Smoke-Filled Rooms

Ellen D. Katz, University of Michigan Law School

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ELLEN D. KATZ

Abstract

The smoke-filled room is making a comeback. Condemned as a corrupt, anti-democratic means for nominating candidates to public office, the smoke-filled room has recently found prominent and diverse defenders. Last winter, Democratic stalwart Geraldine Ferraro celebrated the institution when she urged Democratic superdelegates to exercise their controlling power independently of, or even counter to, the will of the Democratic Party’s rank and file. A few weeks earlier, Justice Scalia celebrated the smoke-filled room as a traditional, legitimate and accepted means for selecting candidates for public office, and hence one on which New York State could permissibly rely to select nominees for state trial judge.

Smoke-filled rooms are not all alike, and the differences among them matter. This paper explores these differences by comparing the role of the smoke-filled room in the nomination process Barack Obama traversed in order to become the Democratic Party’s nominee for president with the one Margarita Lopez Torres confronted when she sought her party’s nomination to become a trial judge in Brooklyn. Broadly similar in structure, both nomination processes rely on decentralized state-run primaries to select delegates to attend party-run conventions that select the party’s nominee. And both give party leaders discretionary power to determine the nominee absent meaningful input by the party’s rank and file.

These two smoke-filled rooms nevertheless differ in important respects. This paper shows how the one Obama confronted and Ferraro defended was more transparent, penetrable, directed by party rule, and politically contestable than was the one Lopez Torres faced and Justice Scalia upheld in New York State Board of Elections v. Lopez Torres. These differences explain not only why Obama succeeded and Lopez Torres failed, but also why the smoke-filled room inhabited by Democratic superdelegates is a far more viable political structure.
# SMOKE-FILLED ROOMS

## ELLEN D. KATZ*

### INTRODUCTION

Last February, Geraldine Ferraro penned a harshly worded op-ed in The New York Times. Barack Obama had just won his eleventh consecutive victory in the primary and caucus contests that followed Super Tuesday. His supporters saw a popular mandate they argued the superdelegates should honor. Ferraro was outraged. According to Ferraro, the superdelegates were supposed “to lead not follow. They were, and are expected to determine what is best for our party and best for our country.” Election returns could inform that determination, but they were in no way controlling. For Ferraro, the superdelegates were under no obligation to ratify a popular mandate—if such a mandate even existed—or to pay heed to it at all, if, in their considered judgment, the good of the party required a different choice.

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* Professor of Law, University of Michigan Law School.
3 Ferraro, *supra* note 1.
4 Ferraro had her doubts, claiming that turnout in the primary and caucus participation was low, that open primary rules diluted the voice of the Democratic rank and file, and that the exclusion of the Michigan and Florida returns undermined the mandate Obama supporters claimed. *Id.*
5 *Id.*
Criticism followed. Ferraro was called patronizing, instrumental, disingenuous, and elitist.7 Her defense of the superdelegates was said to be nothing more than a ruse to secure the nomination of her preferred candidate to whose campaign she was still an advisor.7 Ferraro’s tangential reference to seating the Michigan and Florida delegations was labeled hypocritical, exposing her nominal fidelity to advantageous rules but apparent willingness to abandon damaging ones.8 Ferraro’s position, moreover, was deemed bad policy. The superdelegates, representing the party’s establishment, were said to be too entrenched, too stodgy, and too obtuse to know what was best for the party.9 Were they to heed Ferraro’s advice and ignore the election returns, the superdelegates would only secure John McCain’s election, as Democratic voters betrayed by their party would defect or simply stay home in November.10

Most interestingly, however, the role Ferraro urged the superdelegates to play was said to be illegitimate.11 Ferraro never used the term “smoke-filled room,” but her effort to insulate the superdelegates from the populace was very much a defense of that proverbial institution.12 Back rooms, typically smoky ones, have long been the locus for selecting candidates for elected offices. Their history is not illustrious,13 and criticism of them is widespread.14 Ferraro was thus lambasted when she praised the Democratic Party rules that effectively placed the superdelegates in the smoke-filled room and vested them with controlling influence—influence Ferraro insisted they might exercise counter to the

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7 William Kennard, To the Editor, N.Y. TIMES, Feb. 27, 2008 (“Ferraro wants what is best for her candidate”); Jane Savoca, To The Editor, N.Y. TIMES, Feb. 27, 2008 (“The not so subtle subtext is to promote . . . Clinton’s candidacy”).
8 See Kennard, supra note; Savoca, supra note.
12 Yoo, supra note (“Democratic Party runs by rules that are the epitome of the smoke-filled room”);
Theodore B. Olson, Clinton v. Obama: The Lawsuit, WALL ST. J., Feb. 11, 2008 (“Those 796 superdelegate politicians will decide who the candidate will be . Maybe no cigar or cigarette smoke this time, but backroom politics all the same.”).)
will of the party’s rank-and-file. The rules that supported Ferraro’s position were widely seen to be unfair, improper, and, if not in fact illegal, the kind of thing that ought to be.\(^{15}\) That Ferraro should celebrate such power was proof positive of her ulterior motives. The illegitimacy of the position she was promoting was that self-evident.

But of course it wasn’t. Just six week earlier, the Supreme Court turned back a constitutional challenge to the influence political party leaders exerted within the hybrid system New York State employs to nominate candidates for judicial office.\(^{16}\) Structurally similar to the nomination regime Ferraro defended,\(^{17}\) New York’s process relies on decentralized state-run primaries at which party members select delegates who then attend party-run conventions that select the party’s nominee.\(^{18}\) Within this regime, local party leaders—much like Democratic superdelegates—have the discretionary power to determine the ultimate nominee absent meaningful input from the party’s rank-and-file.

Two lower federal courts thought New York’s system for electing judges gave too much power to local party leaders.\(^{19}\) A unanimous Supreme Court, however, saw no constitutional defect. *New York State Board of Elections vs. Lopez Torres*\(^{20}\) dismissed the notion that party members might possess “their own associational right not only to join, but to have a certain degree of influence in, the party.”\(^{21}\) Justice Scalia’s lead opinion, moreover, made clear that New York’s regime permissibly employed a traditional and legitimate method for nominating candidates to elected office. He wrote, “Party conventions, with their attendant ‘smoke-filled rooms’ and domination by party leaders, have long been an accepted manner of selecting party candidates.”\(^{22}\)

Accepted and in active use. Lawyers defending New York’s nomination regime suggested that invalidation of the State’s system called into question the presidential candidate selection process used not just by the Democrats but by both major parties.\(^{23}\) That claim, while overstated,\(^{24}\) may well have influenced the Justices.\(^{25}\) And even if it did not, *Lopez Torres* ensured that Geraldine Ferraro was on solid legal ground when she urged the superdelegates to adjourn to the smoke-filled room and disregard the election returns.\(^{26}\)

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\(^{17}\) But not identical. *See infra* Part I.

\(^{18}\) *See N.Y. Elec. Law §§ 6-134(4), -136(2)(i), (3), -160(2).*

\(^{19}\) *See 411 F. Supp. 2d at 233; 463 F.3d at 181. I agreed. See Brief for Amici Curiae Law Professors, New York State Board of Elections et al. v. Lopez Torres, et al., No. 06-766.*


\(^{21}\) 128 S.Ct. at 798 (emphasis in original).

\(^{22}\) 128 S.Ct. at 799.

\(^{23}\) *See, e.g.*, Brief Amicus Curiae of the Republican National Committee in Support of Petitioners, at 4, 16-17, 2007 WL 1360323.

\(^{24}\) *See infra* Part II (discussing the ways in which smoke-filled rooms differ).

\(^{25}\) *See 128 S.Ct. at 799.*

\(^{26}\) *Lopez Torres and the Democrats*, THE NEW YORK SUN, Feb. 12, 2008.
What the Court ignored, however, was that all smoke-filled rooms are not the same. The leaders of a political party may control the nomination process in varied ways, some relatively unproblematic, others the cause for serious concern. The smoke-filled room Lopez Torres upheld and the one Ferraro defended differ in important ways—ways that show New York’s to be the far less viable political structure. Unlike Ferraro’s smoke-filled room, New York’s actively inhibits autonomous and vibrant political parties, and accordingly should have been seen to give rise to serious constitutional concerns.

Part I of this paper compares in some detail the nomination process Obama traversed with the one Lopez Torres confronted. Part II explores four salient differences between these processes. As explained in Part II.A., Ferraro’s smoke-filled room was considerably more transparent. Throughout the 2008 presidential primaries, the superdelegates were identified and accountable, and their ever shifting allegiances were monitored, tabulated and discussed, often by the superdelegates themselves.\textsuperscript{27} Lopez Torres, by contrast, upheld a more traditional smoke-filled room, in which party leaders never formally cast deciding votes, but instead secured the election of loyal delegates whom they knew would nominate their preferred candidate at the subsequent pro forma convention.\textsuperscript{28} This control was obscured by a detailed, state-mandated nomination process that facially allowed party members to challenge the leadership choices, but was structured in a manner that ensured such challenges would not occur.\textsuperscript{29}

Part II. B. shows that Ferraro’s smoke-filled room was also more penetrable by a challenger candidate than was the one at issue in Lopez Torres. Barack Obama emerged last winter as the frontrunner for the Democratic nomination, notwithstanding the fact that Hillary Clinton was said to have effectively locked up the nomination months earlier.\textsuperscript{30} In other words, Obama accomplished within the Democratic Party’s presidential nomination process precisely what Margarita Lopez Torres said was impossible to achieve within New York’s system: to mount a credible challenge to the leadership’s choice for the nomination.\textsuperscript{31}

To be sure, Obama was an unusual candidate.\textsuperscript{32} Had he set his sights not on the presidency, but instead on a trial judgeship in New York, perhaps he would have had more success than Lopez Torres. More likely, though, Obama simply had an easier time of it running for president. The structural hurdles he confronted within the nomination


\textsuperscript{28} See infra notes and accompanying text.

\textsuperscript{29} See infra notes and accompanying text.

\textsuperscript{30} See, e.g., The Democrat’s Year, \textit{The Economist} (Dec. 27, 2007) (“The betting is on another Clinton presidency”); Nedra Pickler, Obama’s political team out-organized Clinton, \textit{May 24, 2008}, http://www.washingtonpost.com/wp-dyn/content/article/2008/05/24/AR2008052400879.html (“The band of Obama loyalists who imagined that could happen have stunned even themselves with their success against Hillary Rodham Clinton, who appeared to have wrapped up the nomination last year, before any votes were cast.”).

\textsuperscript{31} See Lopez Torres v. New York State Bd. of Elections, 462 F.3d 161, 174 (2d Cir. 2006).

process—from gaining access to the ballot State by State to his ability to lobby superdelegates attending the convention—were themselves relatively less onerous than the ones at issue in *Lopez Torres*. The district court that examined New York’s system found (and the Supreme Court did not dispute) that office seekers like Lopez Torres—bona fide party members who meet the qualifications for judicial office and enjoy considerable public support but are not favored in advance by the party leadership—could not “clear all the hurdles necessary to elect supportive delegates,” and confront “insurmountable” obstacles in seeking to lobby the delegates who are selected.

As discussed in Part II.C., the junctures that mattered most in the process Obama navigated were regulated more comprehensively by party rule—and less by law—than were the ones at issue in the system upheld in *Lopez Torres*. Most notably, the superdelegates owed the control they enjoyed over the nomination not to any state (or federal) law but instead to the DNC Delegate Selection Rules that gave them controlling influence. In *Lopez Torres*, by contrast, state law played a more complicated role. New York State did not explicitly vest party leaders with controlling influence, but instead created an obscure and complex nomination process that actively, predictably, and indeed deliberately gave party leaders ultimate control over the nomination.

The underlying authority for—or more precisely, authorship of—a smoke-filled room matters. One that emerges exclusively through party initiative may well serve a legitimate and even beneficial role, but backroom decisionmaking actively fostered by state regulation raises concerns unlikely to be offset by such benefits. Such state regulation inhibits a political party from functioning as it should. It distorts internal party operations, blurs the lines of accountability, and appropriates the power of the party to determine for itself how it is to be governed. In short, state regulation of this sort intrudes on the autonomy of the party and its members, even if the party itself might have chosen on its own to structure party decisionmaking in the very same manner.

As discussed in Part II.D., the choice made by the smoke-filled room Obama confronted was far more contestable than the one adopted by the room Lopez Torres faced. After Ferraro’s smoke-filled room chose Obama, he remained just a nominee. Becoming president was contingent on victory in what every participant believed would be a vigorously contested general election. Such a contest, however, was never anticipated in New York’s Second Judicial District, where securing the Democratic nomination to the state supreme court has long been tantamount to election.

