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Selecting Representative and Qualified Candidates for President: Proposals to Reform Presidential Primaries

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Selecting Representative and Qualified Candidates for President: Proposals to Reform Presidential Primaries

Democracy and the Constitution Clinic
Fordham University School of Law

Daisy de Wolff, Ben Kremnitzer, Samara Perlman, & Gabriella Weick

January 2021



FORDHAM UNIVERSITY
THE SCHOOL OF LAW

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This report was researched and written during the 2019-2020 academic year by students in Fordham Law School's Democracy and the Constitution Clinic, where students developed non-partisan recommendations to strengthen the nation's institutions and its democracy. The clinic was supervised by Professor and Dean Emeritus John D. Feerick and Visiting Clinical Professor John Rogan.

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Executive Summary

The way the political parties select their presidential candidates has changed dramatically over the course of the United States' history. While candidates were originally selected by party leaders, the system has gradually become more inclusive. The voice of the average citizen was at first nonexistent, but now voters play a direct role in candidate selection.

Still, more progress is needed. This report addresses the shortcomings of the parties' primary processes and explores how the primaries can result in the selection of presidential nominees who are both the most representative of the electorate's will and qualified to serve as the nation's leader.

A More Equitable Primary Calendar

The calendar of presidential primary contests gives voters in states hosting the earliest presidential primaries and caucuses disproportionate influence in the selection of presidential nominees. The demographics of these early voting states are not representative of the country as a whole.

We recommend a new approach to determining the order of presidential primaries. Our proposed calendar would begin with a day of voting on which one small state from each of the country's four regions would cast its votes. Each of the subsequent weeks of voting would include states of varying sizes from different regions. To give as many voters as possible an opportunity to have a meaningful say, there would be a limit on the percent of delegates that could be at stake on any given day of voting. The announcement of when each state would hold its primary would not occur until the December preceding the primaries, which would prevent candidates from spending a disproportionate amount of time and money courting voters from early voting states.

More Informative Primary Debates

Primary debates should provide voters with information about candidates' plans for the country. But debates in recent election cycles have fallen short of their potential. The events have often become media spectacles instead of substantive dialogues. Candidates' performances are graded more based on style over substance, and most substantive aspects of debates are reduced to soundbites. Some topics receive disproportionate attention, leading to repetitive exchanges. Many debates involve so many candidates that it becomes impossible for any candidate to adequately explain his or her policy positions.

We propose removing television networks, which can be more interested in ratings than policy discussions, from the process of planning debates. Instead, the political parties should coordinate with the candidates to organize the debates. The pool of potential moderators should expand beyond news anchors and journalists to include other experts, such as historians. To encourage candidates to take less performative, more policy-focused approaches, there should not be in-person audiences. Additionally, candidates should be guaranteed set amounts of time to discuss their ideas.

Eliminating Caucuses

Caucuses are meetings where local political party members declare their support for their preferred presidential candidates. State political parties use different rules for caucuses, but caucuses typically involve participants advocating for their candidates to other caucus-goers and physically grouping together based on candidate preferences. While caucuses give some citizens a unique opportunity to engage in participatory democracy, they are difficult to administer and have several drawbacks, including flaws that make it hard for many citizens to participate. Attending a caucus is far more time consuming than casting a ballot in a primary, and the timing of caucuses—several hours on a given weeknight—creates challenges for people who have conflicting work, childcare, or other commitments. Caucuses also deprive participants of their ability to keep their candidate preferences secret. Accordingly, the political parties should eliminate caucuses and replace them with primary elections.

Opening Primaries to Independent Voters

A majority of states host presidential primaries, which permit voters to anonymously cast their votes at polling places or by mail. Some states permit all registered voters to vote in any presidential primary, while other states only permit individuals who have belonged a political party for a certain period of time to participate. The rules for who may participate in primaries substantially impact the representativeness of a state’s pool of primary voters. Primaries should be opened to permit participation by independent voters. Fully closed primaries, which only permit registered party members to participate, tend to lead to the selection of more partisan presidential nominees whose views may not represent the party as a whole.

Ensuring Majority Support for Nominees

In some cases, a presidential candidate receives their party’s nomination with only plurality support from primary voters. Such a candidate is not likely to adequately represent the views of party members. The parties should use ranked-choice voting, a method in which voters “rank” the candidates participating in an election to ensure that the prevailing candidate has secured a majority of votes in the primary. If at first no candidate secures a majority of the votes, the candidate who receives the fewest votes is eliminated from consideration. That candidate’s votes are then redistributed to the voters’ second-choice candidate. This process would continue until a candidate received a majority of the votes, ensuring that the candidate who

receives a party's presidential nomination is supported, even if not as a first choice, by a majority of a party's voters.

Balancing the Input of Voters and Party Establishments

“Peer review” is input by party leaders on who may become a party's presidential nominee. A lack of peer review may lead to the selection of an unqualified candidate who is able to mobilize a large number of voters but who does not represent the party's platform or political goals. One way the political parties can exert “peer review” is by permitting superdelegates—unpledged, elected party elites—to participate in the selection of a presidential candidate at the parties' national conventions. In 2019, the Democratic Party limited the role that superdelegates could play during its 2020 national convention, permitting superdelegates to influence the selection of their party's candidate only if no candidate had secured a majority of delegates pledged through primaries and caucuses. We endorse this reform because it is an appropriate manner for party elites to promote the selection of a presidential candidate who is viable and qualified while preserving the crucial role of voters.

Introduction

A voter in Iowa misses her chance to caucus after getting out of work too late.¹ A voter in New York chooses not to vote in her state's primary, convinced that, so late in the primary calendar, her voice would not matter anyway.² A voter sitting at home, unsure of who to vote for in her state's upcoming primary, tunes in to the latest debate only to watch a media circus unfold as candidates fight to attract the most attention.³ These are only a few examples that illustrate the serious, consistent problems with the current system of presidential primaries and caucuses in the United States.

