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The Trial, the Bench, the Net, and the First Amendment: The Possibilities of Reform in New York State Judicial Elections

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The Trial, the Bench, the Net, and the First Amendment: The Possibilities of Reform in New York State Judicial Elections

Cover Page Footnote

25-4

**THE TRIAL, THE BENCH, THE NET, AND THE FIRST
AMENDMENT:
THE POSSIBILITIES OF REFORM IN NEW YORK STATE
JUDICIAL ELECTIONS**

*Robert Magee**

A judicial election system presents the opportunity, indeed the civic obligation, for voters and the community as a whole to become engaged in the legal process. Judicial elections, if fair and open, could be an essential forum for society to discuss and define the attributes of judicial excellence and to find ways to discern those qualities in the candidates. The organized bar, the legal academy, public advocacy groups, a principled press, and all the other components of functioning democracy must engage in this process.

Even in flawed election systems there emerge brave and honorable judges who exemplify the law's ideals. But it is unfair to them and to the concept of judicial independence if the State is indifferent to a selection process open to manipulation, criticism, and serious abuse.

Rule of law is secured only by the principled exercise of political will. If New York statutes for nominating and electing judges do not produce both the perception and the reality of a system committed to the highest ideals of the law, they ought to be changed and to be changed now.

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

In New York State Board of Elections v. López Torres, 128 S. Ct. 791 (2008), *New York's judicial nominating process was upheld against a constitutional challenge by a wronged would-be New York Supreme Court candidate in Brooklyn. While ultimately sanctioning the process, nothing in any of the Court's opinions could be construed as an endorsement of it. Concurring, Justice Kennedy issued a resounding rebuke to New York as to how it conducts judicial elections. This Comment forgoes analysis or conclusions on this nominating process beyond those reached by the Supreme Court with the understanding that the changes needed are obvious and in the hope that the issues will soon be remedied. Instead, it lays the groundwork for potential reform of New York's judicial elections with an eye towards increasing the quality of New York's already formidable bench and maximizing voter participation and judicial elections' status as a democratic exercise.*

This Comment begins with an examination of how New York State conducts and finances judicial elections with consideration of New York's judicial elections laws and a case study of the elections conducted in the Third Judicial District in the Fall of 2007. It then considers the outermost bounds of reform by examining controlling Supreme Court and New York Court of Appeals precedent governing judicial election conduct and finance. Next it distills, through a consideration of fundamental judicial and democratic values and practice, New York's interests in judicial selection through election and explains how they can be reorganized according to three overarching interests: judicial consistency, judicial veneration, and democratic efficiency. This Comment then compares these interests to how judicial elections occur on the ground in order to see how or if these interests are achieved. Finally, having established what is done now in New York's judicial elections, what can be done, and what can be done better, this Comment will propose five points of reform: 1) the establishment by the State of an open-forum website to facilitate judicial election debate; 2) relaxation of speech restrictions on judicial campaign committees; 3) a moderate decrease in the campaign contribution limit; 4) the establishment of a unified campaign fund to which donors must contribute; and 5) the reworking of the Judicial

Qualification Committee's mission from one of endorsement to one of voter education.

These reforms and the thought processes that produce them are tethered throughout to the most fundamental conceptions of judicial administration and democratic election. What remains is a fairly dramatic departure from existing judicial election norms that will prove useful to lawmakers interested in reforming judicial elections in the wake of López Torres.

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**THE TRIAL, THE BENCH, THE NET, AND THE FIRST
AMENDMENT:
THE POSSIBILITIES OF REFORM IN NEW YORK STATE
JUDICIAL ELECTIONS**

INTRODUCTION

In 1992, Judge Margarita López Torres, a former legal services attorney, became the first Latina elected to the civil court in King's County.¹ She did so with the nomination of Brooklyn's democratic party and with, by implication, the blessing of Democratic county leader, Assemblyman Clarence Norman, Jr.² In violation of an apparent quid pro quo between party leaders and the party's nominees, López Torres hired her own legal secretary, a friend from her days as a legal services attorney, with twenty years experience instead of one of the party's designates.³

Assemblyman Norman took note.⁴ Three years later, López Torres again refused to hire on behalf of the party, when she declined to take on another local Assemblyman's daughter as her court clerk.⁵

As Norman promised, the party did not forget.⁶ Each of the three times the Brooklyn Democratic Party's judicial nomination convention⁷ met during her term as a civil court judge, López Torres

¹ Robin Finn, *Blazing a Trail, and Following Her Own Sense of What's Right*, N.Y. TIMES, Jan. 25, 2008, at B2.

² Tom Robbins, *The Judge Who Said No*, VILLAGE VOICE, Aug. 6, 2002, at 24.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 179-80 (2d Cir. 2006); see also Finn, *supra* note 1. In reality, the convention was a secret slate of delegates who rubber

was denied even consideration for nomination to the county supreme court.⁸ At the 1997 convention López Torres' name appeared on a rogue slate proposed by a minority faction of Brooklyn Democrats attempting to wrest local control from Assemblyman Norman.⁹ This sealed her status as an uncooperative "ingrate," and when party leaders convened again in 2002, they decided not to nominate López Torres upon the expiration of her term, effectively ousting her from the bench.¹⁰

In an action that required the Second Circuit to "peer inside New York State's political clubhouses and determine whether party leaders have arrogated to themselves a choice that belongs to the people,"¹¹ López Torres challenged New York's judicial nomination process on First Amendment grounds.¹² She claimed the State's maintenance of a nomination process so prone to monopolization by a small class of party bosses violated New Yorkers' rights to a "realistic opportunity to participate in a [political party's] nominating process."¹³ Although the Second Circuit upheld an injunction against the process, which the Eastern District of New York had seen fit to grant pending legislative action,¹⁴ all nine Justices of the Supreme Court held that internal party politics could not create a constitutional

stamped a slate of delegates selected by Norman.

⁸ *López Torres*, 462 F.3d at 179-80.

⁹ Robbins, *supra* note 2.

¹⁰ *Id.*

¹¹ *López Torres*, 462 F.3d at 169.

¹² *López Torres v. N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212, 214 (E.D.N.Y. 2006).

¹³ *López Torres*, 462 F.3d at 187; *N.Y. State Bd. of Elections v. López Torres*, 128 S. Ct. 791, 797 (2008).

¹⁴ *López Torres*, 411 F. Supp. 2d at 256.

issue unless they were the actual manifestation of a state's law.¹⁵ Such domination, the Court reasoned, could very well be a manifestation of popular, democratic will, and it simply was not their place to question it.¹⁶ In any event, Judge López Torres had no cause to challenge the nominating process of New York's judicial elections.

Yet nothing about the *López Torres* ruling can be construed as an endorsement of how New York elects its judges. As López Torres' story so clearly demonstrates, New York selects judges based not on the candidate's integrity, impartiality, or intelligence, but on her connections with local party bosses and her ability to complement those bosses' power.¹⁷ The Court was correct in finding that while this situation was not *sanctioned* by New York's election laws—it was the laws that were at fault.¹⁸ The wrong perpetrated against

¹⁵ *López Torres*, 128 S. Ct. at 798.

¹⁶ *Id.* at 797, 798.

¹⁷ Judicial elections are generally unpopular among the legal community. See Republican Party of Minn. v. White, 536 U.S. 765, 788, 789 (2002) (O'Connor, J., concurring); Joel Stashenko, *Spitzer Proposes Court Reform Plan, Merit Selection for Judges*, N.Y. L.J., Apr. 24, 2007, at 1; Press Release, N.Y. State Bar Ass'n, State Bar Endorses Governor Spitzer's Merit Selection Plan (June 21, 2007), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&CONTENTID=8561&TEMPLATE=/CM/ContentDisplay.cfm>; Press Release, Am. Judicature Soc'y, AJS Receives Grant to Promote Merit Selection (2008), available at http://www.ajs.org/selection/ajs_OSIgrant.asp; Am. Bar Ass'n, ABA Standing Committee on Judicial Independence, History, Mission, and Goals, <http://www.abanet.org/judind/home.html> (last visited Mar. 28, 2009). In the wake of *López Torres*, it is likely many will attempt to throw the baby out with the bathwater. This Comment abstains from this debate (except insofar as any discussion of reform is an argument for conservation) except to offer the following: New York's judicial electoral process is more a system of political appointment than an election. It is the same element, local machine politics, which separates it from both. In wrestling judicial selection from these sorts of politics, either the people or their representatives will have to fill the void. The problem with choosing the representatives to do this is that the representatives are the same people running the machines New York ought to rid itself of. Moreover, it is unlikely that New Yorkers' votes in judicial elections will ever stray far from the endorsement of their representatives. Therefore, the same judges will be elected, but without the legitimacy of an open electoral process or the independence judicial elections confer upon the judiciary as a branch of government.

¹⁸ See *López Torres*, 128 S. Ct. at 799.

López Torres was also perpetrated against the citizens of Kings County and was the fault of legislative negligence, coupled with an understanding among lawmakers that they ought not to intrude on each other's turf.

As is clear, the party nomination process must be changed, but that is not the subject of this Comment. The focus instead will be on the elections that occur afterward. Pre-*López Torres* judicial elections were largely matters of ceremony. This Comment attempts to suggest how New York's judicial elections might be prepared for a post-*López Torres* world where the endemic failures of the nominating process have been remedied.

Part I begins with an examination of how New York State conducts and finances judicial elections. Part II then considers the outermost bounds of reform by examining controlling Supreme Court and New York Court of Appeals precedent governing judicial elections and campaign finance. Part III then distills, through a consideration of fundamental judicial and democratic values and practice, New York's interests in judicial selection through election and discover they can be organized according to three overarching interests. Part IV then compares these interests to how judicial elections occur on the ground in order to see how or if these interests are achieved. Finally, having established what is done in New York's judicial elections, what can be done, and what can be done better, this Comment will propose five points of reform.

I. THE HOW OF NEW YORK JUDICIAL ELECTIONS

A. The Elected Judiciary

Of the 1,143 full-time judges in New York State, seventy-three percent are elected.¹⁹ Judges of the Court of Claims,²⁰ Appellate Division,²¹ and Court of Appeals²² are appointed according to political nomination. Many of these judges are elected to serve a fourteen-year term in a division of the Supreme Court of one the State's eleven judicial districts.²³ The number of justices in each district is determined by the legislature, so long as there is no more than one justice for every 50,000 people.²⁴ The second-most visible class consists of elected judges presiding over county courts who serve for ten years.²⁵ Surrogate and Family Court judges are also elected to ten-year terms.²⁶ New York's remaining elected judges preside over any

¹⁹ N.Y. STATE COMM'N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 5 (2006), *available at* <http://law.fordham.edu/commission/judicialections/main.html>. The Commission to Promote Confidence in Judicial Elections was created by Chief Judge Kaye in April of 2003 and is charged with making recommendations to increase confidence in the judicial electoral process in New York. *Id.*

²⁰ See N.Y. CONST. art. VI, § 9 (stating the Court of Claims has exclusive jurisdiction over cases against the state); *see also* DAVID D. SIEGEL, NEW YORK PRACTICE 14 (4th ed. 2005) (1978).

²¹ N.Y. CONST. art. VI, § 4(c) (stating that justices of the Appellate Division are "designated by the governor, from all the justices elected to the supreme court"). Thus, the argument could be made that New York's first-level appellate judges are elected, but the moment of ascension only occurs at the moment of nomination.

²² N.Y. CONST. art. VI, § 2(c)-(e).

²³ N.Y. CONST. art. VI, § 6; COMM'N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, *supra* note 19, at 5-6. To clarify a likely semantic confusion, Judges of the Supreme Court bear the title of Justices. For the purposes of this Comment, the generic term "judge" will be employed since town, city, etc. judges, are included in the analysis.

²⁴ N.Y. CONST. art. VI, § 6(a), (b), (d).

²⁵ N.Y. CONST. art. VI, § 10(b).

²⁶ N.Y. CONST. art. VI, §§ 12(c), 13(a). The terms and means of selection for Surrogate and Family Court judges are different for courts within New York City. Notably, the mayor

number of town, village, and city courts.²⁷ Their duties, classification, and even existence are within the provenance of the legislature. However, their means of appointment is set; they are to serve four-year terms to which they are elected.²⁸

B. The Conduct of the Elected Judiciary

The rules governing judicial conduct are to be found in Part 100 of the 22nd title of the New York Compilation of Codes, Rules and Regulations.²⁹ Part 100 governs both sitting and aspiring judges, with special provisions set aside for the latter. By announcing her candidacy for the bench or authorizing the acceptance of donations pursuant to a campaign for it, a person subjects herself to the dictates of Part 100.³⁰

All candidates for public office in New York are subject to laws prohibiting traditionally undesirable electoral activity.³¹ Judicial candidates, as per Part 100, are further limited. As was deemed constitutional in *López Torres*, a political party's nominating committee selects candidates.³² Once a person becomes a judicial candidate, she is bound to "maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independ-

appoints Family Court judges.

²⁷ N.Y. CONST. art. VI, § 17.

²⁸ *Id.*

²⁹ See N.Y. COMP. CODES R. & REGS. tit. 22, §§ 100.0-100.7 (2009).

³⁰ *Id.* §100.0(A) (setting grounds for when a party officially becomes a candidate for election).

³¹ See N.Y. ELEC. LAW § 17 (McKinney 2007).

