral mechanics decisions have evolved on separate tracks, the *Randall* opinion draws from and could feed back into the electoral mechanics cases,⁹⁰ some of which, as I have tried to show elsewhere, can be understood as inchoate expressions of the danger-signs approach.⁹¹ In *Randall*, Breyer found a danger sign in the fact that Vermont's contribution limits were the lowest in the nation. It might similarly be argued that the sheer peculiarity of New York's system for nominating Supreme Court Justices deprives it of the normal presumption of permissibility, and that "neither formalistic nor abstract" judicial inquiry into how the system works in practice was therefore appropriate.⁹² It is also conceivable that the danger signs approach could be operationalized using indicators of the competitiveness of general elections, although this would be considerably more ambitious.⁹³

However the Supreme Court resolves the burden/level-of-scrutiny question in *Torres*, it will be most interesting to see whether the Court acknowledges the tension between its rhetoric and its practice in this area of law. That the Court has decided to hear two electoral mechanics cases in October Term 2007, neither of which involves a clear circuit split, perhaps suggests that the Justices are ready to give this body of law a serious review.⁹⁴

Remedies

The remedy section of Judge Gleeson's opinion is perfunctory, consisting of little more than

a pronouncement that the "least intrusive course," pending new legislation, is "to require a direct primary election, the nomination mechanism currently in place [in New York] for numerous elective judicial posts."⁹⁵

In the Second Circuit, the appellants protested that Judge Gleeson should have entered a "narrower" remedy, such as reforming rather than replacing the convention regime, or making the remedy district-specific rather than statewide. For authority, they invoked *Ayotte v. Planned Parenthood of Northern New England*,⁹⁶ a recent, unanimous Supreme Court opinion that restates three remedial principles for courts to apply "when confronting a constitutional flaw in a statute."⁹⁷ *Ayotte* instructs, first, that the court should "nullify [no] more of a legislature's work than is necessary."⁹⁸ Second, the court should "restrain [itself] from rewriting state law to conform it to constitutional requirements even as [the court] strive[s] to salvage it."⁹⁹ Elaborating, *Ayotte* suggests that "narrow" remedies are particularly appropriate where "background constitutional rules" have been "clearly . . . articulated."¹⁰⁰ By contrast, where the "constitutional context" is "murky," or "where line-drawing is inherently complex," judicial efforts to "salvage" a constitutionally problematic statute generally entail "a far more serious invasion of the legislative domain than [the courts] ought to under-

⁸⁹ 126 S. Ct. 2479 (2006).

⁹⁰ See Elmendorf, *supra* note 31, at 38–42.

⁹¹ See *id.* at 10–11, 19–58.

⁹² Although the district court and the Second Circuit did explain at the outset of their opinions that New York's hybrid primary-convention procedure for nominating Supreme Court Justices was very unusual, this was just window dressing. It did not figure into the doctrinal analysis.

⁹³ This would seem to require both a competitiveness metric and a cutoff point. Cf. Elmendorf, *supra* note 31, at 28–35 (explaining how the Supreme Court in *Storer v. Brown*, 415 U.S. 724 (1974), established both a simple, quantitative indicator of ease of ballot access, and a cutoff point at which ballot access would be presumed unreasonably difficult).

⁹⁴ The other case is *Washington State Republican Party v. Washington*, 460 F.3d 1108 (9th Cir. 2006).

⁹⁵ 411 F. Supp. 2d at 255–56.

⁹⁶ 126 S. Ct. 961 (2006).

⁹⁷ *Id.* at 967.

⁹⁸ *Id.* at 967–68 (internal quotation marks omitted).

⁹⁹ *Id.* at 968.