The current primary calendar values the votes of some citizens over the votes of all citizens. States' broad discretion to choose whether to host caucuses or primaries and whether to permit voters not registered to a major political party to participate in primary elections creates the potential for more problems. States mishandling their discretion on these issues can decrease voter turnout and create openings for politically extreme candidates to be nominated for the presidency. In some states, a candidate who has only received a plurality of the votes may prevail, giving the candidate a majority of the party's delegates for a state, even though a majority of voters in the contest do not necessarily support that candidate. The current structure of primary debates often prevents informative exchanges on policy issues and sometimes favors well-known candidates over well-qualified candidates. Finally, elected party members play a controversial role in "peer reviewing" candidates, by endorsing and supporting certain presidential candidates.

We recommend several reforms to the existing primary system aimed at ensuring that the system nominates the most representative and qualified candidates from each party. First, the primary calendar should be reformed so that no day of voting is so large it dwarfs other contests, and so that as many voters as possible can have a meaningful vote. Second, debates should be structured to be more informative for voters. Third, caucuses should be eliminated in favor of primaries. Fourth, state political parties should hold semi-open primaries that allow some voters who are not registered members of the parties to participate. Fifth, primary contests should use ranked-choice voting to ensure that candidates win by majorities, not pluralities. Finally, the preferences of party elites, or superdelegates, should only be given

¹ Elaine Godfrey, *Iowans Vote First, If They Can Vote at All*, ATLANTIC (Oct. 7, 2019),

<https://www.theatlantic.com/politics/archive/2019/10/iowa-satellite-caucus-democrats-voting-rights/598999/>.

² Matthew Schuerman, *Why NY and NJ Voters Are Stuck With FOMO on the Presidential Primary*, GOTHAMIST (Jan. 27, 2020, 4:00 AM), <https://gothamist.com/news/why-ny-and-nj-voters-primary>.

³ Edward-Isaac Dove, *The Democratic Debates Aren't Pleasing Anyone*, ATLANTIC (Sept. 19, 2019),

<https://www.theatlantic.com/politics/archive/2019/09/2020-democratic-debates-arent-pleasing-anyone/598306/>.

greater weight than those of rank-and-file voters if a candidate does not secure a majority of delegates in the first vote at the national convention.

This report begins with an overview of the primary system's history before analyzing the system's flaws and elaborating on our reform recommendations.

I. History & Context

The American presidential primary system evolved over centuries, from the framers' vision for how the nation would choose presidents, to the creation of primaries and caucuses, to the shift following the 1968 Democratic National Convention, and finally to the modern system used in both the 2016 and 2020 presidential primaries.

A. The Founding Era

After escaping the rule of King George III, the Constitution's framers set about creating a new form of government, one in which the president would have far less power than a monarch.⁴ The framers had not envisioned anything like the primary system the United States has today. In Federalist Papers Nos. 10 and 51, James Madison underscored both the importance of mediating popular democratic ideals through wise leaders and the necessity of limiting the power of government through internal competition.⁵ Written in 1787 and 1788 respectively, the Federalist Papers give insight into the rationale behind the framers' decisions and suggest they would view the current primary system as too unmanaged, with the need for additional oversight that prevents the rise of unqualified demagogues, without taking too much decision making power from the electorate.⁶

B. Progressive Era

Beginning in 1800, members of Congress would meet with their respective political parties to choose the parties' presidential candidates.⁷ This process faced criticism for disrupting the balance of powers between the executive and legislative branches.⁸

⁴ See, e.g., THE FEDERALIST NO. 69 (Alexander Hamilton).

⁵ *Id.*

⁶ See *id.*

⁷ See ROBERT E. DICLERICO & JAMES W. DAVIS, CHOOSING OUR CHOICES: DEBATING THE PRESIDENTIAL NOMINATING PROCESS 4 (2000).

⁸ See *Nominating Presidents*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Nominating_presidents.htm.

By 1820, the flaws with this system became apparent.⁹ That year, the Federalist Party ceased to be a viable party and did not nominate a candidate for president, leaving Democratic-Republican James Monroe to run unopposed for a second term.¹⁰ Even as the only remaining national party, the Democratic-Republicans faced challenges during the 1824 nominating process.¹¹ The press, state legislatures, and politically involved citizens were tired of Congress having the sole power to select presidential nominees, and they protested the process as unconstitutional.¹² The Democratic-Republican Party went to war with itself over the issue, effectively ending the Congressional Caucus era.¹³

In 1832, the Party Conventions era began.¹⁴ During this period, the parties held national conventions that convened representatives of the parties from across the country to determine their nominees.¹⁵ This transferred the nomination power from members of Congress to state parties.¹⁶

The states were not consistent in the way they chose their delegates for the conventions.¹⁷ In some states, the governor or a state party official appointed the delegates.¹⁸ Other states held local caucuses that chose representatives to send to county caucuses where caucus-goers would select delegates to the state caucus, which would then choose delegates to send to the national convention. No matter the method a state employed, delegates represented only their state, and were not bound to a particular candidate.¹⁹

The parties intended national conventions to be a more open and democratic way to choose their nominees.²⁰ However, as the 20th century began, many Americans became disillusioned with this manner of nomination.²¹ They saw the system as being rife with potential for manipulation by the parties and candidates.²² These sentiments created space for the progressives to advocate for more direct voter involvement in the nomination process.²³ But

⁹ See BARBARA NORRANDER, *THE IMPERFECT PRIMARY: ODDITIES, BIASES, AND STRENGTHS OF U.S. PRESIDENTIAL NOMINATION POLITICS* 11 (2d ed. 2015).

¹⁰ See *id.*

¹¹ See *id.*

¹² See William J. Morgan, *The Decline of the Congressional Nominating Caucus*, 24 TENN. HISTORICAL Q. 245, 250-51 (1965).

¹³ See *id.* at 253-54.

¹⁴ See *id.* at 255.

¹⁵ See NORRANDER, *supra* note 9, at 12.