³² N.Y. ELEC. LAW § 6-106 (McKinney 2007); N.Y. State Bd. of Elections v. *López Torres*, 128 S. Ct. 791, 800-01 (2008).

ence of the judiciary.”³³ This ambiguous admonition permeates the entire life of a judicial candidate. She is bound to discourage employees, associates, and even family members from acting contrary to it.³⁴ Judicial candidates are foreclosed from making pledges or promises other than impartial discharge of their duties in office.³⁵ Nor are they allowed to associate themselves with other candidates or political parties³⁶ or even to attend political gatherings except under controlled circumstances.³⁷ Even with regard to her campaign, a judicial candidate is required to remain aloof.³⁸

A recent administrative enactment requires screening of judicial candidates by an Independent Judicial Election Qualification Commission established in each of the State’s twelve judicial districts.³⁹ The qualifications gauged include “professional ability; character, independence and integrity; reputation for fairness and lack of bias; and temperament, including courtesy and patience.”⁴⁰ The Commission’s findings are made available as a means of informing voters and earning their confidence.⁴¹ This rule preempts (but may herald) the Judiciary Qualifications Act, currently before the New York State Assembly, which would make the designation of “well-

³³ N.Y. COMP. CODES R. & REGS. tit. 22 § 100.5(A)(4)(a) (2009).

³⁴ *Id.* § 100.5(A)(4)(a)-(c).

³⁵ *Id.* § 100.5(A)(4)(d)(i), (ii).

³⁶ *Id.* § 100.5(A)(1).

³⁷ *Id.* § 100.5(A)(1)(g).

³⁸ *Id.* § 100.5(A)(2) (allowing a judicial candidate to speak on her own behalf, but not to personally solicit contributions, to appear in newspapers supporting her candidacy, or to appear at gatherings unless all other candidates are present, and to permit the listing of her name on election materials).

³⁹ N.Y. RULES OF THE CHIEF ADMINISTRATIVE JUDGE § 150.1 (2007), *available at* <http://www.nycourts.gov/rules/ chiefadmin/150.shtml?#A>.

⁴⁰ *Id.* § 150.5(b).

⁴¹ *Id.* § 150.0.

qualified” by similar panels a requirement for ballot access.⁴²

C. The Financing of the Elected Judiciary

Though New York’s contribution limits create different schedules for different offices, judicial campaign contributions are governed by the same catch-all limits imposed on “other public offices.”⁴³ Contributions from family members are capped at \$0.05 per registered voter in the electoral district for a minimum limit of \$1,250 and a maximum \$100,000.⁴⁴ The same formula applies to non-family members, except that such contribution limits must be more than \$1,000 and less than \$50,000.⁴⁵ These limits apply to general, special, and primary elections, except that in the last case the formula is calibrated to enrolled (as opposed to registered) voters. As such, an individual might contribute \$50,000 to a candidate during her nomination, another \$50,000 during her election, and yet another \$50,000 in the event of a special election thereafter.⁴⁶

New York’s judicial candidates are prohibited from soliciting or accepting funds except through campaign committees composed of

⁴² See New York State Assembly, Comm. on Judiciary News, <http://assembly.state.ny.us/comm/Judiciary/20040817/> (discussing the Judicial Qualification Act which is currently before the New York State Assembly) (last visited Apr. 10, 2009). This bill was passed by the Assembly in 2004, but the New York State Senate declined to enact it. The Act would “ensure that justices serving on the state Supreme Court . . . are chosen from a pool of candidates who are well qualified, ethical and committed to the fair administration of justice.” *Id.*

⁴³ N.Y. ELEC. LAW § 14-114(1)(b)(ii) (McKinney 2007); see also N.Y.S. BD. OF ELECTIONS, HANDBOOK OF INSTRUCTIONS FOR CAMPAIGN FINANCE DISCLOSURE 16-19 (2007), *available at* <http://www.elections.state.ny.us.NYSBOE/download/finance/hndbk2007.pdf>.

⁴⁴ N.Y. ELEC. LAW § 14-114(1)(b)(ii) (McKinney 2007).

⁴⁵ *Id.* Different rules and formulas apply to primaries and to funds expended in certain ways, but, like campaign finance laws elsewhere, New York’s are devastatingly complex and immune from full treatment in a note or comment.

⁴⁶ See *id.* § 14-114(1).

“responsible persons” of the candidate’s choosing, and then only in the nine months leading up to the nomination convention may they do so.⁴⁷ In the reverse, a judicial candidate is not permitted, except through her committee, to “make any contribution” to other campaigns.⁴⁸ If any candidate (judicial or otherwise) receives a contribution from an anonymous donor, it must be deposited via the state comptroller into the state treasury.⁴⁹ Finally, an oft-employed exception allows a judicial candidate to purchase tickets to a political dinner or function so long as the cost of the ticket is proportionate to the cost of the dinner or function and, if such a ticket exceeds \$250, a statement must be obtained from the dinner’s sponsor that the cost is proportionate to the actual services rendered.⁵⁰

This system actually leaves judicial campaigns over-financed. To take a recent example: in the fall of 2007, there were four candidates campaigning for three open Supreme Court seats in the Third Judicial District,⁵¹ which encompasses seven upstate New York counties, including Albany County.⁵² The candidates included three incumbents and one Surrogate Court Judge, Cathryn Doyle.⁵³ Two of the three incumbents received every one of the Republican, Democrat, Independent, and Conservative Party nominations, while the

⁴⁷ N.Y. COMP. CODES R. & REGS. tit. 22 §§ 100.0(Q), 100.5(A)(5) (2009).

⁴⁸ N.Y. ELEC. LAW §17-162 (McKinney 2007).

⁴⁹ *Id.* § 14-128.

⁵⁰ N.Y. COMP. CODES R. & REGS. tit. 22 § 100.5 (A)(2)(v) (2007).

⁵¹ Carol DeMare, *Parties Pick Candidates for State Judgeships*, ALB. TIMES UNION, Sept. 26, 2007, available at <http://timesunion.com/AspStories/storyprint.asp?StoryID=624940>.

⁵² N.Y. CONST. art. VI, § 6(a).

⁵³ DeMare, *supra* note 51. All were deemed “qualified” by the Independent Judicial Campaign Commission. Press Release, Third Dep’t Indep. Judicial Election Qualification Commissions (Oct. 10, 2007) (on file with author).

other received all but the Conservative nomination, which went to Doyle, who was defeated.⁵⁴

Joseph Teresi was one of the incumbents to receive nominations from all nominating parties.⁵⁵ Though his election was a foregone conclusion by any standard, between November 2006 and his election in November 2007, the Committee to Re-Elect Justice Joseph C. Teresi received \$282,906.30 dollars.⁵⁶ It spent \$116,386.52.⁵⁷ Similarly, the Committee to Elect Judge Christopher Cahill received \$56,948.00⁵⁸ over the same period and spent only \$24,981.65,⁵⁹ while the Committee to Re-Elect George B. Ceresia, Jr. Supreme Court Justice was rounding up \$149,809.00⁶⁰ in donations and managed to spend only \$79,602.07⁶¹ of them. Even the underdog, Friends of Judge Cathryn Doyle, spent only \$12,610.63⁶² of the

⁵⁴ New York State Bd. of Elections, 2007 Election Results, Third Judicial District, <http://www.elections.state.ny.us/2007electionresults.html> (select "Third Judicial District") (last visited Mar. 27, 2009).

⁵⁵ DeMare, *supra* note 51.

⁵⁶ New York State Bd. of Elections, Campaign Finance, Disclosure Reports, Committee to Re-Elect Justice Joseph C. Teresi, <http://www.elections.state.ny.us> (select "Campaign Finance"; then follow "Disclosure Reports"; then select "View Contributions and Expenditures"; search for "Teresi"; finally choose "The Committee to Re-Elect Justice Joseph C. Teresi"). The Board maintains an updated database of campaign contribution disclosures, which is accessible through its website. The numbers used in this Comment for all candidates are based on a query from November 7, 2006 to November 7, 2007 (last visited Mar. 27, 2009).

⁵⁷ *Id.*

⁵⁸ New York State Bd. of Elections, Campaign Finance, Disclosure Reports, Committee to Elect Judge Cahill, <http://www.elections.state.ny.us> (select "Campaign Finance"; then follow "Disclosure Reports"; then select "View Contributions and Expenditures"; search for "Cahill"; finally choose "Committee to Elect Judge Cahill") (last visited Mar. 27, 2009).

⁵⁹ *Id.*

⁶⁰ New York State Bd. of Elections, Campaign Finance, Disclosure Reports, Committee to Re-Elect George B. Ceresia, Jr., <http://www.elections.state.ny.us> (select "Campaign Finance"; then follow "Disclosure Reports"; then select "View Contributions and Expenditures"; finally search for "Ceresia") (last visited Mar. 29, 2009).

⁶¹ *Id.*

⁶² New York State Bd. of Elections, Campaign Finance, Disclosure Reports, Friends of

\$32,690.65⁶³ it raised.⁶⁴ It is apparent that judicial candidates are given more money than they need and the amount of money they need is not great.

But what is this money actually spent on? Justice Teresi spent \$5,188 of his war chest taking advantage of the event-tickets exception.⁶⁵ This is far less than the \$15,098.62 spent on raising funds,⁶⁶ and nothing compared to the amount of money spent on the one thing you would expect it to be spent on: making the public aware of Justice Teresi's candidacy. All things considered, the Committee to Re-Elect Justice Joseph C. Teresi spent \$79,220.56 on "getting the word out."⁶⁷ This included \$38,894 on television ads, \$8,874.36 on campaign literature, and another \$1,516.95 mailing the materials.⁶⁸

This \$79,220.56 marks an intersection of the two interests

Judge Cathryn Doyle, <http://www.elections.state.ny.us> (select "Campaign Finance"; then follow "Disclosure Reports"; then select "View Contributions and Expenditures"; search for "Doyle"; finally choose "Friends of Judge Cathryn Doyle") (last visited Mar. 29, 2009).

⁶³ *Id.*

⁶⁴ Although not entirely relevant, it is worthwhile to mention there is no statutory or case law governing the fate of unspent campaign donations. However, advisory opinions of the Advisory Committee on Judicial Ethics require they be returned to donors. N.Y. Advisory Comm. on Judicial Ethics, Op. No. 93-80 (1993), http://www.courts.state.ny.us/ip/judicialethics/opinions/93-80_.pdf; 28 N.Y. JUR. 2D, *Courts and Judges* § 375 (2009). In discussions with local attorneys, as well as monitoring of local news and professional publication, the author has found nothing to suggest the candidates did otherwise.

⁶⁵ See N.Y. COMP. CODES R. & REGS. tit. 22 § 100.5 (A)(2)(v); Committee to Re-Elect Justice Joseph C. Teresi, *supra* note 56.

⁶⁶ See Committee to Re-Elect Justice Joseph C. Teresi, *supra* note 56. This number accounts for the cost of designated fundraisers and invitations thereof and does not include a \$1,660 "campaign dinner" claimed on September 25, 2007, or a \$410 campaign breakfast one month later, or other, miscellaneous campaign breakfasts, dinners and lunches, none of which exceeded \$100.

⁶⁷ *Id.*

⁶⁸ *Id.* The remainder was spent on things like stationary, gasoline, and other incidental expenses.

governing electoral campaigns: the interest of the candidate in getting elected and the interest of the public in choosing the best candidate.⁶⁹ While these two overlap in their means—publication for the candidate and education for the voter—their *purposes* are diametrically opposed unless the candidate spending and the best candidate in a given election are the same person. In a contested election, this will be the case, at best, only half of the time. As such, the lesser candidate's interest in getting elected and any money spent toward that end and beyond its informative function will *undermine* the public's interest. Thus, the \$79,220.56 spent by the Teresi campaign on promotion is an invaluable service to democracy as the public receives it, but its dispensation is governed by the necessarily independent aspirations of the candidate, which may serve to undermine the public interest. This, that candidates for public office harbor independent ambition apart from the public good, is true of all elections and highlighting it is not meant to be incendiary or indignant. This Comment's only concern is that laws forbidding the judicial candidate from taking a direct or active role in her campaign⁷⁰ constitute a feeble obfuscation of this reality. Yet it remains as true in judicial elections as it does in any other contest, and in moving forward, it may be better to face it outright.⁷¹

⁶⁹ There is another way to conceptualize these interests. The candidate's interest is the primordial impetus for human government: the will to wield power. Processes of leadership selection, democracy being one, are attempts to systematize this largely malevolent impulse with an eye towards containing it. Thus, the second interest arises in response and to temper the first, a manifestation of the understanding that leadership is desired, but not tyranny.

⁷⁰ See N.Y. COMP. CODES R. & REGS. tit. 22 § 100.5(A)(2).

⁷¹ See *infra* text accompanying note 181. There is clearly a third interest at work; that of the donor as gambler discussed *infra* note 188 or as genuine proponent. However, the donor's specific gambler interest has been largely served by the time the donation is spent and

II. THE CONSTITUTIONALITY OF JUDICIAL ELECTIONS

A. Conduct

Insofar as they significantly regulate political speech and the relationship between a candidate and her family, it is apparent that the laws governing the conduct of judicial elections in New York are fraught with problematic First and Fourteenth Amendment implications.⁷² In spite of this and the finding that the speech of judicial candidates was worthy of strict scrutiny by the United State Supreme Court in *Republican Party of Minnesota v. White*, the New York Court of Appeals roundly upheld section 100's activity and speech restrictions against post-*White* challenges.⁷³

1. *Republican Party of Minnesota v. White*

In *White*, the Supreme Court considered a Minnesota law (the Announce Clause) that prohibited a judicial candidate from announcing his or her views on disputed legal or political issues.⁷⁴ The Court ruled that judicial campaign speech was at the "core" of speech protected by the First Amendment, such that strict scrutiny was the proper standard of review for laws governing it.⁷⁵ With this estab-

the proponent-remainder has melded with that of the candidate.