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33 See infra Part I.
36 DNC Delegate Selection Rules, Rule 9A (describing role of “unpledged party leaders and elected official delegates”).
37 See infra notes and accompanying text (on why ny adopted this system, to nominations elections from popular control).
39 See infra notes and accompanying text.
These differences in contestability help explain Obama’s victory and Lopez Torres’ failure. A prospective contest, or its assured absence, critically shapes the nomination process that precedes it. A contested general election constrains the discretion of party leaders to select the party nominee, counseling them to consider serious challenger candidates within the party, or face electoral defeat and an internal accounting for failing to do so. The absence of contestability frees party leaders from these constraints, particularly in a system like New York’s, where transparency, penetrability, and party authorship are in short supply and hence cannot compensate for a noncompetitive general election and its effects.

None of this, however, mattered to the Court in Lopez Torres. Part III of this paper offers an explanation why. For the Justices, all smoke-filled rooms were equal and all were equally permissible. The lead opinion suggests that the Court would have upheld New York’s smoke-filled regime no matter how opaque, impenetrable, uncontestable, or state authored it was. Narrower holdings were available, ones that would have avoided the subtle yet significant departures from precedent required by the decision at written. But a more circumscribed approach would have invited future challenges to other smoke-filled rooms, and the Court bluntly stated that it was unwilling to extend that invitation.

This unwillingness, while welcomed by some, is cause for concern. Bright lines distinguishing one smoke-filled room from another may prove elusive, but that difficulty alone does not mean meaningful distinctions are either impossible or unnecessary. Nor does it suggest that this arena presents questions that are categorically different from other knotty subjects with which the Court has long engaged. Some distinctions will prove more lasting than others, but drawing them case by case is a staple of what the Court has long done, and something the Court should continue to do.

In Lopez Torres, moreover, the Court did not so much refuse to enter a new arena as retreat from one it had long regulated. Constitutional review of state-mandated nomination processes is nothing new. To be sure, not every foray into this realm has been adequately theorized, and some moves might well be reconsidered. But the legal

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40 The exceptions are the ones that engage in explicit racial discrimination. See Lopez Torres, 128 S.Ct. at 799; see also California Democratic Party v. Jones, California Democratic Party v. Jones, 530 U.S. 567, 573 (2000).
42 128 S.Ct. at 800 (assigning smoke-filled rooms case-by-case would needlessly “open up” a “new and excitingly unpredictable theater of election jurisprudence.”).
44 Cf. Holder v. Hall, 512 U.S. 874, 965 (1994) (Steven, J., dissenting) (“Our work would certainly be much easier if every case could be resolved by consulting a dictionary”).
landscape governing nomination processes has long reflected the Court’s involvement and withdrawal now leaves standing an incomplete and skewed regulatory regime.

Most prominently, *Lopez Torres* equates party autonomy with the whims of party leaders, and accordingly invites party leaders to enlist and rely on state law as the primary vehicle for party governance. Why bother to persuade party members to adopt or accept a rule when the legislature will mandate it as a matter of law? More state regulation (which party leaders themselves will write) will follow, while remaining absent will be a vibrant party organization that actively and internally debates the structure and details of self-governance. The worst aspects of the smoke-filled room will be entrenched.

A more sound approach would embrace substantive review, and expressly recognize that smoke-filled rooms can differ from one another in important ways. The nominating process Obama traversed was more transparent, more penetrable, more directed by party rule, and more contestable than was the one Lopez Torres confronted. Transparency, penetrability, authorship, and contestability matter not because any one of these is constitutionally mandated, but because a nominating system in which they are all absent or sufficiently robust suggests a process with defects that may be of constitutional dimension. Examining the degree to which a nominating process possesses these characteristics offers a means to evaluate whether a regime actively inhibits, facilitates, or promotes vibrant party governance and the protected associational interests that accompany it. Doing so helps to ensure that the associational interests at stake remain interests that are worth protecting.

The Justices may well disagree, but *Lopez Torres* is hardly proof that they do. While the Court viewed the smoke-filled room as another political thicket to be avoided, judicial restraint does not best explain why the Justices were able to stomach New York’s regime. Instead, a wholly distinct concern propelled the Court to rule as they did.

Specifically, the Justices worried New York would replace the nominating system the lower courts invalidated with something much worse. The Court has never much liked the judicial elections, and vindicating the complaint in *Lopez Torres* promised—though hardly guaranteed—New York would replace its “sham” judicial elections with real ones. Whatever the Justices made of the hard fought contest between Senators Obama and Clinton, they had no desire to see it replicated where judicial offices were at stake. Fine for the presidency, perhaps, but for judges, any smoke-filled room was to be preferred.


In 1997, Brooklyn Civil Court Judge Margarita Lopez Torres first decided to seek her party’s nomination to be a state supreme court justice in New York’s Second Judicial  

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48 See Republican Party of Minnesota v. White, 536 U.S. 765, 787-88 (2002); see also *id.* at 788-792 (O’Connor, J., concurring).
49 See *infra* notes and accompanying text.
A decade later, Illinois Senator Barack Obama announced he would be seeking the Democratic Party’s nomination for the presidency.\footnote{\textit{New York currently is divided into 12 judicial districts, N.Y. Const. art. VI, §6(a), (b), each of which encompasses several smaller political subdivisions known as assembly districts. N.Y. Const. art. III, § 5. Supreme court justices in New York are trial judges in state trial courts of general jurisdictions. See \url{http://www.courts.state.ny.us/courts/trialcourts.html}.}}

Securing the nomination to these very different offices required each candidate to traverse nomination processes that looked similar in important respects. Both candidates needed to secure the election of loyal regional delegates to attend a centralized party-run convention at which the delegates would nominate them to be their party’s candidate. Both, moreover, needed the support of the party’s leadership to prevail. Differences in detail between these processes, however, reveal why Obama succeeded and Lopez Torres failed.

\section*{A. Ballot Access}

Every State and territory issues rules governing how a candidate’s name comes to appear on a primary or general election ballot. Obama needed to navigate more than fifty different sets of ballot access rules to make sure voters could choose delegates pledged to him. Lopez Torres confronted a single regime, albeit one that in many ways presented more onerous hurdles than any Obama confronted.

\subsection*{i. Becoming a Delegate to New York’s Second Judicial District’s Democratic Nominating Convention}

One way for Judge Lopez Torres to pursue the Democratic nomination for state supreme court justice was to assemble a slate of loyal delegates to run in the primary election. If elected, such delegates would attend the subsequent convention and cast their votes for her.\footnote{See \url{http://www.nytimes.com/2007/02/10/us/politics/11obama-text.html} (Obama’s Feb. 10, 2007 announcement of his presidential bid).} Under New York law, such delegates run individually or in small groups from each of the assembly districts that comprise a judicial district.\footnote{N.Y. Elec. L. §§ 6-106, -124.} In New York’s Second Judicial District, 124 delegates and an equal number of alternates are elected from the district’s 24 component assembly districts.\footnote{New York cedes to each political party power to determine how many delegates should be accorded to each assembly district, requiring only that the number be “substantially” linked to the support the party received from the assembly district in the last election. N.Y. Elec. L. § 6-124. The Democratic Party provides slots for 124 delegates and equal number of alternates to represent assembly districts with the Second Judicial District. See Rules of Democratic Party of the State of New York, art. II, § 5.}

To be placed on the primary ballot, candidates for delegate must circulate designating petitions within the assembly district in which they are running. State law gives them 37 days to gather 500 valid signatures from party members who both reside in that assembly district and who have not already signed another such petition.\footnote{N.Y. Elec. L. §§ 6-134 (3) & (4), -136(2)(i), (3).} Because these requirements routinely render many obtained signatures invalid, those seeking...
access to the ballot must, as a matter of practice, obtain between one thousand and fifteen hundred signatures to ensure obtaining the required number of valid ones.\textsuperscript{56}

If Judge Lopez Torres wanted to run a full slate of delegates and alternates (which the district court found a credible challenger would need to do\textsuperscript{57}), she needed to enlist nearly 250 people to run, and secure 124,000 qualified signatures from the various assembly districts located Brooklyn and Staten Island that comprise the Second Judicial District.\textsuperscript{58} Accomplishing this would require obtaining nearly a quarter of million signatures, based on the lower courts “conservative” estimate of the number of signatures that must be collected to ensure obtaining a sufficient number of valid ones.\textsuperscript{59}

Judge Lopez Torres did not attempt to fulfill these requirements the first two times she sought her party’s nomination. She hoped instead to secure the internal support of local party leaders. Candidates with such support need not satisfy the ballot access rules on their own, but rather may rely on party leaders to make sure that enough delegate candidates qualify for the primary ballot. The leadership (organized at the county level from the assembly district leaders) recruits candidates to serve as delegates and alternate delegates, and enlists petition circulators to obtain the requisite signatures. These petitions typically include the leadership’s choices for all the offices that are at issue in the same primary election cycle. Party-endorsed slates routinely satisfy the primary ballot access requirements, and typically, they are the only ones to do so.\textsuperscript{60} When unopposed, the party’s slate is, under state law, “deemed elected,” and the names of the delegates never appear on the primary ballot.\textsuperscript{61}

Local party leaders rebuffed Judge Lopez Torres when she repeatedly sought their support, refusing to endorse her explicitly because she had refused to make patronage hires in her civil court chambers.\textsuperscript{62} So the third time Lopez Torres decided to try for the party’s nomination, she attempted to secure delegates on her own. She amassed about 30,000 signatures, mostly from eight assembly districts, which enabled 47 delegates to run on her behalf.\textsuperscript{63} Fifteen of these delegates ran unopposed in two assembly districts and hence were deemed elected.\textsuperscript{64}

\textsuperscript{56} Lopez Torres v. New York State Bd. of Elections, 411 F.Supp.2d 212, 220-221 (E.D.N.Y. 2006) (“As a practical matter, . . . 1000 to 1500 signatures per AD are necessary to ensure that legal challenges will be fended off”); Lopez Torres v. New York State Bd. of Elections, 462 F.3d 161, 173 (2d Cir 2006) (“because petition signatures are routinely and successfully challenged pursuant to the one-petition signature rule, among others, each delegate slate must realistically gather between 1,000 and 1,500 signatures to gain a primary ballot position.”).
\textsuperscript{57} See Lopez Torres v. New York State Bd. of Elections, 411 F.Supp.2d 212, 220 (E.D.N.Y. 2006) (finding that “a challenger candidate would need to field delegates in all or virtually all the ADs to have a realistic chance of prevailing in enough races to obtain a majority of delegate support at the convention . . . not only because a challenger candidate is not likely to win every delegate race under normal circumstances, but also because the prospect of competing against the party leaders elevates the degree of difficulty.”).
\textsuperscript{58} See 411 F. Supp. 2d at 219.
\textsuperscript{59} See supra note [53]
\textsuperscript{60} 462 F.3d 161, 174-75 (2d Cir. 2006).
\textsuperscript{61} N.Y. Elec. L. § 6-160 (2).
\textsuperscript{62} 411 F. Supp. 2d at 235 (describing Lopez Torres’ meeting with Brooklyn Chairman Clarence Norman “on August 22, 1997, in Junior’s Restaurant on Flatbush Avenue in Brooklyn [at which] Norman reminded Lopez Torres that her failures to hire as her court attorney the people sent to her by party leaders had been a serious breach of protocol.”); see also 462 F.3d at 178-79
\textsuperscript{63} 411 F. Supp. 2d at n. 34.
\textsuperscript{64} 411 F. Supp. 2d at n. 34.
The remaining 32 delegates Lopez Torres enlisted ran in contested races. New York law ensured that their names appeared on the primary ballot, but prohibited any indication of their affiliation with Judge Lopez Torres. Two of these 32 candidates were elected, giving Judge Lopez Torres 17 delegates slated to attend the 2003 convention.\(^{65}\)

\[ii. \quad \text{To be a Delegate to the Democratic National Convention}\]

When Barack Obama decided to seek the Democratic Party’s nomination, he needed to get his name on the ballot in each state primary or caucus contest. The process he navigated was a complex one, governed by a mix of rules promulgated by the Democratic National Committee (DNC),\(^{66}\) the respective state Democratic party, and the state itself where primary or caucus occurred.