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.*; see also DICLERICO & DAVIS, *supra* note 7, at 5.

¹⁹ See NORRANDER, *supra* note 9, at 12; see also DICLERICO & DAVIS, *supra* note 7, at 5.

²⁰ See NORRANDER, *supra* note 9, at 12-13.

²¹ See DICLERICO & DAVIS, *supra* note 7, at 4-5.

²² See *id.* at 5.

²³ See *id.*

party leaders were skeptical of giving weight to voters' preferences. They believed primaries were too expensive and that voter turnout was too low.²⁴

Despite party leaders' hesitation, there was a shift toward more direct modes of voting in the primaries, but the parties still effectively controlled the selection of the majority of delegates to the conventions.²⁵ States' primary results were not binding on delegates, who were not required to vote for the candidate who won the state's primary.²⁶ The main purpose of primaries and caucuses in this era was to tell convention delegates about candidates' popularity in the states that held the contests.

C. 1968 Democratic Convention

The familiar American presidential nominee selection process, in which voters' preferences are given significant weight, only began after the 1968 Democratic Convention in Chicago, Illinois. In 1968, Senator Eugene McCarthy, a vocal opponent of the Vietnam War, challenged President Lyndon B. Johnson in the New Hampshire Democratic Primary.²⁷ McCarthy's run prompted Senator Robert F. Kennedy to enter the race and, soon after, on March 31, 1968, President Johnson announced he would not seek re-election.²⁸ His vice president, Hubert Humphrey, who was part of the political establishment many Americans had been protesting throughout the 1960s, then declared his candidacy.²⁹ While Kennedy and McCarthy participated in multiple primaries, Humphrey chose not to participate in any because he had inherited Johnson's delegates. In fact, 25 percent of all delegates to the 1968 Democratic Convention had already been chosen in 1967 by Johnson supporters who automatically threw their support behind Humphrey when Johnson dropped out.³⁰

When Kennedy was assassinated after winning the California primary, the competition narrowed to only McCarthy and Humphrey.³¹ Party elites nominated Humphrey, who had not won a single primary; Humphrey received 1,759.25 delegate votes to McCarthy's 601.³² Massive

²⁴ See *id.* at 5-6.

²⁵ See Stephen Gardbaum & Richard Pildes, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 N.Y.U. L. REV. 647, 655-56 (2018).

²⁶ See NORRANDER, *supra* note 9, at 14-15.

²⁷ See ELAINE KAMARCK, *PRIMARY POLITICS: EVERYTHING YOU NEED TO KNOW ABOUT HOW AMERICA NOMINATES ITS PRESIDENTIAL CANDIDATES* 11-13 (3d ed. 2018).

²⁸ *Id.*

²⁹ *Id.* at 13.

³⁰ *Id.* at 14.

³¹ See Tim Arango, *A Campaign, a Murder, a Legacy: Robert F. Kennedy's California Story*, N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/us/robert-kennedy-california.html>.

³² David Hinckley, *'Chicago 1968' the Most Controversial Convention of Them All*, N.Y. DAILY NEWS (Aug. 21, 2008, 10:47 AM), <https://www.nydailynews.com/news/politics/chicago-1968-controversial-convention-article-1.315416>.

violent protests erupted outside the August 1968 Democratic Convention.³³ The Democrats left the convention deeply divided, and Republican Richard Nixon won the presidency in a landslide that November.³⁴

During the convention, party officials, desperate for a peace offering to the protestors, had promised to create a reform commission to examine the party's nominating process. The McGovern-Fraser Commission, led by South Dakota Senator George McGovern and Minneapolis Mayor Donald Fraser, conducted hearings and meetings throughout 1969 on how to transform the presidential nomination system.³⁵

The commission ultimately issued a report. The first part of the report mandated requirements for state parties because "[i]n at least twenty states, there were no (or inadequate) rules for the selection of Convention delegates, leaving the entire process to the discretion of a handful of party leaders."³⁶ These requirements included publicly notifying voters of how the delegate system works, eliminating the unit rule³⁷ and proxy voting, and mandating procedural regularities in delegate selection across states.³⁸ Most importantly, these procedural regularities included binding delegates to support whichever candidate won their respective state's primary.³⁹ The second part of the report listed suggestions for state parties that encouraged more diversity in both delegate selection and general election participation.⁴⁰

These reforms were adopted by the Democratic National Committee for the 1972 election cycle.⁴¹ In the Republican party, similar reforms occurred as a result of the Republican National Committee's 1968 Committee on Delegates and Organization.⁴² Both parties' reforms shifted the nominating power from the hands of party elites to the hands of the electorate.

D. Evolution of the Primary System In 2008, 2016, & 2020

Since the reforms of the 1970s, it has become increasingly important for primary candidates to appeal and spread their messages directly to voters, not just to party leaders. During this time, the internet has become increasingly ubiquitous in every aspect of life, which has made it easier

³³ *1968 Democratic National Convention: A 'Week of Hate'*, BBC (Aug. 27, 2018), <https://www.bbc.com/news/world-us-canada-45226132>.

³⁴ *Id.*

³⁵ See KAMARCK, *supra* note 27, at 13-14.

³⁶ 117 CONG. REC. 32907, 32909 (1971).

³⁷ *Id.* at 32912 ("... a practice by which a majority of a meeting or delegation can bind a dissenting minority to vote in accordance with the wishes of the majority.").

³⁸ *Id.* at 32914-15.

³⁹ *Id.*

⁴⁰ See *id.* at 32913.

⁴¹ KAMARCK, *supra* note 27, at 14.

⁴² *Id.* at 19.

for presidential candidates to directly appeal to voters. All presidential candidates now have accounts on social media platforms, permitting them to directly communicate and engage with voters, who can passionately follow their preferred candidates and receive updates on the candidates' activities and opinions in real time. Candidates' strategic and candid use of social media to communicate with one another and voters has opened a pathway for insurgent presidential candidates who are not political insiders to gain and mobilize significant support.