⁷² See *Moore v. City of East Cleveland*, 431 U.S. 494, 506-19 (1977) (Brennan, J., concurring) (discussing the family as an associational right protected under the Fourteenth Amendment in concurring with the Court's overruling of a city ordinance defining family as limited to parents and children).

⁷³ *In re Watson*, 794 N.E.2d 1, 6-7 (N.Y. 2003); *In re Raab*, 793 N.E.2d 1287, 1290-91 (N.Y. 2003).

⁷⁴ *Republican Party of Minnesota v. White*, 536 U.S. 765, 768. See MINN. CODE OF JUDICIAL CONDUCT, Canon 5 (A)(3)(d)(i) (2000).

⁷⁵ *White*, 536 U.S. at 774-75 ("[R]espondents [Minnesota Board of Judicial Standards] have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a

lished, Minnesota attempted to justify the Announce Clause as narrowly tailored to the state's interest in judicial impartiality.⁷⁶ However, Minnesota neglected to propose a definition of "impartiality," so the Court considered three possible definitions—lack of party bias, legal impartiality, and open-mindedness—and ruled on each in turn.⁷⁷

The Court agreed that lack of party bias was a compelling state interest, but held Minnesota's Announce Clause was not narrowly tailored to achieve this interest because it prohibited *any* speech on *political issues*, as opposed to speech favoring one party over another.⁷⁸ Next, it found that legal impartiality—a lack of predisposition toward questions of law—was, if not impossible, not traditionally required, and would require an uninformed bench.⁷⁹ As such, it was not deemed a compelling state interest.⁸⁰ Finally, the Court declined to rule on whether open-mindedness was a compelling state interest, and concluded that even if it was the Announce Clause failed to achieve it since it allowed partial speech before and after an election, but not during.⁸¹ The Court acknowledged the exigencies of judicial office permitted greater speech restrictions on judicial candidates than would be allowed against legislative candidates,⁸² but went on to de-emphasize the distinction between judicial and legislative

compelling state interest."'). Though both parties stipulated that strict scrutiny was the proper standard of review, the Court agreed without reservation.

⁷⁶ *Id.* at 775.

⁷⁷ *Id.* at 775-85.

⁷⁸ *Id.* at 776.

⁷⁹ *Id.* at 777-78.

⁸⁰ *White*, 536 U.S. at 777-78.

⁸¹ *Id.* at 779-80.

⁸² *Id.* at 783.

elections.⁸³

2. In re *Raab*/In re *Watson*

In two post-*White* per curiam opinions, the New York Court of Appeals ruled that Part 100, New York's version of the Announce Clause, which was examined above, was distinguishable from Minnesota's Announce Clause for two reasons. First, the Court of Appeals found Part 100 only prohibits campaign promises that run contrary to impartial performance of the office and allows candidates to announce their views on legal and political issues.⁸⁴ In *Raab*, the Court of Appeals addressed Part 100's activity restrictions and stressed they were narrowly tailored in prohibiting judicial candidates only from participating in other candidates' campaigns, while allowing them to participate in their own.⁸⁵ As such, Part 100 was deemed narrowly tailored to a compelling state interest and survived strict scrutiny.⁸⁶

⁸³ *Id.* at 784.

⁸⁴ *Watson*, 794 N.E.2d at 6.

⁸⁵ *Raab*, 793 N.E.2d at 1292-93.

⁸⁶ *In re Watson*, 794 N.E.2d 1, 7 (N.Y. 2003); *In re Raab*, 793 N.E.2d 1287, 1290 (N.Y. 2003). The N.Y. Attorney General and the State Commission on Judicial Conduct named, in amicus curia, the State's interest in impartiality as preventing actual or apparent party bias and close-mindedness. Though not defined as such in the New York Code, the Court of Appeals accepted this as New York's genuine purpose in drafting the regulation and, as per *White*, found it to be compelling. See *Watson*, 794 N.E.2d at 6. It is also worthwhile to note the Court of Appeals elaborated on the impartiality interest by anchoring it to the due process right of litigants to a fair trial. *Id.*; *Raab*, 793 N.E.2d at 1290.

B. Finance

1. Contribution Limits

In the financing of judicial elections, *Buckley v. Valeo*,⁸⁷ in which the United States Supreme Court largely upheld the constitutionality of the Federal Election Campaign Act of 1971,⁸⁸ is controlling. The *Buckley* Court upheld limits on campaign contributions,⁸⁹ while finding limits on campaign expenditures (both by the candidate and private individuals) unconstitutional.⁹⁰ The Court first made an implicit finding that the First Amendment protects monetary political expenditures, and limits on them invoked strict scrutiny.⁹¹ In applying this analysis, the Court deemed “corruption and the appearance of corruption” a sufficiently compelling state interest to justify otherwise impermissible speech regulation.⁹² The Court’s distinction hinged on narrow tailoring; monetary political donation is a small class of speech, and since the candidate spent donations, there was a direct correlation between donations and the actual or apparent cor-

⁸⁷ 424 U.S. 1 (1976).

⁸⁸ Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C.A. §§ 431-37). The Act imposed on federal campaigns contribution limits, personal expenditure limits, and reporting requirements. It also established the Federal Election Commission.

⁸⁹ *Buckley*, 424 U.S. at 38.

⁹⁰ *Id.* at 58-59.

⁹¹ *Id.* at 44-45. It should be noted that *Buckley* was the first time the Court equated money with speech. See Stephanie A. Sprague, *The Restriction of Political Associational Rights Under Current Campaign Finance Reform First Amendment Jurisprudence*, 40 NEW ENG. L. REV. 947, 983 (2006). Further, the Court did so without explanation or dissent until Justice Stevens’ concurrence in *Shrink Missouri*. *Nixon v. Shrink Mo. Gov’t. PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring). In *Nixon*, Justice Stevens argued that while certain monetary expenditures were entitled to First Amendment protection, they ought not to be afforded the same protection as political expression. *Id.* at 398-99.

⁹² *Buckley*, 424 U.S. at 25-26.

ruption of the candidate.⁹³ The contribution limits upheld in *Buckley* were \$1,000 to any given candidate with an aggregate \$25,000 limit on political donations in any given year.⁹⁴ Without stating how low these could go, the Court emphasized that contribution limits had to be “closely drawn,” as per strict scrutiny, to the prevention of actual or apparent corruption.⁹⁵ In subsequent cases, the Court elaborated on this by requiring that campaign contribution limits allow a party or candidate to run an effective campaign, with a non-incumbent campaign as the barometer.⁹⁶ Some specificity emerged years later with *Randall v. Sorrell*,⁹⁷ in which the Court invalidated Vermont’s contribution limits of between \$200 and \$400 (depending on the candidate) as too low to be closely drawn to the corruption interest.⁹⁸ Vermont also presented a new state interest: maximizing the time elected officials spent doing their jobs instead of raising campaign funds.⁹⁹ This was not a compelling state interest because the Court reasoned it would be tantamount to overruling *Buckley* by justifying expenditure limits.¹⁰⁰ With *Randall*, the Court unveiled a balancing test for determining whether contribution limits were too low to be narrowly tailored to the actual or apparent corruption interest.¹⁰¹ The

⁹³ *Id.* at 26-27.
⁹⁴ *Id.* at 7.
⁹⁵ *Id.* at 25.
⁹⁶ *Nixon*, 528 U.S. at 397.
⁹⁷ 548 U.S. 230 (2006).
⁹⁸ *Id.* at 261.
⁹⁹ *Id.* at 245.
¹⁰⁰ *Id.* at 244-46. Perhaps insecure due to the circuitousness of their logic, the Court cited an amici brief submitted in *Buckley* to hold that the Court had in fact considered the candidate-time-conservation interest in rendering its ruling, even though it was not mentioned in the *Buckley* Court’s opinion.
¹⁰¹ *See id.* at 249-50.

Court will consider the contribution limits of other states¹⁰² along with five other factors: 1) flexibility of a party to spend strategically;¹⁰³ 2) ability of contributors to entrust money is spent properly in lieu of their ability to do so;¹⁰⁴ 3) right to incur expenses in the course of volunteering;¹⁰⁵ 4) lack of inflation adjustment; and 5) general low-ness absent special justification.¹⁰⁶

2. *Independent Expenditures*

Buckley found that independent personal expenditure limits implicate a fatally broad swath of protected speech,¹⁰⁷ and are not under the direction of the candidate such that they cannot give rise to corruption or its appearance.¹⁰⁸ As such, independent expenditure limits were unconstitutional.¹⁰⁹ However, because the Court found that express advocacy¹¹⁰ carried with it the danger of actual or implied corruption, *Buckley* subjected express advocacy limits to the same analysis as was applied to contribution limits.¹¹¹ General issue advocacy, on the other hand, was found to enjoy near impermeable First Amendment protection, since it is not rationally related to actual

¹⁰² *Randall*, 548 U.S. at 250-51.

¹⁰³ *Id.* at 253-54.

¹⁰⁴ *Id.* at 256-58.

¹⁰⁵ *Id.* at 259-60.

¹⁰⁶ *Id.* at 261.

¹⁰⁷ *Buckley*, 424 U.S. at 45.

¹⁰⁸ *Id.* at 46.

¹⁰⁹ *Id.* at 58.

¹¹⁰ *See id.* at 43 (“[C]ommunications that include explicit words of advocacy of election or defeat of a candidate.”). This gave rise to the oft-mocked “magic words” doctrine which was employed by corporate and union entities to ensure their independently expended campaign ads were issue advocacy, as opposed to candidate advocacy.

¹¹¹ *Id.* at 44-45.

or apparent corruption.¹¹²

This was not the end of the story. An important development in this distinction occurred between *McConnell*¹¹³ and *Wisconsin Right to Life*.¹¹⁴ In *McConnell*, the Court upheld a provision of the Bipartisan Campaign Reform Act of 2002, which prohibited “electioneering communications” by corporate entities referencing a clearly identified candidate within thirty days of a primary, or within sixty days of a general election.¹¹⁵ The Court reasoned that such ads were the “functional equivalent of express advocacy” and prone to the same concerns which justify greater regulation of the same.¹¹⁶ This determination was considered a significant departure from *Buckley*’s grant of First Amendment protection to campaign-related speech.¹¹⁷ Three years and two justices later, the Court faced an as-applied challenge to this same provision in *Wisconsin Right to Life*.¹¹⁸ Feeling constrained by, but loath to overrule, *McConnell*, the Court, with Chief Justice Roberts writing, instead narrowed the definition of “functional equivalent” of express advocacy to communications “susceptible of no reasonable interpretation other than as an appeal to

¹¹² *Buckley*, 424 U.S. at 43-44.

¹¹³ *McConnell v. FEC*, 540 U.S. 93 (2003).

¹¹⁴ *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007). The first decision in this case, *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006), held that *McConnell* did not foreclose as-applied challenges to electioneering communications and remanded the case back to the district court for an as-applied determination. *Id.* at 412.

¹¹⁵ 2 U.S.C.A. § 434(f)(3)(A)(i) (West 2009); *McConnell*, 540 U.S. at 189-90, 194.

¹¹⁶ *McConnell*, 540 U.S. at 206.

¹¹⁷ See, e.g., Lillian R. BeVier, *McConnell v. FEC: Not Senator Buckley’s First Amendment*, 3 ELECTION L.J. 127, 141 (2004); Erik S. Jaffe, *McConnell v. FEC: Rationing Speech to Prevent “Undue” Influence*, 2004 CATO SUP. CT. REV. 245, 281 (2004).

¹¹⁸ *Wis. Right to Life*, 127 S. Ct. at 2661 (2006).

vote for or against a specific candidate.”¹¹⁹ The 30/60-day prohibition stood, but its application was limited to the point of evisceration.

3. *Reporting Requirements*

A third finding in *Buckley* was that reporting requirements were constitutional.¹²⁰ While implicating core First Amendment speech, reporting requirements satisfied strict scrutiny as being a narrow ancillary requirement necessary for enforcement of constitutional contribution limits.¹²¹ However, *Buckley* created an exception for a minor party that can make a substantial showing with specific evidence that reporting their donor’s identities would subject them to harassment or reprisal.¹²² This exception was later applied to campaign disbursements, but remains extremely narrow by imposing a substantial burden of proof on the candidate or party seeking to invoke the exception.¹²³ Also, as one would assume, laws requiring disclosure of independent expenditures advocating a given electoral outcome have not stood very long in light of the First Amendment.¹²⁴

4. *Expenditure Limits*

Campaign expenditure limits (whether by the candidate or private parties) are unconstitutional as bearing no rational relation-

¹¹⁹ *Id.* at 2667.

¹²⁰ *Buckley*, 424 U.S. at 80-82.

¹²¹ *Id.* at 82.

¹²² *Id.* at 74.

¹²³ *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 93, 95 (1982).