The DNC established the overall structure for 2008 nomination process. It selected a convention date and location.\(^{67}\) It decided that primary voters and caucus participants nationwide would select 3409.5 pledged delegates to attend this convention, apportioned based on a formula meant to account both for population and the degree of past support for the party in the State.\(^{68}\) These delegates would be awarded proportionally to any candidate receiving at least 15 percent of the vote in each congressional district.\(^{69}\) The DNC also created the well-known and much discussed superdelegates, initially set at 823.5\(^{70}\) party officials, Democratic Congress members and Governors, and other prominent Democrats, who would vote as they chose at the

\(^{65}\) 411 F. Supp.2d at n. 34.
\(^{68}\) Under the rules, pledged delegates were allocated to the states based on the following formula: State allocation = \(\frac{1}{2} \times (\text{SDV} ÷ \text{TDV}) + (\text{SEV} ÷ 538)\), where SDV refers to the state’s popular vote for the Democratic candidate in last three presidential elections, TDV refers to the total popular vote for the Democratic candidate nationally in the same elections, and SEV represents the state’s electoral college vote total. Call of the Democratic Convention, Article I, B, http://www.democrats.org/page/-/pdf/FINAL2008CalltotheConvention.pdf.
\(^{69}\) DNC Delegate Selection Rule 13.B (“States shall allocate district-level delegates and alternates in proportion to the percentage of the primary or caucus vote won in that district by each preference, except that preferences falling below a fifteen percent (15%) threshold shall not be awarded any delegates. Subject to section F. of this rule, no state shall have a threshold above or below fifteen percent (15%). States which use a caucus/convention system, shall specify in their Delegate Selection Plans the caucus level at which such percentages shall be determined.”).
convention.\footnote{DNC Rule 9.}

Back in August, 2006, the DNC called on each state party to develop and adopt plans that would govern delegate selection in its State.\footnote{DNC Delegate Selection Rule 1 (“State parties shall adopt Affirmative Action and Delegate Selection Plans which contain explicit rules and procedures governing all aspects of the delegate selection process.”).} State party plans were subject to DNC approval, and needed to comply with several structural constraints the DNC imposed. Among these constraints, DNC rules required that state parties publicize the time and location of all official meetings related to delegate selection (including caucuses and conventions);\footnote{DNC Delegate Rules 3, 4 & 6.} that they comply with a set calendar and complete their selection processes no later than June 10, 2008;\footnote{DNC Delegate Selection Rule 11.A.} that they ensure that all delegate candidates listed on convention, caucus, and on primary ballots have the name of the candidate they support printed next to them;\footnote{DNC Delegate Selection Rule 12.A (“All candidates for delegate and alternate in caucuses, conventions, committees and on primary ballots shall be identified as to presidential preference or uncommitted status at all levels of a process which determines presidential preference.”).} and that they require no more than 5,000 signatures or a fee not exceeding $2,500 before placing the name of a presidential candidate on the ballot.\footnote{Rule 14.A & B.} DNC rules also limited participation in the delegate selection process to voters who “publicly declare or enroll as Democrats.”\footnote{DNC Delegate Selection Rules 2.A.1.}

State parties in turn developed their plans. Thirty-six state Democratic parties along with those in the District of Columbia, Puerto Rico, and the Virgin Islands opted to participate in state-run primaries as their method to select delegates.\footnote{See Delegate Selection Plans for the State Democratic Party in Alabama, Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, South Dakota, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, U.S. Virgin Islands. The Texas Democratic Party opted into the state regime for the selection of 126 of the state’s pledged delegates, with the remaining 67 selected in three-tiers of party-run caucuses. See Texas DSP.} Several of these participated in state regimes that were not in full compliance with DNC requirements. Some state parties sought waivers from the DNC for noncomplying state procedures,\footnote{See, e.g., West Virginia’s DSP (seeking waiver for noncompliant filing deadline); Tennessee’s DSP (seeking waiver from requirement that process be completed within one calendar year).} or otherwise pledged to seek legislative change to bring the State into compliance.\footnote{See New York DSP, I.A} Other simply participated in noncompliant plans.

Most famously, the state parties in Florida and Michigan agreed to participate in state-run primaries scheduled ahead of the dates permitted by DNC rules, a decision that led the DNC’s rules committee first to exclude entirely the delegates selected and subsequently to allow such delegates to participate while halving their vote.\footnote{See Katharine Q. Seelye and Jeff Zeleny, Democrats Approve Deal on Michigan and Florida, THE NEW YORK TIMES, June 1, 2008.} The DNC chose, however, not to penalize other state parties that participated in noncompliant state regimes. Iowa, New Hampshire, and South Carolina, for instance, all held their contests
on dates that did not comply with the ones authorized by the DNC, while Virginia required presidential candidates to obtain 10,000 signatures to qualify for the ballot, notwithstanding the DNC’s 5000 signature cap.

Parties opting to participate in state-run systems confronted varied levels of state regulation. Some States played a limited role, paying for the costs to run the primary, and imposing a few general constraints, but otherwise leaving to the state party power to define the rules for participation, including how candidates would qualify for the ballot. Other States regulated the delegate selection process more closely, granting ballot access to candidates based on factors such as a national reputation, eligibility for federal matching funds, payment of a fee, obtaining a requisite number of signatures, or some combination of these requirements. Where authorized by a State to set ballot access rules, parties participating in state run primaries imposed relatively modest signature and fee requirements.

Fifteen state parties chose not to participate in state-run systems at all, or in the case of Texas, not exclusively, and held party-run caucuses typically on dates that preceded the state-run primaries. Ballot access in caucus states generally required nothing more than a request by the candidate for inclusion, or payment of a modest

82 See DNC Rule 11.A. “Provided, however, that the Iowa precinct caucuses may be held no earlier than 22 days before the first Tuesday in February; that the Nevada first-tier caucuses may be held no earlier than 17 days before the first Tuesday in February; that the New Hampshire primary may be held no earlier than 14 days before the first Tuesday in February; and that the South Carolina primary may be held no earlier than 7 days before the first Tuesday in February. In no instance may a state which scheduled delegate selection procedures on or between the first Tuesday in February and the second Tuesday in June 1984 move out of compliance with the provisions of this rule.”). See also Election Guide 2008: Primary Calendar: Democratic Nominating Contests, N.Y. TIMES, http://politics.nytimes.com/election-guide/2008/primaries/democraticprimaries/index.html (last access August 2, 2008).

83 Virginia Code § 24.2-545 (10,000 qualified voters, including at least 400 qualified voters from each congressional district in the Commonwealth, who attest that they intend to participate in the Democratic primary).

84 See, e.g., South Carolina Code § 7-11-20 (requiring state officials running the elections to employ “cost-effective measures” to the extent possible, and that “the state committee of the party shall set the … filing requirements”).

85 See infra notes [92-94] and accompanying text.

86 See, e.g., South Carolina Democratic Party Delegate Selection Plan, Title VI, http://www.scdp.org/public/files/docs/SCDP_DelegateSelectionPlan2008.pdf ($2500 filing fee or 3000 signatures); Arkansas DSP ($2500); District of Colombia DSP ($2500), Louisiana DSP ($375 fee to party after $750 qualifying fee to state).

87 See Delegate Selection Plans for Colorado, Hawaii, Idaho, Iowa, Kansas, Maine, Minnesota, Nebraska, Nevada, New Mexico North Dakota Washington, Wyoming. The Texas state party opted both to participate in the state-run primary and hold party-run caucuses. See Texas DSP. Democratic Parties in American Samoa and Guam also opted to hold caucuses.


89 See state delegate selection plans for Colorado (candidate must be Democrat for one year); Idaho (automatic placement for being national candidate); Iowa DSP III, 1 (“There are no specific filing requirements whereby a presidential candidate gains access to the Iowa delegate selection process.”); Maine; Nebraska, http://ndp.3cdn.net/1eb31ca4cd1991d1f8_tsm6bnzq0.pdf; New Mexico, http://www.nmdemocrats.org/hu/a/GetDocumentAction/i/1167429; Nevada DSP (citing NRS 293.150 – 293.163 and stating that Nevada has no primary and no formal requirements to participate in the nominating process), North Dakota, Washington.
Operating within this multi-faceted framework, Obama secured access to the ballot in all fifty States and the participating territories. The applicable rules qualified Obama automatically in 29 States based on his status as a “national candidate” and his eligibility for federal matching funds. Obama needed to pay $28,825 to gain access to the ballot in an additional seventeen contests. Finally, Obama needed to collect twenty-nine thousand qualifying signatures to get his name on the ballot in the remaining ten States. At the close of the process, Obama had secured 1766.5 pledged delegates.

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See Delegate Selection Plans for Alaska ($1000); Hawaii ($2,500); Kansas: ($1000); New Mexico ($2,500).


Several Democratic candidates—Dennis Kucinich, Mike Gravel, Bill Richardson, and Chris Dodd—failed to qualify in specific contests. See Richard Winger, Major Party Presidential Candidates Tripped Up By Relatively Lenient Ballot Access Laws, Ballot Access News, Jan. 1, 2008 (noting these failures even though “ballot access laws for candidates to get on presidential primary ballots are very easy, compared to the laws for minor parties and independent candidates to get on the general election ballot.”). These candidates cited strategic decisions to concentrate their resources elsewhere as the reason they failed to qualify in particular contests. See id.


See Alaska DSP ($1000); Ala. Code 1975, §§ 17-13-5(a), -102 ($2500); Arkansas, A.C.A. §§ 7-7-301, 7-8-201 ($2500); District of Columbia, DC ST § 1-1001.05 & DSP ($2500); Hawaii DSP ($2,500); Kansas DSP ($1000); Kentucky, KRS § 118.611 ($1000 plus other requirements); Louisiana, LSA-R.S. 18:1280.22 & DSP ($1125); Missouri, V.A.M.S. 115.761 ($1000); New Hampshire, N.H. Rev. Stat. §655:48 ($1000); New Mexico DSP ($2,500); Pennsylvania, Pa. Cons. Stat. 25 § 2872.1 ($200.00); South Carolina DSP ($2500); Texas Tex. Elec. Code § 191.002, (a) & DSP ($2500); Utah, UCA 20A-9-803 $500 (plus letter from state party chair certifying you as bona fide candidate); Vermont, 17 V.S.A. §§ 2702, 2353, 2354, 2358 ($2000); West Virginia, W. Va. Code, § 3-5-8, ($2500).

Ten states require that candidates obtain a requisite number of signatures, and provide no alternative means of ballot access. See Ala. Code 1975, §§ 17-13-5(a), -102 (signatures from 500 qualified electors statewide, or 50 qualified electors of each congressional district of the state, plus a $2500 filing fee); Illinois, 10 ILCS 5/7-11 (“not less than 3000 or more than 5000” primary electors); Indiana, IC 3-8-3-2 (4500 signatures, including at least 500 from each of the state’s nine congressional districts); New Jersey, N.J. Stat. § 19:25-3(1000); New York, NY ELEC § 6-136 (5000); Ohio, R.C. § 3513.05 (1000); Pennsylvania, 25 P.S. § 2872.1(1) (2000 signatures gathered statewide); Rhode Island Gen. Laws 1956, § 17-12.1-4 (1000 signatures gathered statewide); Vermont, 17 V.S.A. §§ 2702, 2353, 2354, 2358 (1000 and filing fee); Virginia, Virginia Code § 24.2-545 (10,000).

Obama submitted more signatures than the minimum required. See Tim Craig, Obama 1st to
compared with Clinton’s 1639.5.95

iii. Ballot access compared

All told, Obama confronted ballot access rules that enabled him to compete meaningfully for the Democratic presidential nomination. Judge Lopez Torres faced rules that effectively doomed her effort to compete for her party’s nomination. DNC rules ensured that Obama’s name appeared on primary ballots next to the delegate candidates pledged to him;96 New York law kept Judge Lopez Torres’s name off the ballot entirely, and barred delegate candidates from identifying their allegiances on the ballot.97 DNC rules mandated proportional allocation of delegates, allowing Obama to capture a significant number of delegates even in States where he lost the popular vote; New York law gave Lopez Torres no similar opportunity.

DNC rules, moreover, capped the number of signatures Obama needed to get on the ballot and in many places rules adopted by States and state parties reduced or eliminated that number entirely. Even if Obama collected twice the minimum number required (to ensure a sufficient number would qualify), he still needed to collect no more than 60,000 signatures nationwide. Lopez Torres, by contrast, didn’t come close to collecting the nearly 250,000 signatures she needed to run a full slate of loyal delegates and alternates in a single judicial district within New York State.