President Barack Obama's use of social media and technology was critical in his successful 2008 campaign.⁴³ In fact, his direct communication with potential voters helped him gain popularity and defeat Hillary Clinton, a well-known establishment candidate, in a close primary race.⁴⁴

The 2016 presidential primaries and general election marked a notable shift toward rejecting established party figures and supporting outsider candidates, like Donald Trump and Bernie Sanders, who mobilized voters through direct and impassioned communication. During the 2016 campaign, more voters read the social media posts of Donald Trump and Hillary Clinton for updates about the election than visited their campaign websites or subscribed to receive emails from them.⁴⁵ Trump received significant media attention for his inflammatory tweets.⁴⁶ Although Clinton's campaign spent almost twice what Trump's campaign spent throughout the 2016 presidential primaries and general election, Trump's barrage of unfiltered tweets earned him approximately \$5 billion in free media coverage during the 2016 presidential election cycle, which helped him secure the Republican nomination and win the presidency.⁴⁷

In 2020, the strategic use of social media and technology continued to be important tools for candidates from outside the party establishment to gain momentum. For example, former Mayor of South Bend, Indiana, Pete Buttigieg, was relatively unknown to the American public prior to the 2020 primary. But "Mayor Pete" became popular on Twitter, earning support from many small donors, which helped him remain a viable candidate who was able to compete with well-known and established Democratic politicians.⁴⁸

⁴³ See Aaron Smith, *The Internet's Role in Campaign 2008*, PEW RES. CENTER (Apr. 15, 2009), <https://www.pewresearch.org/internet/2009/04/15/the-internets-role-in-campaign-2008/>.

⁴⁴ See David Carr, *How Obama Tapped Into Social Networks' Power*, N.Y. TIMES (Nov. 9, 2008), <https://www.nytimes.com/2008/11/10/business/media/10carr.html>.

⁴⁵ PEW RESEARCH CENTER, ELECTION 2016: CAMPAIGNS AS A DIRECT SOURCE OF NEWS 13 (July 18, 2016), https://www.journalism.org/wp-content/uploads/sites/8/2016/07/PJ_2016.07.18_election-2016_FINAL.pdf.

⁴⁶ Amanda Hess, *How Trump Wins Twitter*, SLATE (Feb. 18, 2016, 1:04 PM), <https://slate.com/technology/2016/02/donald-trump-is-the-best-at-twitter-heres-why.html>.

⁴⁷ See Christopher Ingraham, *Somebody Just Put a Price Tag on the 2016 Election. It's a Doozy*, WASH. POST (Apr. 14, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/04/14/somebody-just-put-a-price-tag-on-the-2016-election-its-a-doozy/>.

⁴⁸ See Issie Lapowsky, *In the 2020 Race, What Is the Value of Social Media Stardom*, WIRED (Apr. 17, 2019, 5:48 PM), <https://www.wired.com/story/2020-race-democrats-social-media-stardom/>.

In sum, the American presidential primary system, once exclusive to party elites, has become highly nationalized and voter-centric. Outsider candidates now communicate directly and frequently with American voters, running increasingly successful campaigns that challenge well-funded, established candidates. Despite these changes to a seemingly more democratic system, problems persist in modern primaries.

II. Recommendations for Reform

This Part presents our recommendations for (1) reorganizing the calendar for when states hold their primary contests; (2) improving primary debates; (3) ending caucuses; (4) allowing independent voters to participate in primaries; (5) implementing ranked-choice voting to ensure that candidates win majority support in primary elections; and (6) striking a balance between the input of voters and the party establishments in selecting nominees.

A. A More Equitable Primary Calendar

The current primary calendar causes votes cast in early voting states to have more weight than votes cast later in the primary season.⁴⁹ The first contests, which currently occur in Iowa, New Hampshire, Nevada, and South Carolina, dominate national media coverage for months⁵⁰ and impact how voters nationwide think about the candidates. These four early states also narrow the field of candidates before voters in later states get the opportunity to cast their votes.⁵¹

However, the four earliest states are not the only states where certain voters can have a disproportionately large influence on the selection of a presidential candidate.⁵² Recognizing the power of an early place in the calendar, some states have scheduled their primaries almost immediately after the first four states' contests to maximize their voters' influence. This phenomenon of "frontloading" leads to an enormous number of delegates being concentrated early in the process of selecting a presidential nominee.⁵³

To attain the impact they desire, frontloading states cluster together on voting days where huge amounts of delegates are in play, such as Super Tuesday.⁵⁴ In 2020, only 3.9 percent of

⁴⁹ Travis N. Ridout & Brandon Rottinghaus, *The Importance of Being Early: Presidential Primary Front-Loading and the Impact of the Proposed Western Regional Primary*, 41 PS: POL. SCI. AND POL. 123, 123 (2008).

⁵⁰ See NORRANDER, *supra* note 9, at 117; John Haskell, *Reforming Presidential Primaries: Three Steps for Improving the Campaign Environment*, 26 PRESIDENTIAL STUD. Q. 380, 384 (1996); Sam Reed & Deb Markowitz, *No Way to Pick a President*, RIPON F. (April-May 2007), <https://www.riponsociety.org/article/no-way-to-pick-a-president-2/>.

⁵¹ See Wayne P. Steger, Andrew J. Dowdle & Randall E. Adkins, *The New Hampshire Effect in Presidential Nominations*, 57 POL. RES. Q. 375, 376 (2004).

⁵² See NORRANDER, *supra* note 9, at 120-21.

⁵³ See *id.* at 121; KAMARCK, *supra* note 27, at 58.