¹⁰⁰ *Id.*

take.”¹⁰¹ Third, “[a]fter finding an application or portion of a statute unconstitutional, [the court] must next ask: Would the legislature have preferred what is left of its statute to no statute at all?”¹⁰²

The Second Circuit upheld Judge Gleeson’s remedy as reasonable light of its own gloss on *Ayotte*. The three remedial alternatives suggested by the appellants—(1) reforming the convention process, (2) limiting the remedy to certain districts, or (3) “merely enjoin[ing] the offending provisions [without] provid[ing] any interim, fallback nomination process”¹⁰³—were rejected as unworkable or incompatible with *Ayotte*. Option #1 would require the court to act as a “one-person legislative superchamber,” contrary to *Ayotte*’s second precept. Option #2 was “highly undesirable” because it “would leave judicial nominations in a state of patchwork chaos”; plus, an expert commission had found that local party leaders control the judicial nomination process across the state.¹⁰⁴ Option #3 was rejected on mutually inconsistent grounds—that “it would have been impractical, if not irresponsible, for the District Court to have left such a gaping hole in the State’s electoral scheme,” and that “[i]f the District Court had merely enjoined the current nominating scheme, the default nature of section 6-110 [of New York’s Election Law] would have resulted in a primary election by operation of law.”¹⁰⁵

Whatever one thinks of the district court’s remedy, the Second Circuit’s defense of it elides a number of important questions. The balance of this section briefly explains the big ones.

First, in response to the defendants’ plea for a district-specific remedy, it was not enough for the Second Circuit to say that such a remedy would be cumbersome, or that the “problem” of exclusionary major-party nomination procedures exists statewide. If the nomination regime is constitutionally problematic because of uncompetitive general elections, a geographically narrow remedy—one limited to districts where general elections are not competitive—would seem presumptively appropriate. To be sure, this presumption might be overcome on the basis of the third *Ayotte* factor.¹⁰⁶ But neither the district court nor the Second Circuit even acknowledged that judicial re-

liance at the merits stage on the lack of competitive general elections might have implications for the proper geographic scope of the remedy.¹⁰⁷

Second, assuming that New York’s election code does *not* establish a direct-primary fallback—an issue that the district court did not reach, that the Second Circuit equivocated about, and that petitioners and *amici* hotly dispute before the U.S. Supreme Court—the Second Circuit too quickly concluded that tinkering with the convention system would involve more of a usurpation of legislative power than replacing it with a direct primary. Although *Ayotte* favors facial invalidation over “rewriting state law,” especially where, as here, “the constitutional context” is “murky,” it is not obvious that *Ayotte* speaks to the relative merits of (A) replacing an unconstitutional convention regime for nominating major-party candidates for Supreme Court Justice with a judicially modified version of that regime, versus (B) replacing the unconstitutional regime with a dissimilar major-party nomination procedure that the state presently employs for a different elective office. Either one of these remedies entails, in effect, adding new affirmative provisions to the state’s election code. Either one could be attacked as illegitimate “judicial legislation.”¹⁰⁸

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ 462 F.3d at 206.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 206–07.

¹⁰⁶ Would the legislature prefer a uniform regime of direct primary elections to a checkerboard in which direct primaries are used in some districts, and hybrid primary-conventions in others?

¹⁰⁷ Perhaps this is because the lower courts weren’t convinced that a lack of competitive general elections was strictly necessary to their holding on the merits.

¹⁰⁸ Was it illegitimate for the district court to “legislate” an alternative nomination procedure, as opposed to simply enjoining continued use of the unconstitutional convention regime? I think not—at least if the effect of simply enjoining the convention regime would have been to leave the major parties without any authorized means of qualifying their Supreme Court Justice candidates for the general election ballot. That state of affairs would surely be unconstitutional. In at least one other context—decennial malapportionment litigation—judges not uncommonly craft a replacement for challenged legislation so as to avoid the unconstitutional state of affairs (elections held in the legislative districts that were adopted after the previous decennial census, which are now malapportioned) that would result if the court simply enjoined operation of the statute found defective.