B. Lobbying Convention Delegates

Neither Lopez Torres nor Obama won enough pledged delegates to secure their party’s nomination. Both accordingly sought to lobby convention delegates to support their candidacies. Once again, Obama was successful, Lopez Torres was not.

i. Lobbying Delegates to New York’s Second Judicial District’s Democratic Nominating Convention

New York law does not compel delegates elected on the leadership’s slate to vote for the leadership’s candidates.98 Lopez Torres accordingly sought to persuade these delegates to vote for her at the convention, but, as the district court found, “[t]he structural and practical impediments” she confronted in this attempt were “insurmountable.”99

Lopez Torres could not easily identify the delegates. During her 2003 attempt at the nomination, she repeatedly asked the Kings County Democratic Committee to

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96 DNC Delegate Selection Rules, 12. For an application, see, e.g., Mobile County, Alabama at: http://www.mobilecounty.org/probatecourt/pdfs/Primary08sampleBallot.pdf.
97 Lopez Torres v. New York State Bd. of Elections, 411 F.Supp.2d 212, 220 (E.D.N.Y. 2006) ("Moreover, unlike presidential delegates, New York's judicial delegates cannot signify on the primary ballot an allegiance to a specific candidate.").
98 128 S.Ct. at 799.
99 411 F. Supp.2d at 217.
identify the delegates, but was rebuffed. Even if Lopez Torres knew whom she needed to contact, New York law gave her what the appellate court deemed “an unrealistically brief” period of time in which to contact them. State law mandates that the party convention be held one to two weeks after the judicial delegates are elected, a period during which Lopez Torres would need to contact and persuade a majority of the 248 delegates and alternates of the merits of her case.

Finally, even if Lopez Torres had sufficient time to lobby the delegates, she would have failed to persuade them of anything. The district court found that the delegates slated by the party are not susceptible to persuasion, that they “do not exercise their own judgment when deciding which candidate to support,” and they “do not actually perform [a] deliberative, consultative, informed role[].” Instead, “without consultation or deliberation, [they] rubber stamp the county leaders' choices (or “package” of choices) for Supreme Court Justice.” The district court explained why: “[The delegates] do not and will not jeopardize their ongoing, multi-faceted relationships with other district leaders and the county leaders over a candidate for Supreme Court Justice.”

ii. Lobbying Delegates to the Democratic National Convention

Barack Obama faced no comparable obstacles when he sought to lobby delegates to the Democratic National Convention. DNC rules set the convention date, and state parties identify their pledged delegates months before the convention. DNC rules, more importantly, identified virtually all the superdelegates much earlier. These rules

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100 411 F. Supp.2d at 225; see also 462 F.3d at 176 (noting that Lopez Torres’ attempt to obtain the names of the delegates was “thwarted by local party officials.”).
101 462 F.3d 176 (“[T]he time frame for lobbying delegates is unrealistically brief.”)
102 411 F. Supp.2d at 224 (time frame leaves “virtually no time for lobbying dozens, if not hundreds of delegates and alternates”). See also 462 F.3d. at 176; N.Y. Elec. L.§ 6-158.
103 462 F.3d at 176.
104 411 F. Supp. 2d at 224. See also 462 F.3d at 176 (noting, inter alia, that “delegates do not exercise their own judgment,” and offer and unanimously confirm nominees without being able to pronounce the nominees names); Clifford J. Levy, Picking Judges: Party Machines, Rubber Stamps, The NEW YORK TIMES, July 20, 2003 (finding the delegates “could not even remember the handful of candidates they had nominated,” that the party “never makes an effort to inform them about which candidates are going to be nominated,” and that “the names are often secret”).
105 411 F. Supp. 2d at 223.
106 411 F. Supp.2d at 223; see also 462 F.3d at 177 (noting that “the party leadership possesses the power to doom a delegate’s political career if she should reject its choice for Supreme Court Justice.”)
108 DNC rules assumed that pledged delegates would vote for the candidate to whom they are pledged, but did not require that they do so. See DNC Delegate Selection Rules 12.J, 1. Presidential candidates have lobbied pledged delegates previously, and for a time, the Clinton campaign indicated that it would do so as well. See Roger Simon, Clinton targets pledged delegates, THE POLITICO, Feb. 19, 2008, http://dyn.politico.com/printstory.cfm?uuid=2EC0F60E-3048-5C12__00410E5BC5CFBB24; Donnie Fowler, It's OK for Clinton & Obama to Lobby Each Others Delegates (February 19, 2008), http://www.huffingtonpost.com/donnie-fowler/its-ok-for-clinton-oba_b_87484.html. There is no suggestion that lobbying of pledged delegates occurred.
109 A comprehensive list of the superdelegates could not be provided prior to the convention itself, given that the public officeholders entitled to the designation were an ever-changing group. See, e.g., Adam Nossiter, Democrat Wins House Seat in Mississippi, N.Y. TIMES (May 14, 2008).
meant Obama easily identified the delegates and that he had sufficient time to make his case to them.

Obama also confronted decisionmakers susceptible to persuasion. Superdelegate support for Hillary Clinton might have “seemed like safe bet” before the primary season began, but by March, “superdelegates were showing an independence that the Clinton campaign had not counted on.”109 Both Obama and Clinton aggressively lobbied the superdelegates, with the media carefully tracking the ever changing allegiances of this critical group.110 Obama’s campaign was able to convince many superdelegates to side with him.

Superdelegates announced their support in public fora and offered varied reasons for it.111 Of those endorsing Obama, some said they chose to support him because he was “tough,” “resilient,”112 a representative of “change,”113 of “hope,”114 and of a “new movement in American political history.”115 Some thought Obama would “provide the necessary leadership,”116 and was “our best chance of winning in November.”117 Several announced they would follow the election returns, either from their district or more generally.118 These announcements added to Obama’s tally, and influenced other superdelegates to sign on as well.119

109 See Katharine Q. Seelye, For Clinton, a Key Group Didn’t Hold, N.Y. Times, June 5, 2008.
110 See id.

111 Superdelegates endorsing Clinton did so as well. See, e.g., Mark Halperin, Ohio Rep. Betty Sutton Statement on Clinton Endorsement, http://thepage.time.com/ohio-rep-betty-sutton-statement-on-clinton-endorsement/ (statement by Rep. Sutton saying she is following the returns in her district, which Clinton won, and that Clinton “has demonstrated a keen understanding of the pressing issues, such as the need to create economic opportunity for working families right here in Northeast Ohio.”).


113 See Robert Schwaneberg, Congressman Payne, NJ Superdelegate, Switches from Clinton to Obama, The Star-Ledger, May 9, 2008 (reporting comments of Rep. Donald Payne (D-10th Dist.), who switched support from Clinton to Obama, saying "After careful consideration, I have reached the conclusion that Barack Obama can best bring about the change that our country so desperately wants and needs.").


118 See, e.g., Jeff Zeleny and Patrick Healy, Black Leader, a Clinton Ally, Tilts to Obama, N.Y. Times, Feb. 15, 2008 (quoting John Lewis saying he could “never, ever do anything to reverse the action” of voters in his district, who supported Obama.; and noting that Rep. David Scott would not against the will of voters in his district); see also http://articles.latimes.com/2008/feb/28/nation/na-endorse28 (quoting John Lewis as
Both Obama and Clinton made campaign contributions to various superdelegates.\textsuperscript{120} These contributions were a matter of public record, but unsurprisingly were not among the reasons cited by superdelegates for their support.

By mid-May, more superdelegates had pledged their support for Obama than for Clinton,\textsuperscript{121} and by day of the last of the primary, enough superdelegates sided with Obama to give him the votes he needed to secure the nomination.\textsuperscript{122}

\textbf{C. The Convention}

Every four years, delegates to the Democratic National Convention select the party’s nominee for the presidency. In recent years, this convention has been a four day affair, televised nationally, attended by thousands. More than 19,000 people attended the 2008 Denver convention, and Obama accepted the nomination at Invesco Field in front of 76,000. The 2008 convention cost more than $100 million.\textsuperscript{123}

A Democratic convention of a very different sort selects the party’s nominees for trial judge in New York’s Second Judicial District. This convention is held without public disclosure of its time or place,\textsuperscript{124} attendance is limited to the delegates themselves,\textsuperscript{125} and the whole affair is over in a manner of minutes.\textsuperscript{126} The 2002 convention for the Second Judicial District took place in the main jury of a Brooklyn courthouse over lunch hour. As one delegate later observed, “You go in, it’s 12 o’clock, and you are out at 12:30.”\textsuperscript{127}

These conventions differ in almost every respect, save one. Both conventions dispense entirely with deliberation and instead nominate a candidate selected elsewhere.

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119 See, e.g., Andrew Sullivan, \textit{John Lewis Switches}, Theatlantic.com, Feb. 15, 2008, \url{http://andrewsullivan.theatlantic.com/the_daily_dish/2008/02/john-lewis-swit.html} (“A figure like Lewis also brings, for good reason, a vast moral credibility with him. He gives permission – even encouragement- for other Clinton super-delegates to move to prevent a bruising and bitter fight through the spring. It’s a tipping point. I predict others will follow.”).


121 See Jake Tapper, Obama Takes Lead in Superdelegate Tally, \url{http://abcnews.go.com/Politics/Vote2008/Story?id=4818637&page=1}.


123 See [Fill in post convention with actual figures]

124 New York States requires that a party hold its judicial nominating convention between two and three weeks after the primary election, see N.Y. Elec. law § 6-158 (5), and that it comply with several procedural requirements. § 6-126. State law does not require the party to make public the specific time and place of the convention.

125 When Judge Lopez Torres sought to address the convention with the hope of persuading the delegates to support her nomination, she was told by a party official “that the floor of the Convention is open, only, to elected Delegates and their successors. I am not aware of any Convention in my thirty (30) years of attendance, which permitted a non-accredited member to be accorded the privilege of the floor....” \textit{Lopez Torres}, 411 F.Supp.2d at 228 (E.D.N.Y. 2006).

126 411 F. Supp. 2d at 230 (noting one convention lasted eleven minutes, another twenty).

New York’s judicial conventions are “are perfunctory, superficial events . . . [that] rubber stamp the major party leaders’ choices for Supreme Court Justice.” Democratic National Conventions were once the locus for real decisionmaking, but today are scripted affairs that approve but do not select a nominee.

That the 2008 convention would follow the modern approach was momentarily uncertain. Senator Clinton, whose supporters represented a majority of the DNC’s Rules and Bylaws Committee, consistently argued that the delegates selected in the Michigan and Florida primaries should be seated at the convention, notwithstanding the Committee’s earlier decision to exclude these delegations for noncompliance with the DNC’s primary schedule. In May, the Committee voted to seat the delegates but to halve their voting power, a resolution that did not give Clinton the boost she needed to fight on after the Montana and South Dakota primaries on June 3. Had the Committee ruled otherwise, Clinton might have continued her campaign, perhaps to the convention floor itself.

No comparable contest would have been possible in New York. State law requires the party to seat all delegates elected through the primary process, thereby eliminating the prospect of competing or discredited slates of delegates. This rule—assuming it is enforceable—facially protects any delegates a challenger candidate manages to secure by guaranteeing them a seat at the convention. Still, the ballot access rules ensure few such delegates will emerge from the primary, while the seating mandate itself eliminates one means for challenger candidates to dispute reported irregularities in the delegate selection process. Thus, even if Lopez Torres knew, as was later reported, that some of the delegates to the 2002 convention were “technically ineligible” to participate, state law facially precluded her from challenging their participation at the convention.

D. The Post-Convention Period

The convention would seemingly mark the end of a comparative account of how Obama secured his party’s nomination and Lopez Torres failed to do so. And yet, the post-convention periods that followed the respective conventions differed significantly and did so in a manner that shaped the nominating processes that preceded them.

129 Thomas Edsall, Clinton Camp Says It Will Use The Nuclear Option, The Huffington Post (May 4, 2008) http://www.huffingtonpost.com/2008/05/04/clinton-camp-considering_n_100051.html
130 N.Y. Elec. L. § 6-124 (delegates elected through the primary process “shall be conclusively entitled to their seats, rights and votes as delegates to such convention.”)
131 The absence of serious challenge to the leadership’s slate means party officials have had no cause to dispute primary results. Were they, however, to be so inclined, the state’s mandatory seating requirement might be subject to challenge as an infringement on party autonomy. See generally Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981); Cousins v. Wigoda, 419 U.S. 477 (1975); Nelson v. Dean, 528 F.Supp. 2d 1271 (N.D. Fla. 2007).
132 See supra notes and accompanying text.
133 See Clifford J. Levy, Picking Judges: Party Machines, Rubber Stamps, The New York Times, July 20, 2003 (quoting delegate who was “technically ineligible” to serve based on residency who nevertheless voted at the convention and stated “I guess it didn’t matter. It was during lunch hour, and the whole thing was so short.”).
Needless to say, securing the Democratic Party’s nomination hardly guaranteed Obama the presidency. The specter of the general election loomed over the primary season, with both Senators Obama and Clinton constantly arguing their relative merits not just against one another, but against the presumptive Republican nominee John McCain.