¹²⁴ *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). This of course, is aside from relying on *Buckley*'s prohibition on independent expenditure limits. *Id.* at 354. This ruling stems from the understanding that a speaker is afforded a right to anonymity in her exercise of First Amendment free speech rights. *Id.* at 357.

ship to actual or apparent corruption.¹²⁵ In *Randall*, the Court considered Vermont’s expenditure limits.¹²⁶ Its ruling on them ought to prove the death knell for expenditure limits as a means of campaign finance reform, given that Vermont’s limits were as narrowly drawn as they could be. They were generous, adjusted for inflation, and were specifically engineered to guarantee a candidate’s ability to campaign effectively.¹²⁷ They were presented as a rational means of achieving the new state interest discussed above:¹²⁸ that of reducing the amount of time state officials spent raising funds as opposed to running the state.¹²⁹ The Court refused to find a compelling state interest, however, reasoning that to do so would be tantamount to overruling *Buckley* (and rewriting its campaign jurisprudence) by justifying expenditure limits.¹³⁰ Furthermore, as narrowly tailored as Vermont’s expenditure limits were, they were not narrowly tailored enough to the actual apparent corruption interest¹³¹ and the only conclusion to be drawn is that none ever could be.

5. The Donor/Litigant Problem

“[I]n the most extreme of cases,” due process entitles a party

¹²⁵

Buckley, 424 U.S. at 47-48.

¹²⁶

Randall, 548 U.S. at 240.

¹²⁷

Id. at 237-38. Vermont allowed a gubernatorial candidate to spend \$300,000, and other state-wide officers \$100,000, with state senators’ limits calculated according to the population of their district. *Id.* Incumbents were only allowed to spend between 85% and 90% of what their challengers could spend. *Id.*

¹²⁸

See *infra* notes 100-01 and accompanying text.

¹²⁹

Id. at 240.

¹³⁰

Id. at 246. The Court’s logic was not entirely circuitous; it also cited an amici brief to hold that *Buckley* had in fact considered the candidate- time-conservation interest in rendering its ruling, even though it was not mentioned in the *Buckley* opinion. *Id.*

¹³¹

Id.

to recusal of a judge.¹³² Such an instance arises where the judge has a personal interest in the outcome of the case¹³³ or some previous involvement with the party which gives rise to a question of the fairness of a subsequent determination.¹³⁴ According to the “donor/litigant problem,” questions of impropriety arise where a donor later appears as a litigant before a donee/judge. Were this scenario precluded or regulated by law, it would have a chilling effect on protected donor conduct and hence the finance of judicial campaigns.

Currently, there is no constitutional or statutory law that speaks to the donor/litigant problem. However, the Supreme Court granted a writ of certiorari in the case of *Caperton v. A.T. Massey Coal Co., Inc.*¹³⁵ to resolve this issue in November of 2008. *Caperton* addressed whether a litigant has a due process right to the appearance of an unbiased hearing, which would entitle the litigant to recusal of a presiding judge who received substantial campaign donations from the litigant’s adversary.¹³⁶

Under facts as egregious as those presented in *Caperton*,¹³⁷ it

¹³² Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821 (1986).

¹³³ *Id.* at 821-22.

¹³⁴ *In re Murchison*, 349 U.S. 133, 135-37 (1955) (holding that under a law allowing a judge to be a “one man grand jury,” when a judge gains an indictment against a defendant said judge cannot then preside over the defendant’s trial without violating the defendant’s due process right to a fair tribunal).

¹³⁵ 129 S. Ct. 593 (2008).

¹³⁶ Petition for Writ of Certiorari, *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 593 (No. 08-22), 2008 WL 2676568, *1 (2008).

¹³⁷ The donor/litigant, Blankenship, spent \$3 million in 2004 to elect a colleague, Brent Benjamin, Justice of the Supreme Court of Appeals of West Virginia, over an incumbent. *Id.* at 2-3. Justice Benjamin refused to recuse himself when Massey Coal, of which Blankenship was CEO and President, appeared before him and proceeded to cast the deciding vote to vacate a \$50 million jury verdict against Massey Coal. Editorial, *Too Generous*, N.Y. TIMES, Sept. 7, 2008, at 8. The case had previously come before the court and the \$50 million verdict had been vacated. *Id.* *Caperton* was granted a rehearing after photos surfaced of West Virginia Chief Justice Elliot Maynard and Blankenship on vacation together in

is not impossible to imagine even the current Court imposing some kind of ceiling on the donor/litigant conflict, though a consideration of the claims counsel against preparing for one. Petitioners staked their due process claim on the “appearance of bias,”¹³⁸ a notoriously slender reed,¹³⁹ and the question presented necessarily raised the question of where a donor’s First Amendment right to make political expenditures and the Petitioner’s right to court access¹⁴⁰ cease to be coterminous, which makes the Petitioner’s job considerably more difficult than it would appear at first blush, especially in light of both *White* and *López Torres*.

Ultimately, there are four possible substantive outcomes of *Caperton*.¹⁴¹ The Court could 1) mandate recusal in all donor/litigant conflicts; 2) impose an actual monetary limit before triggering a recusal mandating donor/litigant conflict; 3) impose a relative monetary limit;¹⁴² or 4) expressly deny the due process claim, thereby relegating the issue to resolution by relevant state bar associations, legislatures and constitutions.

The first three outcomes would work in varying degrees to overrule or at least dilute *White*, particularly if it is not assumed that the litigant’s due process donor/litigant claim would extend to her

Monte Carlo during the pendency of the appeal. *Id.*

¹³⁸ Petition for Writ of Certiorari, *Caperton*, 129 S. Ct. 593 (No. 08-22).

¹³⁹ *Del Vecchio v. Ill. Dep’t of Corr.*, 31 F.3d 1363, 1371-72 (7th Cir. 1994).

¹⁴⁰ For a discussion on the ubiquitous yet elusive right to court access, see *Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002).

¹⁴¹ There is a fifth possible outcome. Though having granted certiorari, it is conceivable, though unlikely, the Court could decline to rule on the due process issue on jurisdictional grounds. Regardless, in so ruling the Court would be impliedly ruling that it was state bar associations, legislatures and constitutions.

¹⁴² The limits in these instances would be, as the Court’s campaign finance jurisprudence has borne out, implied as opposed to specific.

adversary's attorneys. The reality is that businesses often appear before the judges of a given jurisdiction who are in a position to, and often do, exercise their First Amendment right to donate to every sitting judge's campaign. In places like Albany, firms such as Powers and Santola, LLP,¹⁴³ which donated \$20,000 to Justice Teresi's campaign in 2007,¹⁴⁴ litigate so many cases within Teresi's district that even the avoidance of a conflict without incredible inconvenience would be impossible. In such cases, mandated recusal would amount to a ban on personal campaign expenditures for those wishing to practice in or appear before the courts of a given jurisdiction. Even in the second instance, as also seen in *White*, it is unlikely the Court will impose a condition on the exercise of First Amendment personal political expenditure rights.¹⁴⁵ The third outcome would be largely unworkable, making the exercise of one donor's rights contingent on the decision of others to exercise their own constitutional rights. Finally, it is exceedingly unlikely the conservative Roberts Court will enthusiastically discover a due process right to apparently unbiased judicial recourse, particularly if it did not find a First Amendment wrong in *López Torres*.¹⁴⁶

6. *The Constitutionality of New York's Finance Regulations*

As discussed above, New York's contribution limits are gen-

¹⁴³ Powers & Santola, LLP is a prominent upstate New York law firm with offices in Saratoga and Albany, both of which are in Justice Teresi's Third Judicial District. Powers & Santola, LLP, <http://www.powers-santola.com> (last visited Mar. 28, 2009).

¹⁴⁴ See Committee to Re-Elect Justice Joseph C. Teresi, *supra* note 56.

¹⁴⁵ *Wis. Right to Life*, 127 S. Ct. at 2673.

¹⁴⁶ See *López Torres*, 128 S. Ct. at 797-98.

erous (well above the lows invalidated in *Randall*) and its attempts at limiting expenditures have been few and far between. As such, New York-specific campaign finance case law is rare.¹⁴⁷ Moreover, for procedural and practical reasons, challenges to campaign finance systems are hashed out in federal, rather than state court.¹⁴⁸ The only recent blip on the New York campaign finance law radar occurred when a law prohibiting expenditures by candidates for state office during primary campaigns¹⁴⁹ faced simultaneous federal and state challenges.¹⁵⁰ New York's Third Department was the victor by five days in an apparent race to invalidate via *Buckley*.¹⁵¹ In an earlier case, an attempt to invalidate New York's reporting requirements was denied.¹⁵² However, taking everything into account, things have been quiet on this particular front.

¹⁴⁷ See 50 N.Y. JUR. 2D, *Elections* § 496 (2009) (citing, aside from statute, a scarce and disparate group of opinions, without a source of state-wide jurisdiction to explain New York's campaign receipt and expenditure law).

¹⁴⁸ The only party with standing to challenge speech and conduct regulations is the candidate herself, while numerous better-funded parties may challenge expenditure or contribution. The candidate, pressed for time and money, will not subject speech or conduct regulations to First Amendment scrutiny unless faced with an unfavorable advisory opinion or sanction by a state agency, at which time, an Article 78 action will be filed in state court. N.Y. C.P.L.R. 7801 (McKinney 2009) (governing appeals of administrative decisions by New York State agencies in New York State courts). At the same time, political fund-raisers, their livelihood at stake, will peremptorily challenge any threatening legislative developments at the first opportunity within the federal judiciary, which is more hostile to campaign finance.

¹⁴⁹ N.Y. ELEC. LAW § 2-126 (McKinney 2007). This law was a strange one. It had been on the books in one form or another since 1911 and had survived *Buckley* in the face of periodic challenge, most recently in 1999, in *Baran v. Giambra*, 265 A.D.2d 796 (4th Dep't 1999). In *Baran*, the law faced the strict scrutiny demanded by *Buckley* and survived. *Id.* at 797.

¹⁵⁰ *Kermani v. N.Y. State Bd. of Elections*, 487 F. Supp. 2d 101, 104 (N.D.N.Y. 2006); *Avella v. Batt*, 33 A.D.3d 77, 79 (N.Y. App. Div. 3d Dep't 2006).

¹⁵¹ *Kermani*, 487 F. Supp. 2d at 109-10; *Avella*, 33 A.D.3d at 85.

¹⁵² *Herschaf v. N.Y. City Campaign Fin. Bd.*, 127 F. Supp. 2d 164, 169 (E.D.N.Y. 2000).

7. *Conclusions*

Though the Court has strayed from it, *Buckley* remains the post to which campaign finance jurisprudence and reform is tethered.¹⁵³ The fealty with which the Roberts Court regards *Buckley* leaves little doubt that its tenants will stand for the foreseeable future. Indeed, Chief Justice Roberts went out of his way in *Wisconsin Right to Life* to foreclose any doubt that, at least for the time being, his Court is fundamentally opposed to any campaign finance reform whatsoever.¹⁵⁴

Subsequently, it can be said that the interests of the Court, as keepers of the Constitution, are far more limited in this instance than those of American society and democracy in general. There certainly is an interest in both keeping officials honest and ensuring they are perceived as such. But there is also an interest in keeping them at their desks, and in ensuring the democratic process remains a respite from the undemocratic economic striation that governs every other aspect of public life. The former interests have been deemed compelling while the latter have not. Thus, in seeking to realize an anti-corruption interest, the First Amendment may be intruded upon, but in realizing all other interests, the First Amendment forecloses the

¹⁵³ *Randall*, 548 U.S. at 242.

¹⁵⁴ *Wis. Right to Life*, 127 S. Ct. at 2672 (“Enough is enough. Issue ads like WRTL’s are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them. To equate WRTL’s ads with contributions is to ignore their value as political speech.”). Six months after this utterance was handed down, Senator Christopher Dodd was campaigning for the Democratic presidential nomination in Iowa on a customized bus provided by the unregulated and unreported generosity of the International Union of Fire Fighters. Other candidates took full advantage of Robert’s hostility as well. Leslie Wayne, *Hands Untied by Ruling, Outside Groups Pour Money into Race*, INT’L HERALD TRIBUNE, Jan. 2, 2008, at 5.

most effective options. As such, judicial election reformers are put in the awkward position of simultaneously subverting and complying with the Constitution if they seek to achieve these interests through law or policymaking, since all reforms must ostensibly be anti-corruption measures.

This conclusion must be emphasized that any tampering with the electoral process, in either its conduct or finance, must be narrowly tailored to the anti-corruption interest. The party bias interest considered in the judicial conduct/speech cases is essentially the anti-corruption interest as it applies to judges, for what is a corrupt judge but one who favors one party over another for reasons not pertaining to her office. Further, the possibilities presented in *White* by the suggestion that there might be a compelling state interest in open-mindedness are limited.¹⁵⁵ It is difficult to imagine whether this would allow for anything the anti-corruption interest would not, and it is even harder to imagine any legislation that could be so narrowly tailored as to achieve something so vague as “open-mindedness.”¹⁵⁶ Therefore, though the public-officer-time-conservation interest presented in *Randall* is worthy of far better treatment than the Court was willing to give it, an anti-corruption interest is all legislators have to work with in reforming both the conduct and financing of judicial

¹⁵⁵ See *White*, 536 U.S. at 778.

¹⁵⁶ See *id.* at 780.

A candidate who says “If elected, I will vote to uphold the legislature’s power to prohibit same-sex marriages” will positively be breaking his word if he does not do so (although one would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment).

Id.

elections.