⁵⁴ See NORRANDER, *supra* note 9, at 121.

delegates were at stake before the early-March Super Tuesday contests.⁵⁵ On Super Tuesday 2020, held only two days after the South Carolina primary, 34.1 percent of delegates were at stake.⁵⁶ A massive number of delegates was at stake on a single day, yet the media and candidates had spent most of the prior months mostly focusing on Iowa, New Hampshire, Nevada, and South Carolina. Candidates needed strong showings in those first four states to be competitive in all of the 15 Super Tuesday contests. This dynamic requires candidates to raise considerable amounts of money before the primary season even begins in order to be competitive in the first four states.⁵⁷

The outsized importance of the first four states, which are not representative of the country's diversity or of either party, may lead to candidates dropping out before they could realize success in other states.⁵⁸ Iowa is 91 percent white, while New Hampshire is even less diverse, with a population that is 93 percent white.⁵⁹ The demographics of the early states may skew which candidates remain in the race.⁶⁰ And, as a result, a party's eventual nominee may not be representative of his or her party, but merely of the populations of the states that scheduled their primaries at the start of the calendar.⁶¹

Despite the large impact of frontloading, the primary calendar extends for many months.⁶² In 2016, the calendar started with the Iowa Caucus on February 1 and stretched to June 14, when the Democratic primary took place in Washington, D.C.⁶³ Some candidates had announced their candidacies as early as March 2015.⁶⁴

⁵⁵ See *Democratic Delegate Rules, 2020*, BALLOTPEDIA, https://ballotpedia.org/Democratic_delegate_rules,_2020.

⁵⁶ *Id.*

⁵⁷ See Reed & Markowitz, *supra* note 50.

⁵⁸ See Dennis F. Thompson, *The Primary Purpose of Presidential Primaries*, 125 POL. SCI. Q. 205, 219-21 (2010); see also NORRANDER, *supra* note 9, at 129.

⁵⁹ See Ian Milhiser, *Why New Hampshire's Primary Should Not Be the First Primary, in One Chart*, VOX (Feb. 11, 2020), <https://www.vox.com/2020/2/11/21134165/new-hampshire-not-first-one-chart-white-people>.

⁶⁰ See Thompson, *supra* note 58, at 219-21; NORRANDER, *supra* note 9, at 129; KAMARCK, *supra* note 27, at 56-57.

⁶¹ See NORRANDER, *supra* note 9, at 121.

⁶² See Alicia Parlapiano, *How Presidential Campaigns Became Two-Year Marathons*, N.Y. TIMES (Apr. 16, 2015), <https://www.nytimes.com/2015/04/17/upshot/how-presidential-campaigns-became-two-year-marathons.html>.

⁶³ See *Election 2016 Calendar: Primaries and Caucuses*, NPR (Feb. 17, 2016, 2:41 PM), <https://www.npr.org/2016/01/26/464430411/election-2016-calendar-primaries-and-caucuses>.

⁶⁴ See Nick Corasaniti & Patrick Healy, *Ted Cruz Becomes First Major Candidate to Announce Presidential Bid for 2016*, N.Y. TIMES (Mar. 23, 2015), <https://www.nytimes.com/2015/03/24/us/politics/ted-cruz-2016-presidential-race.html>.

1. Existing Proposals

There are several prominent existing proposals for reforming the primary calendar, including plans for a national primary, a rotating regional primary, and a system known as the Delaware Plan, where states would vote in order of their size, from smallest to largest.

a) National Primary

A national primary would involve every state holding both parties' primaries on the same day.⁶⁵ This proposal would give each voter an equal opportunity to influence the selection of his or her party's nominee.⁶⁶ Additionally, all voters would be able to choose from the same slate of candidates because there would be no prior contests to eliminate contenders from the field.⁶⁷

Critics of this proposal argue that it would benefit the candidate with the most name recognition and deepest pockets.⁶⁸ A national primary day would eliminate the opportunity for lesser-known candidates to build momentum with early wins.⁶⁹ Campaigning toward a single contest would likely rely heavily on television and online advertising instead of retail politicking, which traditionally involves candidates interacting with individual voters and small groups.⁷⁰ Candidates would put their resources into the states with the most delegates, ignoring rural areas and smaller states during the campaign.⁷¹ Party leaders also fear that a large field of candidates in a national primary would allow a candidate to win the nomination with plurality support. A primary that ended with a nominee who did not come close to obtaining majority support could tear a party apart rather than unifying it.⁷²

⁶⁵ See Michael Abramson, *Forget Iowa, Let's Switch to a One-Day National Primary*, WASH. EXAM'R (Feb. 18, 2020, 12:00 AM), <https://www.washingtonexaminer.com/opinion/op-eds/forget-iowa-lets-switch-to-a-one-day-national-primary>; NORRANDER, *supra* note 9, at 128.

⁶⁶ See NORRANDER, *supra* note 9, at 128.

⁶⁷ See *id.* at 129.

⁶⁸ See Caroline J. Tolbert, Amanda Keller & Todd Donovan, *A Modified National Primary: State Losers and Support for Changing the Presidential Nominating Process*, 125 POL. SCI. Q. 393, 397 (2010); see also NORRANDER, *supra* note 9, at 129; Danielle Kurtzleben, *No Way to Pick a President? Here Are 6 Other Ways to Do It*, NPR (Jan. 26, 2016, 2:17 PM), <https://www.npr.org/2016/01/26/463870736/no-way-to-pick-a-president-here-are-6-other-ways-to-do-it>.

⁶⁹ See Tolbert, Keller & Donovan, *supra* note 68, at 406-07; NORRANDER, *supra* note 9, at 129.

⁷⁰ See Tolbert, Keller & Donovan, *supra* note 68, at 398; NORRANDER, *supra* note 9, at 129; Heather Frederick, *Reforming the Presidential Primary System: The Voter Turnout Initiative*, 45 PS: POL. SCI. AND POL. 51, 52 (2012); Kurtzleben, *supra* note 68.

⁷¹ See NORRANDER, *supra* note 9, at 129.