Not so for the race for trial judge in New York’s Second Judicial District. Had Judge Lopez Torres secured her party’s nomination, she would have become a state supreme court justice. The lower courts in Lopez Torres noted that the general election for that office plays “almost as minor a role” as does the convention, and “one-party rule is the norm in most judicial districts.”

Lopez Torres unsuccessfully attempted to challenge one-party rule in 2003. Having failed yet again to get her party’s nomination, she ran in the general election with a slate of candidates sponsored by the Working Families Party. Headlines during the preceding months highlighted corruption among sitting Brooklyn Democratic judges and the party leaders involved with their selection. The New York Times endorsed Lopez Torres and the slate with which she ran, calling on voters “to register their disgust with the hack-infested local bench and the clubhouse-driven selection process, and . . . [to] elect some good, politically independent judges.” Lopez Torres and her fellow candidates lost to the Democrats by a margin of three to one.

II. FACETS OF BACKROOM DECISIONMAKING

Not every smoke-filled room is the same. Obama and Lopez Torres confronted ones that differed in important respects. The process Obama navigated was more transparent, more penetrable, more directed by party rule, and more contestable than was the one Lopez Torres traversed. This section explores these differences in more detail and seeks to explain why they matter.

A. Transparency

Geraldine Ferraro’s New York Times op-ed prompted a letter writer to suggest what he called “a radical notion: let all Democrats vote for their preferred nominee, and whoever gets the most votes wins.” Such pure majoritarianism hardly characterized the process through which Obama secured the nomination. The DNC gave sizeable influence to the superdelegates, and allocated pledged delegates based not on one-person, one-vote, or even one-Democrat, one-vote, but instead based on a complex formula that

134 411 F. Supp.2d at 217.
135 462 F.3d at 178.
137 What’s This? An Actual Judicial Election, N.Y.TIMES,Nov. 1, 2003; see also The Sun Palm Card, THE NEW YORK SUN, Nov. 4, 2003 (endorsing Lopez Torres as “an opponent of the Democratic machine” and noting that “[her] election would send a message that it is possible to stand up against corruption in Brooklyn.”).
139 See Aaron Christopher Cohen, To the Editor, N.Y.TIMES, Feb. 27, 2008.
considered a state’s electoral college strength and its past support for the party.\textsuperscript{140} Insofar as majority rule is, in the words of Frank Michelman, “maximally transparent, for our culture,” the DNC’s system was necessarily opaque.\textsuperscript{141}

And yet, even within the constraints imposed by a hybrid nomination system that relies on heavily on a smoke-filled room, the process through which Obama secured the Democratic nomination was notably more transparent than was the one Lopez Torres confronted. The rules governing the regime were more accessible, those participating in it more readily identified, and the decisionmaking process itself more visible.\textsuperscript{142} The decisionmakers, moreover, offered public explanations for their decisions and made sure those explanations were public-regarding.\textsuperscript{143}

Obama knew the names of the superdelegates, and his campaign as well as numerous media organizations kept careful tally of who among the superdelegates had pledged to support him, who were uncommitted, and who might be persuaded to reconsider their fidelity to Clinton.\textsuperscript{144} Superdelegates, for their part, staged public events to announce their decisions to support Obama or Clinton, or to switch their allegiance between the two, and they were wont to describe in some detail the process that led to them to their decision and the reasons underlying it.\textsuperscript{145} And the DNC staged a public event of its own, allowing live coverage of the proceedings of the critical May meeting at which its Rules Committee debated Clinton’s proposal to seat the Michigan and Florida delegations.\textsuperscript{146}

Lopez Torres confronted a far less transparent process. The delegates to the judicial nominating convention for New York’s Second Judicial District were not

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\textsuperscript{140} See supra notes and accompanying text. See also Richard Hasen, \textit{Whatever Happened to ‘One Person, One Vote?’ Why the Crazy Caucus and Primary Rules are Legal}, SLATE, Feb. 5, 2008.

\textsuperscript{141} See Frank Michelman, \textit{Why Voting?} 34 L.OY. L.A. LAW REV. 985, 999 (2001) (“In our civilization, people have a burning need, and they make a morally cognizable demand, to be treated, individually and formally, as equals in the business of governing the country, and simple majority voting does that in a way that is maximally transparent, for our culture”); see also Note, Rethinking The Electoral College Debate: The Framers, Federalism, and One Person, One Vote, 114 HARV. L. REV. 2526, 2544-45 (the idea of one-person, one-vote “promotes transparency in both the operation of and rationale underlying the electoral system”).

\textsuperscript{142} Celebrated in diverse and varied areas of law, transparency defies a single definition. Definitions vary, often based on the context in which the concept is being invoked. See, e.g., Note, Rethinking The Electoral College Debate: The Framers, Federalism, and One Person, One Vote, 114 HARV. L. REV. 2526, 2546 (2001) (“the ability to observe policy choices and understand why those choices are being made, even if they do not agree with them.”); William B.T. Mock, \textit{An Interdisciplinary Introduction to Legal Transparency: A Tool For Rational Development}, 18 Dickinson Journal of International Law 293, 295 (2000) (“A regulation or law is to be transparent if … someone subject to the law can understand what is expected of her, can understand and comply with the commands of the law, and can foresee the consequences of compliance or noncompliance”).

\textsuperscript{143} See, e.g., Jody Kraus, Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis, 93 VA. L. REV. 287, 289 (2007) (describing use of term “transparency” to describe “the extent to which the express legal reasoning offered . . .described the actual reasoning” used to make decisions);


\textsuperscript{145} See supra notes and accompanying text.

\textsuperscript{146} See, e.g., Katharine Q. Seelye and Jeff Zeleny, \textit{Democrats Approve Deal on Michigan and Florida}, THE NEW YORK TIMES, June 1, 2008.
identified publicly nor could she readily determine their identities. When seeking the nomination, Judge Lopez Torres repeatedly asked party officials to identify the delegates but was rebuffed. The delegates themselves provided no public statement or other explanation for their votes, and indeed seemed to have no information whatsoever about the people they nominated. Even the list of the nominees was kept secret until the convention. And while the party leaders who actually selected the nominees that the convention ratified were identified publicly, their role in the process was not.

Needless to say, party leaders offered no public explanation for their decisions to promote a given candidate. Far from public-regarding, these decisions were found by the district court to be based on the nominee’s willingness to comply with the party’s patronage system and to contribute financially to party leaders.

The district court called New York’s process “opaque” and “far more complex than a list of its formal phases suggests.” This lack of transparency (which continues to define the state’s system) is hardly happenstance. Complexity necessarily diminishes transparency, and New York’s regime lacks ancillary measures such as open meeting and publicity requirements that might diminish this effect.

New York’s system, moreover, obscures the critical power it cedes to party leaders over the nomination process. New York might have given party leaders this power through a far less “byzantine” network. The State might have eliminated the election of judges entirely, and adopted an appointive system in which state officials look to party leaders for recommendations about which candidates to appoint. Alternatively, New York State might have retained judicial elections, but required a pure convention system where the party itself would design the rules for participation with party leaders playing a decisive role. Or the State might have deregulated the nomination process.

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148 See supra notes and accompanying text.
149 See Levy, supra note.
150 At least prior to the Lopez Torres litigation itself. See infra notes and accompanying text.
151 411 F. Supp. 2d at 233. See also Michael Cardozo, Corporation Counsel, City of New York, Mending a Broken Branch, http://www.judicialreports.com/archives/2006/09/the_cardozo_rx_for_judicial_re_1.php, Sept. 8, 2006 (noted statement by judge who stepped down for disciplinary violations, “‘You don’t have to know something to be a judge, you have to know somebody’”); COMMISSION TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, http://www.nycourts.gov/reports/FerrickJudicialElection.pdf, Feb. 6, 2006 (system poses “a threat to both judicial impartiality and independence”); Judging Candidates, SYRACUSE POST-STANDARD, Feb. 2, 2006 (“Too many judges get their jobs . . . as rewards for loyal party service”); Breaking Down the Clubhouse, NEW YORK TIMES, Sept. 9, 2006 (“The current system of choosing judges through secret deals and old-fashioned cronyism corrodes the integrity of the legal system and diminishes the courts”); Courting Contempt for the Public, NEW YORK DAILY NEWS, Nov. 19, 2006 (“[T]he bosses made it impossible for anyone not beholden to them to become a Supreme Court justices”); Justice for Voters, SYRACUSE POST STANDARD (“[A] lot of people were put on the bench based on their party loyalty, not their merits”); Change in How Judges are Picked, SYRACUSE POST STANDARD, Dec. 24, 2006 (noting Brooklyn leaders “caught selling judgeships”); Levy, supra note (noting attorney delegates who hoped to solicit court-appointments from the nominee); Levy, Where Parties Select Judges, DONOR LIST IS A COURT ROLL CALL, The NEW YORK TIMES, Aug. 18, 2003.
152 411 F. Supp.2d at 214, 216.
153 462 F.3d 161, 200.
154 See Am. Party of Texas v. White, 415 U.S. 767, 781 (1974) (“It is too plain for argument . . . that the State . . . may insist that intraparty competition be settled before the general election by primary election or party convention”).
entirely, and left to the party the power to select the structure for the nomination of candidates. Any of these regimes would have lodged decisionmaking power in the party leadership more directly and visibly than the system the State employs, a system that facially invites participation by the party rank and file as voters but functionally excludes party members participating meaningfully.

In *Lopez Torres*, the district court found that New York’s regime undermined things like judicial integrity and confidence in the judiciary, values the State brazenly and implausibly claimed its system promoted. Insulating judicial candidates from direct voter involvement in their selection might well produce judges of greater integrity and foster more public confidence in the judiciary itself. But insofar as New York State’s system seeks to minimize direct voter participation in this process, it advances this goal only through obfuscation. The regime limits voter involvement not by explicit statutory command but instead by facially inviting such participation while functionally lodging critical decisionmaking power in local party leaders. Sound reasons support a preference for appointment to election as a means to select judges, but “transform[ing] a de jure election into a de facto appointment” is a convoluted and hence means to secure that end.

Transparency (or the lack thereof) matters. Though not without its critics, transparency is generally thought to facilitate decisions that are based on legitimate criteria, and thus decisions that are better, more other-regarding, and more equitable than those produced by an opaque process. Transparency gives interested parties information about the choices decisionmakers make, and thereby enables those affected to monitor and hold accountable those responsible for the path selected.

In the electoral arena, the importance of transparency is most frequently discussed in connection with vote tabulation and election administration, campaign finance,
and the electoral college. Transparency, however, also matters in a nomination process, largely for the reasons it matters elsewhere. It fosters the selection of candidates based on more objective criteria, it conveys information that enables and encourages party members to monitor the process, and keeps decisionmakers accountable to their membership.

These benefits, however, do not require a nomination process that is completely transparent. Partial transparency may suffice, so long as it exists at crucial junctures. The complex, non-majoritarian systems Obama and Lopez Torres traversed demonstrate how transparency exists along a continuum, how it is a matter of degree, and how the degree that is manifest matters crucially to the vibrancy of the underlying organization. Even partial transparency invites party members to respond in a manner not possible when decisionmaking is wholly obscured. It enables those unhappy with the decisions to know who is responsible for them or at least how to find out, and to know or maybe simply be able to demand to know why the decision was made. As explained in more detail below, even partial transparency contributes to an environment in which those affected by a decision may retreat, defect, or demand change from within.

B. Penetrability

Securing the Democratic Party’s nomination for the presidency required Barack Obama to navigate scores of electoral rules. These rules were numerous, complex and varied, and compliance with them was difficult. But the densely regulated process Obama confronted was ultimately a penetrable one, and his success stemmed, in large part, from the access the rules themselves allowed. The ballot access rules enabled Obama to get his name on primary ballots; the rules governing the allocation of delegates prevented Obama’s defeat in places like California from becoming ruinous; and the rules mandating a lengthy and serialized process ensured that Obama could effectively lobby delegates, and effectively exploit sequential victories and near-victories.