III. WHAT MAKES A GOOD JUDICIAL ELECTION?

After determining how judicial elections work in New York State and gauging their constitutionality, it must be ascertained exactly what the objective is for judicial elections before rendering any subjective judgment regarding their efficacy.

At first this might seem simple: the purpose of a judicial selection process is to attract and select good judges to the bench. But embedded in this answer are the two crucial questions: 1) what makes good judges; and 2) do New York's judicial election laws attract them? Since this Comment's analysis does not question the use of elections as opposed to appointment, a third question is implied: do New York's judicial elections achieve democratic ideals?

A. What Makes a Good Judge?

1. *Conduct*

In asking what constitutes a good judge, the reality that judges are only human must be kept in mind. Ensconced as they are in "chambers," exalted upon "benches" and disembodied beneath "robes," they are people and, more importantly, citizens complete with all accompanying preconceptions and prejudices.¹⁵⁷ Furthermore, it is hardly desirable to have a judge who has not devoted care-

¹⁵⁷ See Vincent Martin Bonventre, *Judicial Activism, Judges' Speech, and Merit Selection: Conventional Wisdom and Nonsense*, 68 ALB. L. REV. 557, 562 (2005) (stating that "[a] judicial robe is not an ideological lobotomy").

ful consideration to the law and society and come to conclusions about both.¹⁵⁸ Acceptance of this reality, while it may appear an abandonment of one's notions of the ideal bench, does not foreclose the achievement of traditional judiciary-specific interests.

At the core of these interests is the fact that a judge should manage her court as an institution of law. This requires certain and precise interpretation of regulation, statute and precedent,¹⁵⁹ combined with a character, which will engender the respect and veneration without which the law cannot thrive.¹⁶⁰ As with any social institution, legal systems included, the New York judiciary can only function when people respect and obey it.¹⁶¹ Certainty of interpretation serves to engender respect and obedience by limiting caprice, which in turn stabilizes confidence in the judiciary itself and shores up vulnerability to subversion and de-legitimization.¹⁶² Resistance

¹⁵⁸ See *White*, 536 U.S. at 778 (noting that "even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so.").

¹⁵⁹ For a useful synthesis of the debate out of which this assertion arises, see Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 561-76 (1983).

¹⁶⁰ See U.S. CONST. art. III, § 1 (stating, in pertinent part, "[j]udges . . . shall hold their offices during good behavior . . ."); N.Y. RULES OF CT. § 100.2(A) (McKinney 2009) (stating, in pertinent part, "[a] judge shall . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary").

¹⁶¹ Respect and obedience are inspired in a number of ways. Certainty of interpretation and venerability are the traditional tools of a judiciary toward this end. United States history is replete with examples of the crises, which flow when people refuse to respect and obey the judiciary. See, e.g., J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978* 131-39 (Oxford Univ. Press 1981) (1979) (highlighting resistance to busing in Richmond and Charlotte after *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)).

¹⁶² GERARD N. MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES* 39-51 (2007) (outlining the malarkey surrounding President Jackson and Georgia's refusal to obey the Supreme Court's functional reversal of *Johnson v. McIntosh*, 21 U.S. 543, 568 (1823) (holding the United States has right to title of all land within its boundaries), by issuing *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (holding the federal government could not interfere in Native American sovereignty rights)).

and undermining of the legitimacy of a court are often accompanied by sudden, poorly explained reversals of precedent.¹⁶³

2. *Appearance*

The required judicial character is bolstered and reflected by the physical presentation of the courtroom, of which the judge is the focal point. Physically, a court is designed along the traditional model you find in synagogues, mosques, or churches. The judge enters and we rise. She sits beneath her halo, typically the seal of the state, on a comfortable leather throne while we are permitted space on rigid wooden benches. Citizens appear before her, approaching only with her permission, and only a select few are permitted to mutter incomprehensible invocations, which she approves or disapproves of for reasons only the anointed could ever comprehend. Her voice amplified, we must obey every word.¹⁶⁴ The effect of this imagery on the collective conscience of the polity is invaluable to the maintenance of the judiciary, but it is undermined when the judge's character strays from the social ideal of the enlightened. Therefore, a good judge should appear to embody, or at least not violate, the ideal of the "dispassionate and enlightened one" in all aspects of her life.¹⁶⁵

The New York Court Rules enumerate a myriad of other in-

¹⁶³ See, e.g., MERTON L. DILLON, *THE ABOLITIONISTS* 233-35 (1975) (noting how Dred Scott v. Sandford, 60 U.S. 393 (1856), radicalized the abolitionist movement); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 758 (1994) (detailing the efforts of anti-abortion protestors to subvert a court order).

¹⁶⁴ See generally New York v. Moulton, 374 N.E.2d 1243, 1244 (N.Y. 1978). For an interesting parable further blurring the lines between religious and legal judgment, see Amalia D. Kessler, *Enforcing Virtue: Social Norms and Self-Interest in an Eighteenth-Century Merchant Court*, 22 LAW & HIST. REV. 71 (2004).

¹⁶⁵ See N.Y. RULES OF CT. § 100.3(A).

terests that are relevant, even after *White*, and are not forsaken by the conclusions just reached.¹⁶⁶ Instead, the enumeration of the two essential “good judge” qualities, consistent interpretation and promotion of veneration, serve to consolidate these interests so that the efficacy of New York Judicial Election Law as a judicial selection process can be efficiently analyzed.¹⁶⁷ Note that under these two broad interests fall more specific ones, like zealous discharge of duties, efficient court management, etc.

B. What Makes a Good Election?

Finally, the purpose of judicial elections as a democratic exercise must be considered. “[G]overnments are instituted among men, deriving their just powers from the consent of the governed.”¹⁶⁸ This, the underlying philosophy of American governance, requires that all power be traceable to the will of the people and the will of the people is most peaceably ascertained through elections. Further, elections are a practical and fundamental means of undermining unwanted political development.¹⁶⁹ The purpose of an election, then, is to establish and divine the consent of voters and provide an opportunity for the polity to undermine unwanted developments in lawmaking. Each

¹⁶⁶ *Id.*

¹⁶⁷ This Comment declines to make a distinction between “actual” and “appearance” of any of these interests based on the idea that this distinction simply is not useful. Aside from the fact that one typically begets the other, that both are desirable makes distinguishing between the two essentially redundant.

¹⁶⁸ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁶⁹ THE FEDERALIST NO. 51, at 252 (James Madison) (Terence Ball ed., 2003) (noting that “[a] dependence on the people is no doubt the primary controul [sic] on the government; but experience has taught mankind the necessity of auxiliary precautions”); *see also* *Randall*, 548 U.S. at 248-49 (observing that “contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, *thereby reducing democratic accountability*”) (emphasis added).

of these requires the participation of a polity informed of the government's work during the previous term and of its ability to exercise control over it.

IV. THE PERFORMANCE OF NEW YORK'S JUDICIAL ELECTIONS

The questions, then, have become whether New York judicial election laws: 1) attract and select judges who interpret the law consistently; 2) who engender respect and veneration for the bench; 3) while encouraging public participation in the democratic process, and 4) providing an opportunity to divine and respond to the will of the governed? In order to analyze and answer these questions, the election-related purposes, and the good judge-related purposes are considered separately, and then together.

A. Public Participation

Only seventeen percent of New Yorkers vote in judicial elections,¹⁷⁰ while forty-one percent do not, even while voting for other candidates in a given election.¹⁷¹ In fact, sixty-five percent of New Yorkers do not even know Supreme Court justices *are* elected.¹⁷² When asked why, fifty-eight percent of voters cited lack of knowl-

¹⁷⁰ COMM'N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, *supra* note 19, app. A, at 36. As part of the mandate bestowed upon them by Chief Judge Kaye, the Commission enlisted the help of the Albany Government Law Center to conduct a rare, if not utterly comprehensive, survey of public perceptions of judicial elections, which included a series of questionnaires and focus groups, answered by and composed of a variety of citizens in key areas of the state.

¹⁷¹ *Id.* (noting that seventy-five percent, when voting for judges, forgot which they had voted for in exit polls . . . [and] [f]orty-eight percent did not realize Court of Appeals judges were appointed).

¹⁷² *Id.*

edge about judicial candidates as the reason they did not vote.¹⁷³

But lack of information is a key objective of New York's judicial election laws. Speech restrictions prevent candidates from informing the electorate, except through winks and nods,¹⁷⁴ as to how they will rule on issues likely to appear before the court or make any statement to suggest they might not be impartial.¹⁷⁵ Without discussion which might transgress these rules, any interest in judicial elections average New Yorkers may harbor is left to wither on the vine. The speech prohibitions fail in practice as well. In *In re Shanley*, for example, a judicial candidate's assertion that she was a "law and order" candidate was held proper,¹⁷⁶ while in *In re Watson*, statements that a candidate would "work with" and "assist" police were not.¹⁷⁷ Is there any material difference in the effect of these two statements? In both cases the message to local prosecutors and police was that in the candidate's court, they would get the benefit of the doubt. The speech prohibitions abandon actual impartiality for its appearance, and only where the lay voter is concerned. This only serves to discourage participation and hence undermines the establishment of consent.

Further, fifteen percent of registered voters consider the judicial election process inimical per se.¹⁷⁸ This is likely the fault of New

¹⁷³ *Id.*

¹⁷⁴ See *In re Shanley*, 774 N.E.2d 735, 736 (N.Y. 2002) (holding that a judicial candidate's use of the term "law and order" to describe herself was not in contravention of N.Y. COMP. CODES R. & REGS. tit. 22 § 100.5 (A)(4)(d)(i), (ii)).

¹⁷⁵ N.Y. COMP. CODES R. & REGS. tit. 22 § 100.5 (A)(4)(a).

¹⁷⁶ *Shanley*, 774 N.E.2d at 736.

¹⁷⁷ *In re Watson*, 794 N.E.2d 1, 4 (N.Y. 2003).

¹⁷⁸ COMM'N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, *supra* note 19, app. G, at 5.

York electoral politics generally, but provisions requiring disclosure of campaign donations¹⁷⁹ are the only rules that mandate the sort of openness that could restore a voter's faith. However, the allowance of contributions at all is contrary to faith in the electoral process insofar as New Yorkers have faith in it as a means and ends of democratic equality.¹⁸⁰ Private campaign financing is a system whereby citizens may purchase premium access to democratic institutions. It creates classes of citizens based on who can afford to pay for the attention of government officers and those who cannot. This clearly contravenes the ideals of American equality at necessarily dilutes the enthusiasm of the vast majority of New Yorkers who are not in a position to donate enough money to earn the special attention of candidates. Once again, determination of the popular will is undermined, this time through alienation.

B. Attracting Good Candidates

The question we'll ask first is whether New York's judicial campaign laws attract judges who will interpret the law consistently, before asking whether they attract judges who will promote veneration of the bench. Currently, candidates are anointed via the party nomination process. Since the analysis is limited to elections, and since the nomination process is hopefully on the verge of reform, it must admittedly ignore the dominant factor in candidate selection and

¹⁷⁹ N.Y. COMP. CODES R. & REGS. tit. 22 § 100.5 (A)(4)(g).

¹⁸⁰ The Commission to Promote Public Confidence in Judicial Elections found further that seven percent of the people did not care that much, four percent held the belief that their vote did not matter, and sixteen percent believed people always voted in judicial elections. COMM'N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, *supra* note 19, app. E, at 22.

focus solely on the role elections have in it.

1. *Consistent Interpretation*

With the exception of district, town, village, or city courts, the New York Constitution requires that judges have been admitted to practice law in New York for ten years.¹⁸¹ By extension the requirement means that a candidate must have gone to law school, graduated, and survived ten years of practice without being disbarred. However, New York's 2,164 district, town, village, and city court judges (sixty-seven percent of the state's judiciary), the majority of whom are elected,¹⁸² are not required to have a law degree—¹⁸³indeed, eighty-two percent of them do not.¹⁸⁴ At least in the first instance, the law requires the development of a familiarity with the law during which any caprice of the candidate will theoretically have been vetted. Because the underlying premise of the legal profession is that the intricacies of law are beyond the ken of the average citizen, elections themselves as an appointive mechanism cannot be relied upon to favor consistent judicial interpretation. Keeping in mind this foundational truism, the bar membership exemption for district, town, village, or city court judges¹⁸⁵ leads us to the conclusion that there is nothing *inherent* to the judicial election law which encourages the election of candidates with consistent legal interpretation.

The Independent Judicial Election Qualification Commis-

¹⁸¹ N.Y. CONST. art. VI, § 20(a).

¹⁸² COMM'N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, *supra* note 19, at 5.

¹⁸³ N.Y. CONST. art. VI, § 20(c).

¹⁸⁴ John Caher, *Complaints Against Judges Rose in 2004*, N.Y. L.J., Sept. 29, 2005, at 1.

¹⁸⁵ Town and village judges are required to take a training course. N.Y. CONST. art. 6, § 20(c).

sion's (JEQC) mandate¹⁸⁶ would screen for, *inter alia*, those traits which lend themselves to consistent legal interpretation (education, experience, etc.). The JEQC was established by administrative enactment in February 2007¹⁸⁷ but its evaluations during its first run in the Fall of 2007 were not thorough. They were issued in a series of press releases regarding individual districts.¹⁸⁸ None of the 127 candidates screened earned anything but a "qualified" rating and no explanation for the rating was proffered except on general terms. The Commission clearly failed in its mandate to inform or inspire confidence in the public regarding the judicial election process.