⁷² See *id.* at 128.

b) Regional Rotating Primary

A rotating regional primary would split the country into four regions, with each region voting on the first Tuesday of every month from March until June.⁷³ Some versions of the proposal would have Iowa and New Hampshire retain their positions at the start of the calendar before the regional primaries began.⁷⁴ Proponents of a regional primary contend that confining campaigns to one region at a time would make them more manageable and could make prospective candidates more willing to run for president.⁷⁵ Additionally, proponents suggest the system would allow candidates to bypass issues that are specific to very few states, such as the ethanol tax's relevance in Iowa,⁷⁶ and instead address only national and regional issues.⁷⁷

Although there may be environmental and convenience value in holding regional primaries, this proposal would probably do little to address the problems the current calendar poses. There is a clear advantage in voting early in the primary cycle, and giving one region the opportunity to vote first would disadvantage the others.⁷⁸ This proposal would also hurt candidates who do not relate well to the voters in the first region, but who may have many supporters elsewhere in the country.⁷⁹ Regional primaries would put a large number of delegates at stake on the first day of voting, which could result in a presumptive nominee without any other part of the country having an opportunity to weigh in.⁸⁰

c) Delaware Plan

The Delaware Plan was proposed in 1999 by the Republican Party's Advisory Commission on the Presidential Nominating Process.⁸¹ This plan groups states by population size and puts the smallest states, such as Delaware, on the first day of voting.⁸² That first day of voting would be held during the first week in March.⁸³ Then, on set days over the next three months, groups of

⁷³ See *id.*

⁷⁴ See *id.*; Kurtzleben, *supra* note 68; Steve Israel, *Rotating Regional Primaries: A Grand Bargain to Save Iowa*, HILL (Feb. 12, 2020, 10:00 AM), <https://thehill.com/opinion/campaign/482685-rotating-regional-primaries-a-grand-bargain-to-save-iowa>.

⁷⁵ See NORRANDER, *supra* note 9, at 124; Caitlin Oprysko, *Utah Governor Says Broken Primary Process Is Discarding the Best White House Candidates*, POLITICO (Feb. 7, 2020, 5:22 PM), <https://www.politico.com/news/2020/02/07/utah-herbert-primaries-112186>.

⁷⁶ See, e.g., Michael Grunwalk, *How the 2020 Democrats Learned to Love Ethanol*, POLITICO MAG. (Mar. 5, 2019), <https://www.politico.com/magazine/story/2019/03/05/2020-democrats-ethanol-225517>.

⁷⁷ See NORRANDER, *supra* note 9, at 124.

⁷⁸ See Kurtzleben, *supra* note 68.

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ See NORRANDER, *supra* note 9, at 125-26; Kurtzleben, *supra* note 68.

⁸² See NORRANDER, *supra* note 9, at 126; Scott Piroth, *Selecting Presidential Nominees: The Evolution of the Current System and Prospects for Reform*, 64 SOCIAL EDUC. 278, 283-84 (Sept. 2000).

⁸³ See Piroth, *supra* note 82, at 283.

gradually larger states would vote.⁸⁴ The final group, which would include the largest states, would represent nearly 50 percent of all delegates at stake in the primaries.⁸⁵

Proponents of the Delaware Plan assert that allocating a majority of delegates to the last day of voting would prevent a presumptive nominee from emerging before voters in every state had had a chance to cast their ballots.⁸⁶ This would allow most, if not all, voters to have a real say in choosing the nominee.⁸⁷ Additionally, by letting the smaller states vote first, the plan would still allow for retail politicking, which permits the candidates with less money and name recognition to gain momentum and have a chance at the nomination.

Critics contend that the plan does not prevent early states from having disproportionate influence.⁸⁸ And granting small states outsized influence is made worse by the fact that they tend to be less diverse than larger states and the country as a whole.⁸⁹ The Delaware Plan could create a two-step process, with candidates using the first step to concentrate on gaining early victories and momentum in the eyes of the media and then using the second to focus on accumulating delegates. These two steps would still allow the first states to vote to eliminate many of the candidates and give later states less of a choice.⁹⁰

2. Our Recommendation

Our recommendation seeks to give the most citizens possible the opportunity to cast a meaningful vote, while giving all candidates the opportunity to introduce themselves to the electorate, gain momentum, and raise campaign funds. We recommend removing Iowa, New Hampshire, South Carolina, and Nevada as the first states to vote in the primaries. Instead, four states would vote on the first Tuesday in March, one from each region of the country (Northeast/Mid-Atlantic, South, Midwest, and West).⁹¹ Each state in this first group would be a “small state” with no more than 45 delegates in the Democratic primary and no more than 35 delegates in the Republican primary.⁹²

On December 1, the national parties would hold separate lotteries to choose one state from each of these regions to hold a primary on the first day of the primaries. Although the states

⁸⁴ See *id.*

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See NORRANDER, *supra* note 9, at 127.

⁸⁸ See *id.*; Kurtzleben, *supra* note 68; Piroth, *supra* note 82, at 284.

⁸⁹ See Kurtzleben, *supra* note 68.

⁹⁰ See NORRANDER, *supra* note 9, at 127.

⁹¹ See *Census Regions and Divisions of the United States*, U.S. CENSUS BUREAU, https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf (last visited Jul. 31, 2020).

⁹² For the Democrats, there are four states from New England, five states from the Midwest, eight states from the West, and seven states from the South that would make up this group. For the Republicans, there are six states from New England, four states from the Midwest, four states from the West, and three states from the South.

chosen by each party would be different, the first day of voting would remain the same. A state chosen to vote first in a particular primary cycle could not vote first in a subsequent cycle until every “small state” from its region had been chosen to vote first. A few days after the December 1 lottery, the national parties would announce the rest of the primary schedule. Any state that attempted to change its dictated day of voting would not only have its delegates taken away, but would automatically be given the last day of voting in the next election cycle.