The rules Obama confronted might well have been different. More stringent ballot access rules might have kept Obama’s name off the ballot while allocating delegates based on a winner-take-all approach might have ended the Obama candidacy on Super Tuesday. A decision by the DNC early on to count the Michigan and Florida returns in full (or never to have excluded them in the first instance) might well have secured Hillary Clinton’s success. But the rules were what they were, and they allowed Obama to succeed in critical early battles, remain viable through Super Tuesday, and claim frontrunner status by late February. Once Obama got that far, he could not be ignored.

Judge Lopez Torres enjoyed no comparable access to her party’s nomination process. As the district court found, challenger candidates like Lopez Torres could not “clear all the hurdles necessary to elect supportive delegates,” and confront

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165 See Electoral College Debate, supra note.
166 See infra notes and accompanying text.
167 See, e.g., John M. Broder, The Nation: Show Me the Delegate Rules and I’ll Show You the Party, N.Y. TIMES, Feb. 17, 2008; A Primer on the All-Important Role of Delegates, http://www.motherjones.com/mojoblog/archives/2008/02/7080_a_primer_on_the.html. (That, on Super Tuesday, Obama “does not have to come out the winner. He need only survive”)
168 See, e.g., A Primer, supra note.
“insurmountable” obstacles in seeking to lobby the delegates elected on the party’s slate.\textsuperscript{169} Both in design and effect, the New York’s system was functionally impenetrable.\textsuperscript{170}

The Supreme Court did not disagree. What mattered to the Justices, however, was that the process was and remains legally accessible. As Justice Scalia pointed out, “[n]o New York law” compels the election of the leadership’s slate; no law directs those elected to vote the leadership’s preference; and no state law prohibits challenger candidates from attending the convention or from lobbying the delegates.\textsuperscript{171}

All this is true, to be sure. That the Court would nevertheless explicitly and unanimously deem formal, legal accessibility sufficient to validate New York’s regime is something new. No state law, after all, blocked African-American voters from participating in the primaries at issue in the last two White Primary Cases.\textsuperscript{172} Texas law had been intentionally silent on the question, but the Court nevertheless invalidated regimes that denied black voters access to the only elections that mattered in the respective jurisdictions.\textsuperscript{173}

Even if decisions like \textit{Smith v. Allwright} and \textit{Terry v. Adams} represent a special rule regarding race discrimination,\textsuperscript{174} the Court’s explicitly narrow focus in \textit{Lopez Torres} remains novel. The Justices have repeatedly claimed to have engaged in precisely the type of analysis \textit{Lopez Torres} disavowed; that is, the Court has said it focuses not only the “requirements themselves” but also on “on the manner in which political actors function under those requirements.”\textsuperscript{175} When, for instance, \textit{Bullock v. Carter} struck down a state-mandated filing fee for prospective candidates, Chief Justice Burger emphasized that barriers to access must be examined “in a realistic light” that includes “the extent and nature of their impact on voters.”\textsuperscript{176} He explained that, under the challenged regime, “potential office seekers . . . are in every practical sense precluded from seeking the nomination of their chosen party.”\textsuperscript{177} \textit{Bullock} did not focus exclusively on legal impediments but instead examined the system’s “real and appreciable impact,” stressing that do otherwise would to be “ignore reality” about the system’s effect in practice.\textsuperscript{178}

\textsuperscript{169} 411 F. Supp. 2d at 217.  
\textsuperscript{170} See, e.g., 462 F.3d 161, 175 (2d Cir. 2006) (quoting testimony that “the idea that in individual candidate would go out and recruit delegate candidates and run delegates pledged to that candidate in the primary is not the system and it twists the design of the system on its head”); \textit{id.} at 177 (quoting testimony that “By definition, the convention system is designed [so] that the political leadership of the party is going to designate the party’s candidates”).  
\textsuperscript{173} See also \textit{Rice v. Elmore}, 165 F.2d 387 (4th Cir. 1947) (\textit{Lopez Torres} on 14th Amendment, citation to CDP at 573); California Democratic Party v. Jones, 530 U.S. at 573.  
\textsuperscript{174} See Lopez Torres (on 14th Amendment, citation to CDP at 573); California Democratic Party v. Jones, 530 U.S. at 573.  
\textsuperscript{176} \textit{Bullock}, 405 U.S. at 143.  
\textsuperscript{177} \textit{id.} (emphasis added).  
\textsuperscript{178} \textit{id.} at 144.
Bullock was hardly an outlier in this regard. Back in United States v. Classic, the Court emphasized the “the practical operation” of a primary election in controlling outcomes, even as it observed the absence of any “effective legal prohibition” on voter rejection of the primary choice in the general election.\textsuperscript{179} After Bullock, Lubin v. Panish emphasized the need to examine “[t]he realities of the electoral process,”\textsuperscript{180} and rejected access that was “merely theoretical.”\textsuperscript{181} And as recently as Clingman v. Beaver, Justice O’Connor called for a “realistic assessment of regulatory burdens on associational rights” and an “examination of the cumulative effects of the State’s overall scheme.”\textsuperscript{182}

Not so in Lopez Torres, where the Justices steadfastly refused to examine the system’s cumulative effects and came pretty close to embracing empty formalism.\textsuperscript{183} No state law prevented Judge Lopez Torres from attending the convention or lobbying delegates, but the Court knew full well that in “every practical sense” she would be unable to do so. So too, the Court willingly “ignore[d] reality” and deemed “entirely reasonable” New York’s requirement that a single candidate for delegate obtain 500 signatures before gaining access to the primary ballot.\textsuperscript{184} The legal obstacles to a successful standalone candidacy as a convention delegate were certainly less onerous than those involved with securing the election of a coordinated slate, but practical obstacles made pursuing such a standalone candidacy pointless. Even if such a candidate could amass the requisite signatures and successfully earn a spot at the convention, the absence of debate and discussion at that state-mandated convention guaranteed participation would be a fruitless endeavor. Indeed, Lopez Torres never suggests these standalone candidates ever occurred.

Lopez Torres, moreover, does not appear to be an aberration. The Court’s rigid focus on legal rather than practical impediments to participation was again evident in Crawford v. Marion County Board of Elections,\textsuperscript{185} in which the Justices turned back a constitutional challenge to Indiana’s voter identification requirement. Indiana’s law did not wholly preclude anyone from voting, but instead imposed steps to be taken by voters lacking the requisite ID.\textsuperscript{186} Under this regime, a sufficiently diligent voter lacking conventional ID should still be able to vote. Still, the law undoubtedly creates obstacles that many voters simply will not overcome\textsuperscript{187}—not because compliance is wholly impossible, but because it is too burdensome.\textsuperscript{188}

\textsuperscript{179} United States v. Classic, 313 U.S. at 313, 319. \\
\textsuperscript{180} Lubin v. Panish, 415 U.S. 709, 719 n.5 (1974). \\
\textsuperscript{181} Amer. Party of Tex. v. White, 415 U.S. 767, 783 (1974). \\
\textsuperscript{183} Id. at 610 (Stevens, J., dissenting in part) (emphasizing that the assessment “should focus on the realities of the situation, not on empty formalism.”). Cf. Elmendorf, supra note [40], at 409 (predicting the Court would not give “unqualified approval” to the “neither formal no abstract” approach followed by the lower courts in Lopez Torres). \\
\textsuperscript{184} Lopez Torres, 128 S.Ct. at 799. \\
\textsuperscript{185} 128 S.Ct. 1610 (2008). \\
\textsuperscript{187} Cf. Bruce Ackerman and Jennifer Nou, Hey, What About the 24th?, http://www.slate.com/id/2190372. \\
\textsuperscript{188} Cf. Vikram David Amar, What the Supreme Court’s Recent Decision Upholding Indiana’s Voter ID law Tells Us About the Court, Beyond the Area of Election Law, Findlaw,
A burden, to be sure, does not alone make a law invalid. Diligence might be a proper prerequisite to participation, at least if concerns about fraud and its perception factor into the calculus. So too, a functionally impenetrable nomination process might not be problematic, at least insofar the system retains other features (like transparency, party-driven authority, or contestability) that counterbalance the lack of access. But in both Crawford and Lopez Torres, the Justices chose not to consider such questions, satisfied to limit their gaze to formal legal access, and to ignore the burdens that arise under each system in practice. As a result, the Court seems to have given States license to structure electoral processes to impose barriers to participation, subject only to the most limited constraint that they not be legally impossible to traverse. Reality no longer has anything to do with it.

C. Authorship

Obama confronted a smoke-filled room for which the DNC was the sole author. DNC rules alone created the superdelegates and explicitly gave them control over the nomination process. The smoke-filled room Lopez Torres faced stood in more complex relation to state law. Lopez Torres directed her legal complaint not at her party’s leaders who blocked her candidacy, but at New York State, which authored the procedures governing the nomination process. She did not claim a freestanding entitlement to influence within her party, but instead sought a nomination process in which the State had not unreasonably interfered. And she argued New York has so interfered by creating and empowering a smoke-filled room that functionally barred meaningful participation by bona fide party members.

The Supreme Court disagreed that New York’s regime constituted unreasonable interference. It might have stopped there, but instead the Court went further to suggest that Lopez Torres lacked any associational interest with which the State might interfere. Justice Scalia’s opinion flatly rejected the claim that the plaintiffs possessed an “associational right not only to join, but to have a certain degree of influence in, the party.” The opinion added that they were “in no position to rely on the right the First Amendment confers on political parties to structure their internal party processes and to select the candidate of the party’s choosing,” noting that “both the Republican and Democratic state parties have intervened in the very early stages of this litigation to defend New York’s electoral law.”

The suggestion seems to be that such participation precludes, negates, or otherwise resolves any alleged interference with a party’s associational freedom, and that party members like Lopez Torres possess no distinct associational interests the State

http://writ.news.findlaw.com/amar/20080508.html (“It doesn't take a genius to see that relegating plaintiffs to 'as applied' challenges in these kinds of cases doesn't really leave them with much.”).

188 See 128 S.Ct. at 1617; id. at 1636 (Souter, J dissenting) (“There is no denying the abstract importance, the compelling nature, of combating voter fraud.”); see also http://www.gop.com/ycmtu.htm

189 See infra notes and accompanying text.

190 128 S.Ct. at 798, 799 (also “realistic chance to secure the party’s nomination”) See supra notes [198 and 199] and accompanying text.

191 128 S.Ct. at 798.

192 Id. See also Elmendorf, supra note [40], at n.11.
might infringe. This suggestion is interesting in several respects. First, Justice Scalia turns out to have been mistaken about the participation of the State Democratic Party. The New York Republican State Committee intervened as a defendant, but its Democratic counterpart did not. And while the New York County Democratic Committee signed on as an intervenor-defendant, no other Democratic county organization—including that of King’s County where Judge Lopez Torres sought her party’s nomination—chose to participate. This failure to intervene should seemingly be consequential given the Court’s suggestion that that intervention by a state party as an intervenor-defendant suffices to resolve any associational interests at stake. Does the failure to intervene give rise to constitutional issues that require resolution?

Second, even if the State Democratic Party had intervened as Justice Scalia seemed to think it had, the Court has not previously suggested such intervention might be sufficient to resolve an alleged infringement of associational rights. Even if intervention of this sort might be equated with consent—itself a novel proposition—the Court has previously rejected the claim that “a political party’s consent will cure a statute that otherwise violates the First Amendment.”

Finally, the Court had not previously suggested that party members lack distinct associational interests that warrant protection. Lopez Torres appears to hold that, barring complaint from the party leaders themselves, the State may regulate party conduct without constraint, and that, apart from the joining the party itself, party members possess no associational rights the State might infringe. This breaks new ground.

Prior to Lopez Torres, however, the Court repeatedly recognized that party members possess distinct interests to participate in their party’s candidate selection process free from unreasonable state interference. Kusper v. Pontikes, for example, struck down a state law that required a voter to register with a party twenty-three months in advance of a primary election to vote in the primary. The Court held that the law impermissibly burdened the voter’s interest in free political association because it blocked her from participating in her party’s nomination process. Describing the nomination of candidates as a political party’s most “basic function,” the Court held that the state-mandated restriction undermined the voter’s “prime objective” for joining the

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196 Winger, supra note [n. 46].
197 See Elmendorf, supra note 40, at 407 (“Ought the district court to have processed the constitutional challenge along two tracks, applying lenient review . . . for purposes of Republican judicial nominations . . . and strict scrutiny on the Democratic side (where no offsetting right had been asserted by the relevant organ of the party?”).
199 See Eu, 489 U.S. 214, 225 n. 15.
200 128 S.Ct. at 798. Cf. Elmendorf, supra note, at 400 (characterizing as “novel” recognition that party organizations might possess a “constitutionally protected interest in choosing candidates without regard to the wishes of bona-fide party members”); Lowenstein, supra note, at 1783 (suggesting that party organizations ought to have no greater claim than the State itself “to speak for the associational interests of the party”).
201 Pontikes voted in the February, 1971, Republican primary, then switched parties, and sought to vote in the March, 1972, Democratic primary. 414 U.S. at 52-53.
party: it denied her “any voice in choosing the party’s candidates, and thus substantially abridged her ability to associate effectively with the party of choice.”