There was little improvement during the 2008 elections. Though the Commission of the Second Department deemed five candidates "not qualified" and the Fourth Department deemed one candidate "not qualified," the reasons for the designation were not readily apparent.¹⁸⁹ The First and Third Department Commissions did not

¹⁸⁶ See *supra* text accompanying notes 37-39.

¹⁸⁷ N.Y. RULES OF THE CHIEF ADMINISTRATIVE JUDGE § 150.1.

¹⁸⁸ See Press Release, Third Dep't Indep. Judicial Election Qualification Commission—Sixth Judicial District (Aug. 27, 2007); Press Release, Third Dep't Indep. Judicial Election Qualification Commissions—Fourth Judicial District (Oct. 3 2007); Press Release, Third Dep't Indep. Judicial Election Qualification Commissions—Third Judicial District (Oct. 10, 2007), <http://courts.state.ny.us/ad3/JEQC/Qualified%20Candidates.html> (last visited Mar. 28, 2009); Press Release, First Dep't Indep. Judicial Election Qualification Commissions—First Judicial District Independent Judicial Election Qualification Commission Announces Qualified Candidates (July 17, 2007), http://www.judicialreports.com/attachments/Jason/PR07_17.pdf (last visited Mar. 28, 2009); Press Release, Second Dep't Indep. Judicial Election Qualification Commissions—Independent Judicial Election Qualification Commissions for the Second Judicial Department Announce Qualified Candidates, (Sept. 14, 2007), <http://www.courts.state.ny.us/courts/ad2/IJEQC/IJEQC2.shtml> (last visited Jan. 11, 2008).

¹⁸⁹ INDEP. JUDICIAL ELECTION QUALIFICATION COMMISSIONS, 2008 FINAL LIST OF RATED CANDIDATES 2-3 (2008), *available at* <http://www.nycourts.gov/courts/ad2/IJEQC/2008RatedCandidates.pdf>; INDEP. JUDICIAL ELECTION QUALIFICATION COMMISSIONS, 2008 CANDIDATE RATINGS: EIGHTH JUDICIAL DISTRICT, <http://www.courts.state.ny.us/ad4/> (last visited Mar. 30, 2009).

see fit to deem any candidate to be less than qualified.¹⁹⁰

Unfortunately, these designations, the product of a new and haphazard commission, constitute the only systematic attempt to gauge the capacity for legal consistency among New York's judicial candidates. Hence, there is no reliable barometer available to determine whether candidates capable of consistent judicial interpretation are in fact attracted.¹⁹¹

2. *Promotion of Veneration*

a. **Systemic/Legal Guarantees**

If judicial election laws do not attract judges capable of consistent legal interpretation, they speak squarely to the candidate's promotion of veneration. The New York Constitution forbids holding other public offices or practicing law in a way that might risk a conflict of interest.¹⁹² There are other, similar qualifications inherent in the nature of the elections imposed by Part 100. For example, in order to conduct a campaign under this law, a judicial candidate (typically a politically active person) must at least outwardly with-

¹⁹⁰ Press Release, Indep. Judicial Election Qualification Commissions—First Judicial District (Sept. 3, 2008), http://www.courts.state.ny.us/courts/ad1/press_release-2008-1stJD.pdf (last visited Mar. 11, 2009); Press Release, Indep. Judicial Election Qualification Commissions—Twelfth Judicial District (Sept. 3, 2008), http://www.courts.state.ny.us/courts/ad1/press_release-2008-12thJD.pdf (last visited Mar. 11, 2009); Press Release, Indep. Judicial Election Qualification Commissions—2008 Commission Ratings (Oct. 23, 2008), <http://www.courts.state.ny.us/ad3/JEQC/2008-Qualified-Candidates.pdf> (last visited Mar. 28, 2009).

¹⁹¹ A seemingly obvious determinant of judicial consistency would be reversal rates. However, no systematic reporting of reversal rates is available, much less reversal rates for legal misinterpretation as opposed to judicial misconduct. See *DeCrescenzo v. Gonzalez*, 847 N.Y.S.2d 236 (App. Div. 2d Dep't 2007).

¹⁹² N.Y. CONST. art. VI, § 20(b)(1)-(4).

draw from political life and must subject herself to vague provisions regarding the maintenance of the “dignity of the office.”¹⁹³ She must go so far as to ensure that her family does the same.¹⁹⁴ In this way, a candidacy for judicial office is unique. A candidate for judicial office is required by law to reconsider the conduct of her entire life in light of her pursuit of office.¹⁹⁵

The effect of this is similar to the “awakening the conscience”¹⁹⁶ an oath is meant to impart on a trial witness, whereby a judicial candidate is made to acknowledge the gravity of the authority she seeks via submission to Part 100. The awakening for judicial candidates is more concrete however, for in subjecting herself to Part 100, a judicial candidate, unlike typical candidates, submits to the jurisdiction of the New York State Commission on Judicial Conduct, the New York State Board of Election, and the Independent Judicial Qualifications Commission at a time when her actions are going to be heavily scrutinized, if not by the commissions and board independently, then by those seeking to bar the candidate’s election.¹⁹⁷ The result is, at the very least, a one-month period in which a judicial candidate is tested on how well she “uphold[s] the dignity of the bench.”¹⁹⁸

¹⁹³ N.Y. COMP. CODES R. & REGS. tit. 22 § 100.5 (A)(1).

¹⁹⁴ *Id.* § 100.5 (A)(4)(a).

¹⁹⁵ *Id.*

¹⁹⁶ FED. R. EVID. 603.

¹⁹⁷ N.Y. COMP. CODES R. & REGS. tit. 22 § 100.0(A). As seen below, that such people exist is not a “given” and is in fact rare.

¹⁹⁸ N.Y. ELEC. LAW § 6-158(5) (requiring that a judicial district convention be held between the first Tuesday after the third Monday in September and the fourth Monday in September); *id.* § 8-100(c) (placing the general election on the Tuesday after the first Monday in November). In practice, this period is much longer. See N.Y. COMP. CODES R. & REGS. tit. 22 § 100.0(Q) (2007) (defining “window period” as applied to finance regulations, as begin-

Taking a more subjective approach, the 2005 Commission on Judicial Conduct conducted 260 investigations based on a record number of complaints—1,565—resulting in approximately ninety-three reprimands to elected judges.¹⁹⁹ In 2004 the commission conducted 255 full investigations, which resulted in twenty public sanctions and thirty-five private warnings.²⁰⁰ In 2005, therefore, approximately three percent of all elected judges (including town and village judges) and approximately four percent of full-time elected judges were reprimanded, marking six years of sustained reprimand-growth.²⁰¹ During a similar period, Massachusetts, which employs a merit-based judicial appointment system,²⁰² “informally resolved” investigations of two of its judges and dismissed charges with concern but after investigation against 6 of its judges.²⁰³ Thus, two percent of its 410-member judiciary was reprimanded in some way.²⁰⁴ Meanwhile, Texas, which selects all of its judges through partisan election, also disciplined only two percent of its 3,661 judges.²⁰⁵ This brief comparison is too cursory and uncontrolled to justify broad conclu-

ning nine months before a nomination convention); *Id.* § 100.0(A) (defining a candidate as anyone who has publicly announced her candidacy).

¹⁹⁹ John Caher, *Complaints Against Judges on the Rise*, N.Y. L.J., Oct. 12, 2006, at 1. The majority of these reprimands, fifty-eight, were issued against town or village court judges, who are subject to local regulation as to whether they are elected. *Id.* at 3-4.

²⁰⁰ *Id.* at 1.

²⁰¹ *Id.*

²⁰² American Judicature Soc’y, *Judicial Selection Methods in the States*, http://www.ajs.org/selection/sel_state-select-map.asp#top (last visited Mar. 28, 2009).

²⁰³ COMMONWEALTH OF MASS., COMMISSION ON JUDICIAL CONDUCT ANNUAL REPORT 2005 9 (2005), available at http://www.mass.gov/cjc/2005_Annual_Report.pdf.

²⁰⁴ The Massachusetts Court System, *Chart of the Massachusetts Court System*, http://www.mass.gov/courts/courtsandjudges/courts/structure_color.pdf (last visited Mar. 28, 2009).

²⁰⁵ TEXAS COMM’N OF JUDICIAL CONDUCT, FISCAL YEAR 2005 ANNUAL REPORT 17-18 (2005), available at <http://www.scjc.state.tx.us/pdf/rpts/AR-FY05.pdf>.

sions, but it is enough to conclude that New York's judicial election laws are not facing crises for failure to select judges who promote veneration and respect for the judiciary, though we should be concerned that the numbers are relatively high. This conclusion is bolstered by public opinion: forty-two percent of New Yorkers feel elected judges are doing a good job, and thirty-nine percent believe they are doing a "just fair job."²⁰⁶ Only nine percent feel they are "poor."²⁰⁷ The slightly poorer performance of New York's judiciary compared to its counterparts in Massachusetts and Texas is a cause for concern, it's clear that there is no revolution in the works.

b. Campaign Finance

Insofar as New York's Judicial Election laws provide for the private financing of judicial campaigns,²⁰⁸ they pose a threat to consistent legal interpretation by risking bias in favor of donor/litigants and pose a threat to the veneration of the bench in perpetuating perceived bias among voters.²⁰⁹

The belief that private contributions to political campaigns are offered, at least the vast majority of time, without the intent to garner special treatment, is a stifling naiveté, which any reconstitution of New York's judicial election process must avoid. To return to the

²⁰⁶ COMM'N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, *supra* note 19, app. G, at 2.

²⁰⁷ *Id.* This left three percent believing that New York's judges were doing an excellent job, with an honest eight percent recusing themselves for lack of knowledge. As acknowledged with the veneration promotion interest, job performance and perceived job importance, while separable in other professions, are indistinguishable for judges.

²⁰⁸ N.Y. COMP. CODES R. & REGS. tit. 22 § 100.5(A)(5).

²⁰⁹ COMM'N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, *supra* note 19, app. G, at 2.

elections examined earlier,²¹⁰ judicial contributions came from local law firms and attorneys, as one would expect, but local construction companies also made significant donations and a number of donors were not from New York at all, including one man from Ocean Ridge, Florida who donated \$10,000 to the Teresi campaign.²¹¹ It can be assumed that when Donald Led Duke, Chairman of BBL Construction Services LLC,²¹² whose building projects include the Albany Family Court and the New York Court of Appeals Hall,²¹³ donated \$5,000 to the Committee to Re-Elect Justice Joseph C. Teresi, he was merely adding his voice to the electoral debate, but to do so would be to ignore a critical problem.

In acknowledging the problem, the mindset of a large donor is best understood according to the horse racing model.²¹⁴ A local lawyer, for example, sees her donation not as aid to ensure a favored candidate wins, but rather as a bet placed on a candidate she thinks will win.²¹⁵ Large donors invest in candidates rather than donate to them. Whether undemocratic campaign contributions translate to un-

²¹⁰ See *infra* Part IV.A.

²¹¹ See Committee to Elect Judge Cahill, *supra* note 58.

²¹² Michael DeMasi, *Troy, in Need of Hotel Rooms, is Beneficiary of Competing Projects*, THE BUSINESS REV., Sept. 21, 2007, http://www.bizjournals.com/albany/stories/2007/09/24/story9.html?jst=s_cn_hl (last visited Mar. 28, 2009).

²¹³ BBL Construction Services, Completed Projects, <http://bblconstructionservices.com/projects/completed.asp> (last visited Mar. 28, 2009). Other Albany area projects include the Alfred E. Smith building, the New York State Office of the Comptroller, the Empire State Plaza parking garage, the Albany County Justice Center, and the Greene County Municipal Building. *Id.* BBL has also appeared before Justice Teresi. In September of 2007, the Third Department overturned a motion for summary judgment Justice Teresi granted BBL in a case involving a worker who was injured during construction of the Court of Appeals Hall. See *Gadani v. Dormitory Auth. of the State of N.Y.*, 43 A.D.3d 1218, 1221-22 (N.Y. App. Div. 3d Dep't 2007).

²¹⁴ STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS* 10-12 (2006).

²¹⁵ *Id.*

democratic tendencies among elected judges is unclear, but what is clear is thirty-eight percent of New Yorkers feel campaign contributions have “a great deal” of influence and forty-five percent believe they have “some”²¹⁶ influence over the decision making of judges. This alone undermines veneration of the bench, but the risk posed by the sanctioned assault upon judicial candidates by improper interests also imperils consistent legal interpretation via the promotion of party bias.

It is important to note that there is no legal bar to party bias in favor of donors, and it is not likely that *Caperton* will change that significantly.²¹⁷ While there are laws clearly mandating recusal for reasons of “interest,”²¹⁸ there is no law requiring a recusal where a campaign donor is a litigant before the judge.

Regardless, New Yorkers are presently afforded no real guarantee that frequent litigant donations are not used to influence judicial decision making. As mentioned earlier, Part 100 prohibits a judicial candidate from personally soliciting funds, but allows her to do so through committees she personally appoints. This is an attempt to soften the impact of the donor/litigant problem, but fails for the same reason the *Shanley* and *Watson*²¹⁹ distinction does. Any shielding effect the solicitation prohibition has is illusory. Who and how much one donates to a judicial campaign is public knowledge by law;

²¹⁶ COMM’N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, *supra* note 19, app. G, at 2.

²¹⁷ See *supra*, Part II.B.5.

²¹⁸ N.Y. JUD. LAW § 30-14 (McKinney 2007).