When organizing the rest of the primary calendar, each national party would be able to schedule as many states on a given day as it wanted, up to a certain percentage of the total delegates at stake in the primaries. The national parties could choose to coordinate when states vote or construct their own schedules. In the second week, there could be up to 15 percent of the total delegates at stake, the third week 15 percent, the fourth week 10 percent, the fifth week 15 percent, the sixth week 15 percent, the seventh week 15 percent, and the eighth week 25 percent. By the fifth week, up to 50 percent of delegates could be awarded. Although a nominee requires a majority, or over 50 percent of delegates, it is possible that an especially dominant candidate may secure the nomination on the fifth voting day. However, in a more competitive primary race there may not be a presumptive nominee until the final week of voting.

The first day of voting would be the first Tuesday in March. There would be no primary the following week, but, after the one-week break, there would be a primary every Tuesday for the next four weeks. There would then be one week without a primary, followed by a primary every Tuesday for the next three weeks. The gap after the first day of voting would allow campaigns to regroup and capitalize on any momentum they gained, while ensuring that the voters in other states have their voices heard in short order.

Below is a sample primary calendar for the Democratic Party’s primary in 2024 that follows the recommended system:

| | |
|--|---|
| Week 1: March 5 (MAX 5%) | Vermont (16), Nebraska (29), New Mexico (34), <i>District of Columbia</i> (20) = 99 (2.4%) |
| Week 2 March 19 (MAX 15%) | Massachusetts (91), Georgia (105), Minnesota (75), Illinois (155), Alaska (15), Rhode Island (26), South Dakota (16), Arizona (67), North Dakota (14), Arkansas (31) = 595 (14.9%) |
| Week 3 March 26 (MAX 15%) | New York (274), North Carolina (110), Wisconsin (84), Louisiana (54) = 522 (13.1%) |

| | |
|---|---|
| Week 1: March 5 (MAX 5%) | Vermont (16), Nebraska (29), New Mexico (34), <i>District of Columbia</i> (20) = 99 (2.4%) |
| Week 4: April 2 (MAX 10%) | Virginia (99), Connecticut (60), Montana (19), South Carolina (54), Maine (24), Wyoming (14), New Hampshire (24), <i>Guam</i> (7), <i>Virgin Islands</i> (7), <i>American Samoa</i> (6) = 314 (7.8%) |
| Week 5: April 9 (MAX 15%) | Texas (228), Maryland (96), Idaho (20), Mississippi (36), Colorado (67) = 447 (11.2%) |
| Week 6: April 23 (MAX 15%) | California (415), Delaware (21), Utah (29), Michigan (125) = 590 (14.8%) |
| Week 7: April 30 (MAX 15%) | Ohio (136), Washington (89), Florida (219), Indiana (82), West Virginia (28) <i>Democrats Abroad</i> (13) = 567 (14.2%) |
| Week 8: May 6 (MAX 25%) | Pennsylvania (186), New Jersey (126), <i>Puerto Rico</i> (51), Tennessee (64), Oregon (61), Missouri (68), <i>Northern Mariana</i> (6), Hawaii (24), Alabama (52), Iowa (41), Nevada (36), Oklahoma (37), Kansas (39), Kentucky (54) = 845 (21.2%) |

Our proposed reforms to the primary calendar are not without potential drawbacks, but the reforms would provide a substantial improvement on the current system. It is inevitable that the first states to vote will have an outsized effect on the primary, particularly because media coverage emphasizes the “horse race.” However, changing the states that go first in each primary cycle allows for different voters to set off the beginning phase of the primaries. Currently, Iowa and New Hampshire dominate the news for months, making it only natural that candidates who are more attractive to voters in those states seem more viable to the whole country. This recommended calendar may also change the way the media tracks the race, by hypothetically having eight different states vote on the same day (if Republicans and Democrats drew completely different states), the media could no longer highlight one state as a “kingmaker.” Using December 1, which is approximately three months before the first primary date, as the date to announce which four states will vote first prevents campaigns from having boots on the ground in the first states months or years in advance. This delay would help lesser-known and lesser-funded candidates be more competitive. This delayed announcement also might reign in the disproportionate amount of money candidates spend in the first few states, and allow for spending to be distributed among more states. The announcement date may not stop candidates from declaring their candidacies as early as they do now, but it may encourage candidates to hone their national messages before their appeals become more focused on the

first states. Some may contend that three months is too quick for states to set-up their elections. But the states that qualify to vote first would know that they could be chosen and could prepare accordingly.

Larger states may object that smaller states would still vote first. However, for the field to consist of more than just the well-known or well-funded candidates, there should be an opportunity for “retail politics.” Connecting and interacting with individual voters is less expensive and more easily achievable in a small state. Little known and less well-funded candidates would be at a significant disadvantage in the larger states where support is gained more through advertising and large rallies than individual interactions. The proposed calendar preserves opportunities for candidates to interact directly with voters while allowing different regions of the country to be represented on the first voting day.

The lack of diversity in many small states is a significant drawback of starting the primary calendar with those states. But that flaw is partially addressed by limiting the percentage of delegates at stake on each primary day, which helps encourage campaigns to appeal to diverse groups of voters. This also ensures the primary is not over before the majority of voters have a chance to cast a meaningful vote. The national parties could choose different kinds of states to reach the maximum percentage allocated per day in order to get a diverse and balanced contest.

The proposed schedule could face criticism for being too fast paced. Although our proposed calendar ends earlier than the current calendar, it may delay having a presumptive nominee until later in the cycle, which could be precarious for a party facing a powerful incumbent. A longer wait for a presumptive nominee could limit time for fundraising and consolidating support behind the nominee. But allowing more voters to have a meaningful say in choosing the nominee should result in a candidate who voters across the country can enthusiastically rally behind and support financially.