It might be argued that approach *B* is preferable to *A* because *B* leaves the district court with fewer discretionary choices. But overreaching district judges can be checked in other ways. To illustrate, imagine a Supreme Court determination that judge-made remedies in candidate nomination cases are presumptively subject to override by the state parties' respective governing bodies, as well as by statute.¹⁰⁹ (Doctrinally, this presumption could be tied to the political parties' associational interest in the selection of party standard bearers.) The idea here is to establish a low-transaction-cost mechanism for supplanting judicial remedies, and thereby to discourage judicial overreaching in the first instance. This solution might also have accountability advantages. If a party-promulgated judicial nomination procedure results in cronyism and corruption, electorally accountable actors will share in the blame. And lest this solution seem altogether fanciful, two *amici* have already filed briefs in *Torres* arguing that remedy design should have been left to the political parties.¹¹⁰

The final remedial puzzle in *Torres* is this: Should the district court have considered remedies designed to spur inter-party competition, as an alternative to dismantling the hybrid primary-convention regime? This matter wasn't briefed in the courts below, and it has yet to be raised in the petitions and briefs filed with the Supreme Court, but I consider it real and important nonetheless.¹¹¹ One can imagine a variety of remedies meant to promote inter-party competition, from disallowing cross-endorsements between the major parties, to attacking the enduring bipartisan gerrymander of New York's state legislature.¹¹² In principle, a district judge could use the *Ayotte* factors, along with some guesswork about relative efficacy, to choose among the full suite of potential competition-oriented and nomination-oriented remedies. Then again, there may be further, substantive reasons to prefer a competition-oriented remedy, derived perhaps from one's conception of ultimate goals for the Court's election law jurisprudence,¹¹³ or from one's sense that a competition-oriented remedy would impinge less on the political parties' associational interest in choosing their own standard bearers.¹¹⁴ There may also be factors that cut the other way.

CONCLUSION

It is an old saw that bad facts make bad law. This article's survey of the numerous issues afoot in *Torres* perhaps suggests a corollary: that unusual facts make for interesting law. We will soon see whether the Court's decision bears this out.

Address reprint requests to:
Christopher S. Elmendorf
U.C. Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

E-mail: cselmendorf@ucdavis.edu

¹⁰⁹ The presumption might be rebutted if state law is clearly to the contrary, or if the party's governing body can fairly be blamed for the stricken, unconstitutional procedures.

¹¹⁰ See Brief of Amici Curiae the Cato Institute et al. in Support of None of the Parties at 15–16, N.Y. State Bd. of Elections v. Torres, No. 07-766 (May 7, 2007); Amicus Curiae Brief of the Asian American Bar Ass'n in Support of the Petition for a Writ of Certiorari at 14–15, N.Y. State Bd. of Elections v. López Torres, No. 07-766. A third brief argues, quite to the contrary, that the district court should have crafted a remedy by modifying the party-made rules within the primary-convention regime, while leaving the rules prescribed by statute in place. See Brief for the Mid-Manhattan Branch of the NAACP and the Metropolitan Black Bar Ass'n As Amici Curiae in Support of Petitioners at 12–14, N.Y. State Bd. of Elections v. López Torres, No. 07-766.

¹¹¹ Cf. James A. Gardner, *New York's Judicial Selection Process Is Fine—It's the Party System that Needs Fixing*, 79 N.Y. STATE BAR J. (forthcoming, Sept. 2007) (arguing that no reform to New York's system for selecting Supreme Court Justices is likely to help much unless other reforms are instituted to bolster competition between the major parties).

¹¹² Gardner argues that the longstanding bipartisan gerrymander of New York's Assembly and Senate lies at the root of the problems New York has experienced in selecting Supreme Court Justices. See *id.*

¹¹³ Compare Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) (proposing a competition-oriented approach to political process cases), with RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW 138–56 (critiquing the competition-oriented approach).

¹¹⁴ Cf. Brief of Amici Curiae the Cato Institute et al. in Support of None of the Parties, N.Y. State Bd. of Elections v. Torres, No. 07-766 (May 7, 2007) (arguing that the district court's remedy transgressed the political parties' associational rights).