²¹⁹ See *supra* text accompanying notes 177-78; *In re Shanley*, 774 N.E.2d 735, 736 (N.Y. 2002); *In re Watson*, 794 N.E.2d 1, 4 (N.Y. 2003).

hence, it is not realistic to think a judge would not know to whom she owes her office and to act accordingly if she were so inclined.

Therefore, that New York State's judicial election laws serve to educate the public—but not in a way which encourages public participation. At best, it maintains veneration of the bench, and may or may not attract qualified candidates. The inquiry moves now to whether it is worthwhile to improve judicial elections, and if so, how.

c. Tactical Groundwork for Improvement

Any modification of the system of private campaign finance must prioritize the campaign expenditures discussed above with an eye towards the purposes of electoral judicial selection: promoting and maintaining a good bench while promoting democratic ideals. In this way, the ends served by the \$79,220.56 spent by Justice Teresi's campaign on public awareness becomes essential to both the promotion of democracy via education and the maintenance of a good bench, presuming democratic election is the favored leadership selection mode. For the public, the \$15,098.62 spent on fundraising is an accommodation to our system of private campaign finance; a necessary investment to raise the funds to educate the polity. Notwithstanding the conception of campaign donation as a democratic exercise, the image of the judge's committee drumming up political support, even in the candidate's absence, undermines veneration of and respect for the bench.²²⁰ Though no one could seriously argue

²²⁰ COMM'N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, *supra* note 19, app. G, at 2.

the New York bench engages in any systematic preference for donors, party bias is the inherent risk of private campaign finance. The same reasoning de-prioritizes the \$5,188 spent on event tickets. Thus, reformers in the public interest must understand the money spent on fundraising and event tickets is expendable as either unnecessary in light of other solutions, or as serving the interest of the candidate where it opposes that of the public.

Money spent educating the public is essential to the establishment of consent, but the \$79,220.56 spent by the Teresi campaign and the \$282,706.30 from which it was drawn must be considered in light of this education's essential components and the means available for achieving them. In the democratic process, education of the public requires that 1) information be communicated to the public and that 2) the public be afforded the opportunity to weigh one another's impression of it. In an election, the judicial candidate can only work to fulfill the first. However, the opportunity for voters to weigh one another's opinions is inherently informal. It occurs between individuals in unpredictable settings and ways. Individual voters bear what minimal costs it requires. The only cost that can be borne is that of whoever voluntarily facilitates or encourages it. The candidate—or more accurately the candidate's donors—bear the cost of the first. So we see that private campaign finance enables the candidate to fulfill critical democratic need. What must be kept in mind, however, is that the candidate is not uniquely qualified to fill this need and is often impelled to manipulate it.

V. THE POSSIBILITIES FOR REFORM

A. Why Reform?

Despite the findings we have discussed, judicial elections, as they are now, have worked for New York. Though people grumble about the judiciary, they do not openly contest its authority, which is enough to ensure its survival as an effective institution. Why then should something be fixed that does not appear broken? The answer is that the efficacy of New York's elected judiciary is bolstered primarily, if not solely, by the tradition of the bench and its system of review and oversight. Elections have only an incidental effect on this foundation of judicial authority, such that one is free to adjust the judicial electoral process without fear of destabilizing the bench. This freedom presents us with an opportunity to make otherwise frivolous improvements in order to create surplus legislative, judicial, and democratic legitimacy.

Regardless, recent legal and technological developments, as well as a fresh, post-*White* approach to financing and speech restrictions, might make the collection of surplus legitimacy possible.

B. Consideration of Reform

Before continuing, we should review our aspirations, the nature of judicial elections, and our constitutional limitations. If judicial elections in New York are to be reconstructed, it must be done in an attempt to secure good judges while promoting the democratic

ideal.²²¹ The twin pillars of judicial election law are conduct and finance regulations. In addressing finance regulation, contributions of more than \$400 dollars²²² must be allowed and we cannot limit the amount of money personally spent by candidates or supporters,²²³ except where such expenditures amount to the most express sort of advocacy, and only during the shortest possible period leading up to the election.²²⁴ In adjusting the judicial election conduct laws, speech restrictions must be narrowly tailored to New York's interest in preventing party bias.²²⁵ At the same time, an indeterminate but limited amount of breathing room is provided us in *White* with which one can pursue interests unrecognized by the Supreme Court's campaign conduct and finance jurisprudence.²²⁶ Further, it must be acknowledged that reform does not allow for the kind of compartmentalization this analysis has managed to apply towards their ends. Their application will necessarily be uneven and will often overlap.

Corruption is difficult to understand and even more difficult to isolate and address.²²⁷ This makes tailoring reform to the anti-corruption interest inherently problematic. However, the entrenchment of democratic government has a decidedly inverse impact on

²²¹ See *supra* Part V.

²²² See *Randall*, 548 U.S. at 261.

²²³ See *Buckley*, 424 U.S. at 46.

²²⁴ *Wis. Right to Life*, 127 S. Ct. at 2667.

²²⁵ *White*, 536 U.S. at 776.

²²⁶ *Id.* at 783 (stating "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office").

²²⁷ Daniel Treisman, *The Causes of Corruption: A Cross-National Study*, 76 J. PUB. ECON. 399, 431 (2000), available at <http://www.sscnet.ucla.edu/polisci/faculty/treisman/causes.PDF>.

corruption.²²⁸ Thus, it is convenient that any reform narrowly tailored toward promotion of democracy must be narrowly tailored to the anti-corruption interest. As such, reform will be most efficient if characterized as one that fights corruption via the promotion of democracy, but also designed to maximize beneficial “secondary” impacts on the interest in a good judiciary.

Before continuing, it should be understood that even the best ideas are slow to gain traction in Albany.²²⁹ Reformers acknowledge that the primary agent of legislative change is not innovation or compassion, but crisis and the avoidance of crisis. However, we should also be confident in the power of ideas to guide change when crisis deems it appropriate. Building and asserting the ideas outlined below also buries them in the soil of crisis for discovery at some undetermined time by panicked lawmakers. This is when the practical fruits of our labor can be harvested. In the meantime, one can only hope these ideas galvanize voters to precipitate crises by demanding change.

1. *Website*

The New York State Board of Elections ought to establish an open forum website devoted to particular judicial campaigns. It would provide designated pages and forums for each candidate, as well as a central forum for open discussion and the posting of donations and expenditures. Each candidate’s committee would be pro-

²²⁸ *Id.* at 432-33.

²²⁹ *See, e.g.*, N.Y. DOM. REL. LAW § 170 (McKinney 2003) (encompassing the last fault divorce statute in the United States).

vided complete access to its own page and a central, neutral administrator would administer the open forum, screening only for inappropriate, non-campaign related content, or content posted by plants from another campaign.²³⁰ This page would provide a central location for lay voters to interact with both judicial election campaigns, and purview the candidates' records and judicial philosophy. It would also publish the candidates' campaign receipt and expenditure reports.

The possibilities that the Internet presents the democratic debate are so compelling that if New York were to adopt this approach it is unlikely it would be the only state to do so.²³¹ By opening spontaneous and instant lines of communication between people, both globally and locally with equal intensity, the Internet has made possible a public discourse unimaginable even thirty years ago.²³² One need look no further than Wikipedia or Craigslist to glimpse the Internet's potential to not only alter the democratic debate, but the collective perception of reality and human interaction.²³³ For our

²³⁰ A campaign plant is the agent of a candidate who poses as a neutral voter or supporter of the opponent candidate in order to leverage support for the principle candidate. The tactic has become increasingly popular. See Ed Pilkington, *Planted Question Damages Clinton in Key Primary State*, THE GUARDIAN, Nov. 12, 2007, <http://www.guardian.co.uk/world/2007/nov/12/uselections2008.international>; Dan Froomkin, *Scandal in the Press Corps*, WASH. POST, Feb. 10, 2005.

²³¹ See A. Michael Froomkin, *Habermas@Discourse.Net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749, 856-71 (2003) (describing the potential effect of weblogs, collaborative draft sights, filtering software, and government websites coupled with the increasing availability of Internet access on public discourse).

²³² *Id.* at 778.

²³³ See Neal Katyal, *Property Rights on the Frontier: The Economics of Self-Help and Self-Defense in Cyberspace*, 1 J. L. ECON. & POL'Y 33, 49 (2005) ("The community in cyberspace may revolve around any number of things, such as a virtual place (eBay); a place in realspace (Georgetown); a concept (Maoism); or even a sport (windsurfing). The proliferation of such communities, and the ease of transacting in each one, suggest robust potential for community solutions."); Ken S. Myers, *Wikimmunity: Fitting the Communications De-*

purposes, the Internet allows a democracy to overcome the physical and temporal limitations that have always hindered the engagement of a policy wide debate. Though the website proposed here would be the smallest step toward harnessing this potential, the harnessing itself is inevitable and taking this step is only logical.

This logic is sound without considering the reality that Internet anonymity and international transmission renders the enforceability of content-based speech restrictions either impossible or prohibitively expensive.²³⁴ Let us suppose a candidate would announce herself as one of “law and order,”²³⁵ while an “unaffiliated” person sent an anonymous email from abroad to local law enforcement officials announcing further the candidate would “work with” and “assist” them,²³⁶ or promise the conviction of notorious defendant? Combined, these communications would clearly violate Part 100, but without proof of the speaker’s identity, much less the candidate’s direction, no real sanction could be imposed.²³⁷ However, whether the resources of the New York Board of Elections are enough, or efficiently devoted to enforcement of Part 100 in such an instance is a moot point in light of much more easily accessed loopholes already

cency Act to Wikipedia, 20 HARV. J. L. & TECH. 163, 164-65 (2006) (describing, briefly, the dispute over truth which revolves around Wikipedia).

²³⁴ Jonathan I. Edelstein, *Anonymity and International Law Enforcement in Cyberspace*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 231, 240-41 (1996) (noting law enforcement, through the legislature, has reacted to this enforcement dilemma by attempting to make Internet crimes easier to commit, and hence easier to enforce); see *Ashcroft v. A.C.L.U.*, 535 U.S. 564, 570 (2002) (ruling as overbroad, an attempt to expand the definition of child pornography in response to a proliferation of child pornography on the Internet).

²³⁵ See *Shanley*, 774 N.E.2d at 736.

²³⁶ See *Watson*, 794 N.E.2d at 4.

²³⁷ Edelstein, *supra* note 234, at 237-38.

built into it.²³⁸ A publicly funded and moderated website, coupled with relaxed speech restrictions to be discussed below, would head off this potential danger to electoral integrity. By consolidating the judicial electoral debate in a way that enables the publication of unaffiliated and/or anonymous statements, it would dilute the overall impact of any statement.

The website could also provide candidates a forum in which to point out inconsistencies in each other's records. This would favor candidates who are better able to justify their judicial record, legal career, and judicial philosophy, and therefore encourage the selection of candidates capable of consistent legal interpretation. Also, the website would allow voters to weigh their impressions of the candidate and share stories about her. This would benefit candidates of higher esteem, and so ensure the selection of judges who are best able to maintain the dignity of the bench.

The Unified Court System does post a voter's guide through its website.²³⁹ It includes brief biographies of the candidates and their personal statements or pictures as they provide them.²⁴⁰ This website only covers judicial elections within the Unified Court System and therefore excludes, among others, campaigns for county court. It does not engage in the sort of debate you would expect in any other democratic election. The crucial difference between the traditional

²³⁸ See *supra* notes 175-78 and accompanying text.

²³⁹ New York State Unified Court Sys., Publications, Judicial Elections, Voter Guide, <http://www.courts.state.ny.us/vote/> (last visited Apr. 10, 2009). This site includes guides going back to the 2005 election.

²⁴⁰ New York State Unified Court Sys., Appellate Division, First Department, Qualified Candidates for Judicial Offices 2008 Elections, <http://courts.state.ny.us/courts/ad1/candidates2008.shtml> (last visited Mar. 28, 2009).

voter's guide approach to election websites and the open forum approach advocated here does not need highlighting. Also, the judicial candidate committees typically offer their own websites.²⁴¹ These bear a predictable lack of substance. Though they tend to provide an overview of the judicial candidate's education and career, without the oversight of a neutral third party or the freedom to delineate how a judicial candidate would exercise the authority, these resumes are of limited value.

Finally, the website proposed here would not create any constitutional problems. It does not place any restrictions on speech and the information it would publish is both entrenched in the core of protected First Amendment speech and is currently available to voters, if only through prohibitively extensive research. Even assuming it were subject to strict scrutiny, it serves the anti-corruption interest by enabling voters to examine a candidate's record, donation receipts, and expenditure reports. The freedom of judicial speech the website would encourage and require would run afoul of New York's current speech restrictions, which is one of the reasons these restrictions must be relaxed.

2. *Relax Speech Restrictions*

A judicial candidate's appointed committee ought to be able to inform the public as to how a candidate, if she has been a judge before, has ruled in the past or how she would have ruled in the past had

²⁴¹ See, e.g., Comm. to Elect Former Judge Linda Stephens, <http://www.judgelinda.org/> (last visited Feb. 19, 2009); Elect Patrick Lepore for Judge, <http://www.patricklepore.com> (last visited Mar. 28, 2009).

she been a judge.²⁴² This would involve the presentation of court opinions, academic articles, public statements, and the like. It would not, however, go so far as to allow ruminations (much less promises) on how a candidate would rule on future cases.