The “ability to associate effectively” is admittedly a fuzzy concept. Kusper makes clear, however, both that it encompasses something more than the simple fact of membership in a political party, and that it prevents the State from wholly denying party members the ability to participate in their party’s nomination process. Other cases confirm that the associational interest at stake here transcends the mere fact of affiliation. Eu v. California Democratic Central Committee emphasized as particularly strong “the associational rights at stake” when “party members . . . seek to associate . . . with one another in freely choosing their party leaders,” and explicitly emphasized “the independent First Amendment rights of the parties' members.” California Democratic Party v. Jones spoke of “the moment of choosing the party’s nominee” as the juncture where “party members traditionally find their collective voice and select their spokesman.” In Cousins v. Wigoda, Justice Rehnquist stated, “[A]t the very heart of the freedom of assembly and association” is “[t]he right of members of a political party to gather in a . . . political convention in order to formulate proposed programs and nominate candidates for political office.” Justice Stevens wrote in Timmons v. Twin Cities Area New Party that the “members of a recognized political party unquestionably have a constitutional right to select their nominees for public office.” And in Tashjian, Justice Scalia stated without equivocation that the “[t]he ability of the members of the Republican Party to select their own candidate . . . unquestionably implicates an associational freedom.”

To be sure, none of this suggests that federal courts should help party members displace choices made by party leaders. Were New York to deregulate the nomination process entirely, the Kings County Democratic Party might opt to nominate judicial candidates in smoke-filled rooms that are inhospitable to Judge Lopez Torres. Political parties possess associational interests in so doing.

But these interests hardly establish that the State may mandate the very same procedures with impunity. In fact, the Court itself had repeatedly distinguished procedures mandated by the State from those implemented by party prerogative. A State, for instance, may not compel a political party to include nonmembers in the party primary, even though the party itself may invite nonmembers to participate in its nominating process. Nor may States compel political parties to seat convention delegates selected using state-mandated processes that the party rejects, even though the parties might select those very procedures for themselves.

202 414 U.S. 51, 58 (1973) (“A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in [the candidate] selection process.”).
205 419 U.S. 477, 491 (1975) (Rehnquist, J., concurring in result) (emphasis added).
206 520 U.S. 351, 371 (1997) (Stevens, J., dissenting) (emphasis added);
207 479 U.S. at 235-236 (Scalia, J., dissenting) (emphasis added).
211 Compare Tashjian, 479 U.S. at 216-17 (upholding associational freedom of political party to include nonmembers in nominating process) with LaFollette, 450 U.S. at 122 (associational freedom of political
The legitimacy of the State’s regime has never before hinged on whether party leaders might select that regime for themselves. Instead, the Court has repeatedly distinguished policy from its source—and for good reason. A smoke-filled room installed by a political party is different in kind from one state law actively promotes. State regulation of this sort inhibits a political party from functioning as it should. It distorts internal party operations, blurs the lines of accountability, and infringes on party autonomy itself. It appropriates to the State and thereby infringes the freedom of political parties to determine party structure and leadership on their own free from state interference.

New York’s judicial nomination system highlights the point. State authorship of the rules governing the critical junctures of the nomination process has obscured responsibility within the system. State law and party policy have become intertwined such that party officials look to the legislature not their membership for policy, and party members often fail to distinguish the two. It’s no surprise, then, that the 2003 judicial nominating convention for the Second Judicial District was held in the main jury room of the downtown Brooklyn courthouse.

D. Contestability

Finally, the decision made by the smoke-filled Obama confronted was far more contestable than was the choice made by the one Lopez Torres faced. Republican nominee John McCain led that contest, making clear long before the Democratic convention itself that an Obama presidency was far from assured. No one doubted that the general election would be competitive, and that assumption shaped Obama’s path to the nomination. All the Democratic candidates in 2008 presented themselves as the best choice to beat the Republicans in November, and the superdelegates prominently cited this interest in victory when pledging their support.

Not so in New York’s Second Judicial District, where securing the Democratic nomination is tantamount to election as state supreme court justice. To be sure, no legal obstacle prevents those aspiring to this office from running in the general election as an independent or third party candidate. New York’s requirements for doing so are, in fact, relatively undemanding.

But, again, reality is something different entirely. Rampant gerrymandering in New York ensures “one-party” rule in each of the judicial districts

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party includes power to reject delegates selected at state primary at which nonmembers participated).

Lower courts have likewise recognized this distinction between party power and state rule by upholding the ability of political parties to structure participation in party affairs in a manner not available to the State. See, e.g., Bachur v. Democratic National Party, 836 F.2d 837 (4th Cir. 1987) (associational freedom encompasses party power to mandate that men and women comprise equal proportions of state delegation to national convention); Ripon Society v. National Republican Party, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc) (political party may chose “among various ways of governing itself . . . the one which seems best calculated to strengthen the party and advance its interests,” even if that choice allocates delegates in manner that dilutes the voting strength of some members); see also LaRouche v. Fowler, 152 F.3d 974, 996-998 (D.C. Cir. 1998) (associational freedom of political party includes power to exclude candidate as unqualified under party rules and disregard votes cast for him).

Levy, supra note.

See supra note and accompanying text.

See 128 S.Ct. at 802 (Kennedy, J., concurring) (noting signature requirement “has not been shown to be an unreasonable one”)

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(and indeed other types of electoral districts as well.)\textsuperscript{215} That means the general election is not a locus of real decisionmaking. The New York Times consequently noted with some surprise Lopez Torres’s 2003 effort to challenge party dominance, headlining its endorsement of her third party candidacy with the query: \textit{What’s This? An Actual Judicial Election.}\textsuperscript{216} Turns out, it wasn’t, and Lopez Torres was routed.

The Court in \textit{Lopez Torres} thought this lack of competition was irrelevant. The Constitution does not require a competitive general election, to be sure.\textsuperscript{217} And yet, the fact that nomination is tantamount to election within New York’s regime critically shapes the incentives of the party leaders who control the smoke-filled room. Where competitive, the general election functions as a protective device and imposes a structural constraint on leadership discretion to select the party nominee.\textsuperscript{218} It counsels party leaders to consider seriously challenger candidates like Lopez Torres, or to ignore them at their peril.

Competition in the general election may even function as a viable substitute for a transparent, penetrable and party-driven nomination process. The absence of competition—the inability to contest the choices made in the smoke-filled room—compounds the effects of a nominating regime characterized by insufficient transparency, penetrability, and party authorship, and thus signals a regime that may be constitutionally suspect.

\textbf{III. A CURE WORSE THAN THE DISEASE?}

Throughout the 2008 primary season, the DNC’s process remained sufficiently transparent, penetrable, party-driven, and ultimately contestable that party leaders, party members, and observers generally engaged in a vigorous debate about the merits of the process. Some, like Ferraro, praised the superdelegates’ independence;\textsuperscript{219} others celebrated their role in ending the process by June, thereby providing a close race a clear winner.\textsuperscript{220} Those unhappy with the power DNC rules gave to the superdelegates

\begin{footnotesize}
\textsuperscript{215} See 411 F.Supp. 2d at 230-31.

\textsuperscript{216} See \textit{N.Y. TIMES}, Nov. 1, 2003.


\textsuperscript{218} \textit{See also} Elmendorf, \textit{supra} note, at 408 (noting argument that a competitive general election “should lead the major parties to support or adopt responsible methods for nominating candidates,” while its absence makes “party insiders . . . much more likely to use the nomination process to pursue their own interests, or their idiosyncratic visions of the common good.”); Gardner, \textit{supra} note, at 45 (“the parties’ collusive legislative gerrymander . . . undermines the operation of the state’s system of party democracy because it thoroughly thwarts the ability of the electorate to hold any party accountable for the actions of the government.”); Lowenstein, \textit{supra} note, at 1768 (noting argument that “the presence of interparty rather than intraparty electoral competition is sufficient to ensure that party leaders will be accountable to the public.”)

\textsuperscript{219} \textit{See, e.g.,} Lanny Davis, \textit{The “Superdelegates”: Always Intended to be Independent}, The Huffington Post, Feb. 13, 2008.

\textsuperscript{220} \textit{See, e.g.,} John K. Wilson, \textit{In Praise of Superdelegates: Why the Democratic Party Delegate Process Worked}, June 3, 2008 \url{http://www.dailykos.com/story/2008/6/3/165646/4106?new=true} (arguing that the superdelegates gave “a close election . . . a clear winner before the convention, and a major division within the party is . . . avoided”); Ron Klain, \textit{In Praise of the Primary Slog}, \textit{NYTIMES.COM}, June 9, 2008 (“The deluge of superdelegate commitments to Barack Obama at the end of the campaign was a positive lift, even as the final primary results were mixed. These party leaders brought with them unity, finality and closure.”).
\end{footnotesize}
complained, blogged, and voted; some threatened defection, and some defected; some promised retaliation against those superdelegates holding elective office, and some may yet retaliate. In this transparent, party-authored regime, voice was readily implemented, exit even more easily exercised. Debate over the superdelegates, moreover, exposed and in many ways crystallized the nature and quality of the associational interests involved and of the political association itself.

Contrast this process with the response to New York’s judicial nomination regime. Good government groups have long complained about the system, editorial boards have demanded reform, and criminal indictments have periodically highlighted the corruption the system facilitates. The Lopez Torres litigation itself, with its multiple opinions from three courts, offered a scathing critique of the State’s system. Justice Stevens went so far as to suggest that New York’s system was “stupid.” And while many have defended the regime’s legality, and some praised its purported ancillary benefits, absent throughout has been a structural defense of this smoke-filled room of the sort Ferraro lodged on behalf of the superdelegates, and other party insiders advanced by the time Obama claimed the nomination. Meaningful reform in New York is nevertheless nowhere in sight, and a vigorous internal debate about the merits of the system is missing entirely.

221 See, e.g., Adam Nagourney, A Primary Calendar Democrats Will Never Forget, N.Y. TIMES, June 2, 2008 (quoting Former DNC chairman Donald Fowler as saying: “Our whole system is a mess — I think it requires a complete renovation.”); Harkin Wants Democrats to Ditch Superdelegates, DES MOINES REGISTER, Feb. 15, 2008 (“I am convinced that this idea of superdelegates has to be done away with.”); Primary Reforms, N.Y. TIMES, June 8, 2008 (calling for the elimination of the superdelegates, as either “unnecessary” insofar as they just ratify popular opinion, or “undemocratic,” insofar as they ignore it.).

222 See, e.g., Lopez Torres and the Democrats, N.Y. SUN, Feb. 12, 2008 (noting DNC member Donna Brazile statement on CNN that “If 795 of my colleagues decide this election, I will quit the Democratic Party”); Ari Emanuel, My Brother the Superdelegate and Why I Don’t Trust Him to Pick the Next President, The Huffington Post, Feb. 10, 2008 (“The right thing for my brother, and all the other superdelegates to do, is to support the decision of voters”); Shaila Dewan, Obama Plays a Part in Contests in Georgia, N.Y. TIMES, July 16, 2008 (noting Rep. John Lewis, who initially endorsed Clinton, faced primary challenges for the first time since 1992); see also supra notes and accompanying text.

223 See supra note [152].

224 See It’s Time To Change A Stupid Law, Newsday.com, Jan. 18, 2008; Supreme Task for Silver, N.Y. DAILY NEWS, Jan. 18, 2008; see also supra note [162].

225 See, e.g., Anemona Hartocollis, Clarence Norman is Guilty of Illegal Campaign Contributions, N.Y. TIMES, Sept. 27, 2005 (noting conviction of county leader who, inter alia, “strong-armed judicial candidates into hiring consultants for the party”).

226 128 S.Ct. at 801 (Stevens, J, concurring) (emphasizing “the distinction between constitutionality and wide policy” and quoting Justice Marshall’s pithy observation that “the Constitution does not prohibit legislatures from enacting stupid laws.”).