The ruling in *White* limited the possibilities of regulation, but imposed no such limits on deregulation.²⁴³ Indeed, by taking the moment to specifically allocate judicial campaign speech the full weight of First Amendment protection,²⁴⁴ it might be said the Court was encouraging it. Still, allowing deregulation to go to the point where candidates are allowed to make party-specific campaign promises would undermine veneration of the bench, stymie a judge's own consistency in legal interpretation and would likely undermine a defendant's right to a fair trial.²⁴⁵ The same can be said of allowing the candidate herself to make these sorts of promises. Therefore, deregulation cannot be allowed to go so far as to permit a candidate herself to explain her judicial philosophy. Only the committee should be permitted to actively campaign on the candidate's behalf, and the current limits should be broadened to allow statements about how a judge has or would have ruled on particular legal issues in the past.

²⁴² Though one might be tempted to retain a prohibition against speculation, the rational relationship between it and its ends are tenuous. It is also tempting to include an explicit prohibition against "personal attacks," meaning attacks on the judicial candidate's character by other judicial candidates. Engaging in these sorts of attacks would clearly be detrimental to the judiciary and judicial elections (as is the case with the other branches of government). However, an explicit prohibition would be inappropriate for three reasons: (1) it is unlikely to pass constitutional muster as narrowly tailored to the anti-corruption interest; (2) the prohibition is seemingly implicit in the culture of judicial elections; and (3) if a candidate is incapable of surviving a personal attack, she is not likely capable of upholding the veneration of the bench.

²⁴³ *White*, 536 U.S. at 774-75.

²⁴⁴ *Id.* at 788.

²⁴⁵ *Watson*, 794 N.E.2d at 6.

This kind of deregulation would also amount to an abandonment of the logical irrelevance of New York's current judicial speech restrictions. This in and of itself is valuable. Part 100 is susceptible to the same criticism as Minnesota's Announce Clause in that judges are allowed to announce their views before and after an election, but not during.²⁴⁶ The deregulation proposed here does not make this information any more available than it already is; it simply allows judicial candidates' committees to gather and consolidate it on behalf of the voters.

Relaxed speech restrictions, coupled with the open-forum website, allow judicial campaign committees to more efficiently bear their burden of public education by broadening the scope of communicable information and promoting real and material engagement of and between the polity. This achieves not only the promotion of democracy through education, but the subjection of a judicial candidate's record to scrutiny. By allowing the consolidation of records, a relaxation of speech restrictions would offer voters a realistic opportunity to discover inconsistencies in a judge's record and would offer the candidate's committee an opportunity to explain their candidate's judicial philosophy. Furthermore, candidates incapable of justifying their record's logic would be discouraged from running altogether. As such, the relaxation of Part 100 would advance all of New York's interests in judicial elections.

²⁴⁶ N.Y. COMP. CODES R. & REGS. tit. 22 § 100.5 (2009); *White*, 536 U.S. at 779-80.

3. *Lower Campaign Contribution Limits*

There is no reason to believe that campaign donations are particularly determinative of the outcomes of judicial elections. The correlation between donations and victory can go both ways: candidates with more money can better influence voters and will likely win an election and donors, wishing to garner favor with a powerful person, are more likely to back a likely winner.²⁴⁷ It is not argued here that they are determinative of judicial outcomes. It is clear, however, that voters are convinced that donations beget judicial impropriety.²⁴⁸ Since veneration of the bench is one of the ends and since veneration is in the eyes of the beholder, this is all that matters. Though this information is available, if the public became generally aware of the fact that local attorneys and business owners routinely donated tens of thousands of dollars to the campaigns of a judge before whom they routinely appeared,²⁴⁹ the damage to that judge's legitimacy would be irreparable.

Consider further that only a small percentage of total donations are actually spent.²⁵⁰ As a purely practical matter, judicial campaigns do not *need* the money they get, which makes the risk such money poses to judicial legitimacy utterly reckless when compared

²⁴⁷ LEVITT & DUBNER, *supra* note 214, at 10-12.

²⁴⁸ COMM'N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, *supra* note 19, app. G, at 5 (illustrating the limitations of candidates' ability to collect contributions); NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 5 (1999) (indicating that nearly eighty percent of voters believe contributions influence a judge's ruling in some way).

²⁴⁹ See *supra* notes 212-15 and accompanying text.

²⁵⁰ See *supra* notes 56-64 and accompanying text.

with what little value it is to both the candidates and the electorate.²⁵¹ Since the \$50,000 limit afforded donors allows us at least \$49,000 worth of constitutional leeway,²⁵² we should take advantage of the fact that significant reductions can do little harm to the financing of judicial elections while securing the bench against potential scandal.

4. *Unified Campaign Fund*

Between fifty and sixty percent of judicial campaign donations ought to be diverted to an open judicial campaign fund that would be used to maintain the website, advertise its existence, fund the Judicial Qualifications Committee, and furnish funds for other house-keeping campaign activities incurred by the State. The donations would be made in the name of one candidate or another and be posted on the website. The remaining fifty and forty percent would go to the candidate named.

This remaining percentage would be enough for a candidate to conduct her campaign, even if donations were dramatically lessened by the aforementioned contribution limits. The Teresi campaign spent just forty-one percent of its total contributions,²⁵³ with only twenty-eight percent going to essential educational purposes.²⁵⁴

²⁵¹ See *Gadani v. Dormitory Auth. of the State of N.Y.*, 841 N.Y.S.2d 709, 711 (App. Div. 3d Dep't 2007) (granting summary judgment to a donor who, through its president and PAC, had contributed \$7,500 to the judge's recent re-election campaign).

²⁵² *Randall*, 548 U.S. at 260-62.

²⁵³ See *supra* notes 56-57 and accompanying text.

²⁵⁴ See *supra* notes 56 and 67 and accompanying text. Two considerations must bear on this understanding of these numbers. The first is that this spending was conducted in a non-competitive election. If judicial elections are to become more democratic, they should also be made more competitive and therefore expensive. However, the second consideration demonstrates that since the elections from which these numbers are drawn were uncompetitive *and* because so much money was being donated, a need for efficient spending was not

Though spending habits would necessarily require curtailment, judicial campaigns could bear both the limits and the fund, especially considering the website would go a long way towards absolving a campaign of its job as educator.

The united campaign fund would encourage veneration of the bench by reinforcing the uniqueness of the judicial branch already manifest in its procedures and culture.²⁵⁵ By requiring both candidates to contribute to a fund spent neutrally and for the sole purpose of anointing the best candidate, the message that New York's judges are above politics is necessarily reinforced. It would preserve the current culture of judicial elections and work against the sort of "debate" to which other political contests have long since succumbed by absolving judicial candidate committees of a large portion of their power to allocate funds. Further, it would promote more effective voter education, at least compared to the current system of private, adversarial campaign spending. By anointing a disinterested spender immune from temptations to "go negative," the campaign fund will isolate and protect a source of voter education spending from devolving into a series of salvos that are irrelevant to the purposes of judicial selection.

The unified campaign fund would be susceptible to First Amendment challenge, particularly a challenge claiming that it forces donors to lend support to judicial candidates of which they do not ap-

imposed. As such, the numbers with which this analysis is working are both less and more than one might require after this reform is imposed.

²⁵⁵ See *supra* notes 158-59 and accompanying text.

prove.²⁵⁶ This argument has been made most often by union workers objecting on First Amendment grounds to the activities of unions within the political arena.²⁵⁷ No one can predict with certainty how the Supreme Court would receive this argument from New York's judicial campaign contributors, but important distinctions can be drawn based on both the facts and the law. The primary purpose of a campaign donation is to finance a campaign, while union dues pay for the privilege of the union's advocacy with the employer.²⁵⁸ The unified fund's expenditure of the donor's contribution would be more than fifty percent in line with the donor's intent. Moreover, the contribution to the fund would be in the donor's candidate's name, and insofar as the donation is a statement of support, its speech-value to the donor remains intact. Voters would know what wealthy or prominent citizens donated to a judicial campaign and the unified fund; so the *message* of the donation would not be silenced, and with the website, would be more effectively communicated.²⁵⁹ The Constitution also supports this unified fund. First, the constitutionality of campaign donation regulations is well established.²⁶⁰ Second, the unique and compelling interests presented by judicial campaigns justify regulation that would be unconstitutional in other settings.²⁶¹ For both reasons, the differences in fact and law suggest the unified cam-

²⁵⁶ See *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 769-70 (1961) (holding that workers who object to their union's non-bargaining political activities may require their dues be excluded from such spending).

²⁵⁷ *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 515-16 (1991).

²⁵⁸ *Id.*

²⁵⁹ *Randall*, 548 U.S. at 241-42; *Buckley*, 424 U.S. at 23.

²⁶⁰ See *supra* notes 72-124 and accompanying text.

²⁶¹ *White*, 536 U.S. at 783.

paign fund would be keeping in with the First Amendment.²⁶²

5. *Rewrite the Mission of the Independent Judicial Election Qualification Commission*

On a fundamental level, the Independent Judicial Election Qualification Commission embodies a fundamental lack of faith in voters to select good judges. This official distrust can only serve to discourage voter participation, both in education and voting. In establishing an organization whose sole purpose is to lend a state-sanctioned endorsement to certain candidates, New York's Unified Court System has arrogated a decision, which a democracy demands remain in the hands of voters alone. An election, after all, is premised on the understanding that no one but the electorate ought to decide whether a candidate is qualified enough to lead it. As it stands, the Independent Judicial Election Qualification Commission is a meager attempt to circumvent the judicial election process while an appointive system is installed to replace it.²⁶³

If the Qualification Commission has a place in judicial elections at all, it is as a disinterested educator, not as an endorser or screener of candidates. The committee's resources should be devoted to the accumulation of materials illuminating a candidate's professional and scholarly history that would then be made available to voters.

In this role as a publicly funded research organization vetting

²⁶² Of course, any risk of unconstitutionality could be avoided by making the fund "voluntary" on the part of the campaign. Since judicial campaigns have so much more money than needed, and because *not* donating to a voluntary unified fund might reflect poorly on the candidate, it is not likely this would greatly hamper the fund's resources.

²⁶³ See *supra* note 19.

judicial candidates side-by-side with other candidates, the Judicial Qualifications Committee would be an effective stabilizer where judicial elections prove very contentious. It would prove or disprove claims, both made by the judicial candidate's committee about the opposing judicial candidate, and also the assertions made by the candidate's committee regarding the candidate's policy or history.²⁶⁴

As with the website, the activities of the Qualification Commission would constitute a service to the voters of New York with no restriction on the activities of a judicial candidate's freedom. As such, there could be no cognizable First Amendment claim. Even under the current judicial speech regime²⁶⁵ no claim could be drawn, since the current rules only restrict the speech of the candidate and to a lesser extent her committee, and not the speech of third parties.

VI. CONCLUSION

This Comment has sought to shed light on the practical and legal exigencies of New York's curious and oft-overlooked judicial elections and in so doing ruminate upon possibilities in improving them. New York's judicial elections, if imperfect, are hardly on the verge of disaster with respect to their purpose. Where they fail, and dismally so, are as exercises in democratic government. The facts of *López Torres*, and Justice Kennedy's stinging rebuke of New York's status quo, have made it abundantly clear that New York's judicial elections are in need of real reform.

²⁶⁴ See, e.g., FactCheck.org, Annenberg Political Fact Check, <http://factcheck.org> (last visited Mar. 28, 2009). This is one of many websites which attempts to determine whether statements made are truthful, fabrications, or flat out falsities.

²⁶⁵ N.Y. COMP. CODES R. & REGS. tit. 22 § 100.5 (2009).

It seems paradoxical to some, especially lawmakers and the organizations of the profession, that trial judges, whose impartiality and reason are the cornerstone of their authority, are selected by such a theoretically adversarial and impassioned means as an election. For these thinkers, the paradox lies only in their own lowered expectations of New York's voters. The current laws regulating the scope of the judicial electoral debate are a product of these expectations, and manifest a fundamental distrust of the New York electorate's ability to make reasoned decisions about the bench.

The reforms agreed upon here amount to a casting off of this distrust and a fresh effort to take the electorate seriously and to provide it with the opportunity and means to participate in this, the highest and most critical echelon of law making. They are born of an understanding that democracy cannot breathe if it is not embraced and that a polity cannot be free if not trusted by its government.

With this in mind, the subject of our analysis should not serve to limit our thinking on these reforms to just judicial elections. The compelling state interest in preventing party bias, unique to judicial elections,²⁶⁶ allows campaign regulations and practices that might be unconstitutional in legislative or electoral elections. Judicial culture, in its self-regulation and tradition, and its structure, with substantial and sophisticated oversight by attorneys and appellate courts, afford us considerable protection against democratic failure. Both amount to an unmatched opportunity to innovate, and the lessons learned here may very well aid us in remedying the anti-democratic tendencies of

²⁶⁶ *White*, 536 U.S. at 776.

legislative and executive elections.

As Justice Kennedy stressed, this is an opportunity that must be taken. A weighing of the potential benefits against the potential costs and harms urges us to seize this moment to transform New York's judicial elections into institutions of democratic exercise and innovation and to rescue them from the smoky-parlor politics²⁶⁷ which continue to invoke so much ridicule, shame, and ultimately tyranny.

²⁶⁷ *López Torres*, 462 F.3d at 169.

FIRST AMENDMENT

United States Constitution Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

New York Constitution article I, section 8:

Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