228 Many defended the merits of nomination by convention, but Lopez Torres never challenged the legitimacy of this procedure. In fact, she did not dispute the legitimacy of a hybrid system combining an indirect primary with a nominating convention, so long as such systems lack the state-imposed obstacles to participation the lower courts found to inhere in New York’s system. Cf. James A. Gardner, New York’s Judicial Selection Process is Fine—It’s the Party System that Needs Fixing, 79 N.Y.St. B.J. 42 (2007).

229 128 S.Ct. at 801 (Stevens, J, concurring) (emphasizing “the distinction between constitutionality and wide policy” and quoting Justice Marshall’s pithy observation that “The Constitution does not prohibit legislatures from enacting stupid laws.”).

230 See, e.g., A Defeat for Judicial Reform, N.Y.TIMES, Jan. 17, 2008 (calling the odds for reform “long, since the powers that be in the Legislature are the same ones that profit from the current corrupt system.”); Time to Change, supra note (expressing skepticism whether reform will occur); Supreme Task, supra note (same); James Sample & Richard Samp, Supreme Spotlight on a ‘Stupid’ System, N.Y. Law J., Jan. 22,
The Court in *Lopez Torres* professed institutional incompetence to address the situation, and specifically cited an inability to distinguish the good from the bad among smoke-filled rooms. A distinct concern, however, better explains the Court’s approach. As is true in other areas of election law, the Court’s distaste for a particular remedy dictated a circumscribed view of the rights at issue.

A. Judicial Review

The Court in *Lopez Torres* suggested that New Yorkers might like the State’s judicial nominating system, but made clear that even if they didn’t, any problem with this smoke-filled room—or indeed any other—was not of constitutional dimension. To hold otherwise, Justice Scalia said, would only invite new complaints about other forms of backroom decisionmaking. Perhaps envisioning lawsuits brought by disgruntled Democratic voters unhappy with the superdelegates, Justice Scalia insisted that the Court was ill-suited to distinguish among smoke-filled rooms.\(^{231}\)

On this point, Justice Scalia sounded a lot like Justice Frankfurter, who famously pressed a similar argument in *Baker v. Carr* and lost.\(^{232}\) The Court, of course, has never quite overcome that nagging suspicion that Frankfurter may have been right and that *Baker* launched a foray into the political thicket that might wisely have been avoided.\(^{233}\) Still, unlike *Baker*, or other, more recent manifestations of the question,\(^{234}\) *Lopez Torres* did not require the Court to break wholly new ground. The Justices have long engaged in constitutional review of state-mandated nomination processes, and long recognized that such processes implicate protected participatory and associational interests.\(^{235}\) Precedent accordingly makes clear that constitutional obligations necessarily accompanied New York’s decision to adopt a hybrid nomination process that both grants the right to vote in primary elections and mandates and in important respects directs the conventions that follow.\(^{236}\)

New York, of course, might have dispensed with primaries entirely, and it might have left the conventions that followed unregulated. But once the State chose to regulate the nominating process as it did, well-settled constitutional obligations attached. Or at

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\(^{231}\) 128 S.Ct. at 800 (declining “to open up this new and excitingly unpredictable theater of election jurisprudence.”).

\(^{232}\) See Stephen Ansolabehere & Samuel Issacharoff, *The Story of Baker v. Carr*, in *CONSTITUTIONAL LAW STORIES* (Michael C. Dorf, ed., 2004), at 316 (relaying exchange at oral argument in which Frankfurter, confronted with evidence that one third of the voters in Tennessee selected two-thirds of the state legislators, asked whether counsel would “be right back up here complaining” were the State to respond to judicial invalidation of its system with plan in which 40 percent elected 60 percent; and counsel’s response “Yessir. For a fee.”).


\(^{234}\) See, e.g., Vieth, 551 U.S. at 277-90.


\(^{236}\) See, e.g., Harper v. Virginia, 383 U.S. 663 (1966) (“once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”).
least they should have. The Court in *Lopez Torres* expressed surprising skepticism on this point. At oral argument, for example, Chief Justice Roberts said he thought “it seem[ed] kind of odd, that if a State can have no role for voters, it can have a pure convention, that they’re penalized if they have some role for voters?” And yet, in the voting context and elsewhere, the Court had long recognized that greater power does not necessarily encompass lesser.

The Court’s retreat in *Lopez Torres* is, moreover, incomplete. Leaving disputes of this sort to the political process has undeniable allure, but *Lopez Torres* fails to secure this result. The decision invites party leaders to enlist and rely on state law as the primary vehicle for party governance, largely relieving these leaders of any need to secure the support or acquiescence of party members to a chosen course. But by placing what appears to be constitutional significance on the litigating positions of the state parties, the Court privileges the party machines in a manner that guarantees litigation. Should party leaders fail to get what they want from the legislature, they will sue, claiming the undesired outcome amounts to a denial of associational freedom.

*Lopez Torres* accordingly does what a prominent proponent of judicial restraint in this realm has counseled against: it gives party organizations a constitutional position “that immunizes them from the results of the give-and-take” of the political process, and thereby favors “unaccountable and generally obscure party officials.” Associational interests may be understood in such terms, to be sure, but whether they remain worth protecting once they are is another matter.

A more sound approach would embrace substantive review of state-mandated nomination processes, while expressly recognizing that smoke-filled rooms differ in important ways. Lines are needed, and some will be difficult to draw, but manageable and discernible distinctions may indeed be made. Comparing Obama’s success with *Lopez Torres*’s failure shows how. The nominating process Obama traversed was more transparent, more penetrable, more directed by party rule, and more contestable than was the one *Lopez Torres* confronted. Transparency, penetrability, authorship, and contestability matter here not because they are constitutionally mandated—they most definitely are not. But a nominating system in which they are absent or insufficiently robust signals a process with defects that may be of constitutional dimension. Much like the role district shape plays in the redistricting context, the degree to which a nominating regime is transparent, penetrable, party-authored and contestable offers a means to gauge the health and vibrancy of the associational interests of the participants within it.

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238 *See, e.g.*, Federal Election Com’n v. Wisconsin Right to Life, Inc., 127 S.Ct. 2652 (“This great-includes-the-lesser approach is not how strict scrutiny works”); Meyer v. Grant, 486 U.S. 414, 424-425 (1988) (rejecting argument that greater power to end voter initiatives includes lesser power to prohibit paid petition-circulators); Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969) (school board positions need not be elective, but once they are, strict scrutiny applies to restriction on the franchise); Avery v. Midland County, 390 U.S. 474 (1968) (one person, one vote rule applies to local elective officers, even though offices might have been filled by appointment).

239 *See supra* notes and accompanying text.

240 *See* Elmendorf, *supra* note at 407-08.

241 Lowenstein, *supra* note, at 1771.

242 *Cf.* Lowenstein, *supra* note, at 1783 (urging judicial restraint not “abdication”).

The Justices no doubt disagree, but Lopez Torres was not primarily animated by that disagreement. Instead, a distinct anxiety critically shaped the Court’s response to legal challenge presented in the case.

B. Judicial Elections

The Justices have long been uneasy with the practice of electing judges. This uneasiness was manifest in Lopez Torres not as a critique of the system plaintiffs challenged, but rather as apprehension about what might follow were the Justices to affirm the lower courts. The district court had already ordered the State to hold direct primaries until the state legislature came up with a constitutional replacement for the invalidated regime. The Justices worried that this remedy was both worse than the practice it replaced and that it might become permanent.

In concurring opinions, Justice Stevens queried whether “the very practice of electing judges is unwise,” while Justice Kennedy wondered whether judicial elections that require candidates “to conduct campaigns and to raise funds” damaged “the perception and the reality of judicial independence.” At oral argument, Chief Justice Roberts observed that a purely appointive system was “not a realistic option,” after which Justice Ginsburg recalled that a commission studying judicial elections in New York concluded that “the worst thing in the world would be to return us to the primary system this system was intended to replace.” Justice Breyer, for his part, said that if counsel for Lopez Torres thought the challenged system was “so terrible... [that] the Constitution forbids that, ... you’d have to explain, wouldn’t you, why, with all its faults, that is not better in the judgment of New York than a system where people raised $4 million from the lawyers in order to run for office?”

Needless to say, no such explanation was required, nor was any of this speculation about judicial elections even relevant. The hybrid system New York employed to nominate judicial candidates was either unconstitutional, or it was not. Given that candidates for judicial office may lawfully be selected by direct primary, what New York might (or might not) do had the Court invalidated the challenged system was, as a matter of law, beside the point.

And yet, for many of the Justices it appeared to be the point that mattered most. It distracted them and may well have colored their view of the merits issue. Justice

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245 411 F.Supp.2d at 255-56.
246 128 S.Ct. at 801 (Stevens, J., concurring).
247 128 S.Ct. at 803.
248 Oral Argument, supra note, at 48, 50.
249 See Oral Argument, supra note, at 47.
Stevens, for example, seemed to think the “glaring deficiencies” the district court found to inhere in New York’s system lent support “to the broader proposition that the very practice of electing judges is unwise.” Judge Gleeson’s findings, however, did no such thing. The “glaring deficiencies” he identified—and there were many—were those that characterize a classic patronage system, and not those typically associated with judicial elections. He identified, for instance, questionable contributions given not to judicial candidates to skew future litigation, but by such candidates to local party bosses to safeguard nominations. Judge Gleeson’s findings lend support not for the claim that electing judges is unwise, but instead for the proposition that New York’s judicial elections are not really elections at all.

Many of the Justices seemed to think that might just be a good thing. New York’s judicial nominating regime is a mess, to be sure. But for all the difficulties it presents, it appeared more palatable to a Court squeamish about judicial candidates actively soliciting cash in order to finance a campaign, and making the promises candidates seeking election make. A little backroom decisionmaking might seem a small price to pay to temper such conduct.

*Lopez Torres* nevertheless made no effort to limit its analysis to judicial elections. It immunized every smoke-filled room from review, not just the ones that select judicial candidates. The Obama-Clinton contest shows that not all of these rooms stunt political participation and prevent an election from being a “real” election. But some smoke-filled rooms do stymie democratic engagement, and it was this effect that the Court in *Lopez Torres* sought to encourage.

**CONCLUSION**

Justice Kennedy closed his concurring opinion by wondering whether it might all be otherwise. He contemplated judicial elections of a sort that “offer[ed] the opportunity, indeed the civic obligation, for voters and the community as a whole to become engaged in the legal process.” He imagined that “fair and open” judicial elections might even function “as an essential forum for society to discuss and define those attributes of judicial excellence and to find ways to discern those qualities in the candidates.”

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250 128 S.Ct. at 801 (Stevens, J. concurring).
251 See 411 F.Supp. 2d 212 (describing how local party insiders gave trial court judgeships to the most loyal, but hardly the most competent, adherents; how a plethora of uninformed delegates, unable to pronounce the nominees’ names, let alone identify their qualifications, attended perfunctory conventions that ratified the pre-selected choices of the local party leadership; and how barriers to ballot access became so severe that primaries were routinely cancelled for lack of contest.)
252 Id.
254 Elemendorf, supra note, at 404. A generation ago, the Court seemed to think special rules might govern the election of judges, see Wells v. Edwards, 347 F.Supp. 453, 455 (D.C. La. 1972), summarily aff’d, 409 U.S. 1095 (1973) (exempting judicial elections from the one-person one vote mandate), but since then the Court has made clear that judicial elections are no different from other elections and that the same rules control. See, e.g., Republican Party of Minnesota v. White, 536 U.S. 765 (2002); Chisom v. Roemer, 501 U.S. 380 (1991).
255 128 S.Ct. at 803.
Pie in the sky perhaps, but still not a bad aspiration—not just for judicial elections but for all elections that select public officers. But it is an aspiration that *Lopez Torres* actively undermines. Justice Kennedy suggested implementing his vision would require wide participation from the “organized bar, the legal academy, public advocacy groups, a principled press, and all the other components of functioning democracy.” 256 He omitted the Court itself from this list of participants. He should have included it, and recognized it as an essential “component of functioning democracy.” The Court’s biggest mistake in *Lopez Torres* was its refusal to accept and embrace this role.

Doing so hardly requires the Court to eradicate all smoke-filled rooms. Some might co-exist with and even facilitate the sort of democratic participation to which Justice Kennedy suggests we should all aspire. One might even argue that the nomination process Obama traversed—with the superdelegates controlling the smoke-filled room and the very institutions Justice Kennedy identified actively engaged in its evaluation—came pretty close to realizing the aspiration. But even if it fell short, this smoke-filled room holds far more promise than the one that dominates in New York, where public engagement and vigorous democratic participation remain absent.

256 *Id.*