B. More Informative Primary Debates

The numerous debates between candidates for their parties’ presidential nominations often fail to live up to their potential for informing voters. The debates are typically organized through collaborations between television networks and the political parties. Federal Election Commission regulations dictate only structural aspects of presidential debates. For example, only non-profit organizations or broadcasters that are not controlled by a political party, political committee, or candidate can host debates and dictate polling criteria the candidates must meet to participate.⁹³ But the apparent purpose of these rules—encouraging neutrality—is often undermined, as increasingly partisan news networks typically serve as organizers. The

⁹³ 11 C.F.R. § 110.13(a)-(b) (2002).

debates have become counterproductive to furthering the goal of nominating representative and qualified candidates.⁹⁴

Criticism of the current debate structure includes disapproval of “mass debates” with so many candidates that each only has minutes to make their case to voters;⁹⁵ the networks’ priority of attracting viewers, not informing voters;⁹⁶ and questioning that rapidly jumps through topics and gives disproportionate attention to certain topics.⁹⁷ The focus on performance over substance makes it hard for voters to understand candidates’ positions.⁹⁸ The use of polling to determine which candidates qualify to participate in the debates is also detrimental. Candidates’ standing in polls can be influenced by name recognition, which can come from involvement in debates. The relationship between polling success and debate participation can create a cycle where qualified candidates are consistently excluded in favor of those who deliver the highest ratings.⁹⁹

1. Existing Proposals

Multiple proposals already exist to reform the primary debates. First, to address criticisms that debates are geared more toward being entertaining than informative, proposals call for replacing celebrity news anchors with ordinary citizens¹⁰⁰ or eliminating large audiences.¹⁰¹ Audiences, critics assert, incentivize candidates to “grandstand and ignore moderators, while encouraging the journalists to cover the audience’s reaction more than what the candidates are saying.”¹⁰² To address criticism that debates do not give candidates enough time to respond to a multitude of questions on a wide array of subjects, proposals call for allowing candidates to respond with longer answers that highlight their platforms at a slower pace.¹⁰³

⁹⁴ See Bob Bauer, *A Debatable Role in the Process: Political Parties and the Candidate Debates in the Presidential Nominating Process*, 93 N.Y.U. L. REV. 589, 615 (2018).

⁹⁵ Andrew Langer, *How to Reform Our Flawed System of Presidential Debates*, REAL CLEAR POL’Y (Jan. 31, 2019), https://www.realclearpolicy.com/articles/2019/01/31/how_to_reform_our_flawed_system_of_presidential_debates_111021.html.

⁹⁶ Walter Shapiro, *How to Fix the Primary Debates*, BRENNAN CTR. FOR JUST. (Oct. 10, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-fix-primary-debates>.

⁹⁷ See *Dovere*, *supra* note 3 (“Several topics, such as health care, have been picked over repeatedly, while others, including the economy, haven’t been touch on much at all.”).

⁹⁸ *See id.*

⁹⁹ *See generally id.*

¹⁰⁰ Frederick C. Harris, *Let Citizens, Not Celebrity Journalists, Ask the Questions at Debates*, N.Y. TIMES (Oct. 13, 2015), <https://www.nytimes.com/roomfordebate/2015/10/13/how-to-reform-the-presidential-debates/let-citizens-not-celebrity-journalists-ask-the-questions-at-debates>.

¹⁰¹ Keena Lipsitz, *An Intimate Conversation Is the Best Presidential Debate Format*, N.Y. TIMES (Oct. 13, 2015, 7:04 AM), <https://www.nytimes.com/roomfordebate/2015/10/13/how-to-reform-the-presidential-debates/an-intimate-conversation-is-the-best-presidential-debate-format>.

¹⁰² *Id.*

¹⁰³ Shapiro, *supra* note 96.

2. Our Recommendation

Drawing on these existing proposals, we recommend overhauling the debates to make them informative and substantive events during which candidates explain their platforms in detail. The focus by networks and candidates on soundbites and performance allows fringe candidates to attract significant support without engaging in serious policy discussions.

The debates should be planned by political parties in conjunction with candidates, instead of television networks, because the event is, after all, an opportunity for candidates to spread their messages. Networks too often seem more interested in achieving high ratings than fostering substantive policy discussions. Without networks producing the debates, the pool of moderators could expand beyond journalists to other credible experts, such as historians, as the Annenberg Working Group on Presidential Campaign Debate Reform suggested.¹⁰⁴

Access to debates for viewers should be expanded to allow as many Americans as possible to watch, both during and after the broadcasts. If the rights to debates were not owned by networks, the broadcasts could be viewed on a universally accessible online feed. Organizers could also post clips of important discussions of policy proposals by candidates once a debate is over, another recommendation from the Annenberg Working Group.¹⁰⁵

Debates should be structured with the same audience-less format as the March 2020 debate between Joe Biden and Bernie Sanders. Voters' takeaways from a debate without audiences is determined "less by how the candidates performed and more by what they said."¹⁰⁶ Candidates' time for answers should be controlled by the "Chess Clock" model, in which they would have a set amount of speaking time to allocate however they choose. This model would allow candidates to go into greater detail on policy issues that are important to them.¹⁰⁷

We recommend maintaining polling requirements as part of the criteria for candidates to qualify for participation in debates. Given that the number of primary candidates in both parties has swelled in recent cycles, there is a need to keep the number of candidates on debate stages manageable. Polling requirements are the best way to keep debates focused on the most viable candidates. The proposed debate format would highlight qualified candidates who are able to thoroughly explain their ideas and proposals to the American people.

¹⁰⁴ ANNENBERG WORKING GRP. ON PRESIDENTIAL CAMPAIGN DEBATE REFORM, ANNENBERG PUB. POL. CTR. U. PA., DEMOCRATIZING THE DEBATES 13-14 (2015), <https://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/Democratizing-The-Debates.pdf> [hereinafter DEMOCRATIZING THE DEBATES].

¹⁰⁵ *Id.* at 18.

¹⁰⁶ Fred Kaplan, *Keep Audiences Out of Debates—Forever*, SLATE (Mar. 16, 2020, 2:52 PM), <https://slate.com/news-and-politics/2020/03/debate-audience-coronavirus-biden-sanders.html>.

¹⁰⁷ See DEMOCRATIZING THE DEBATES, *supra* note 104, at 10-11.

C. Eliminating Caucuses

The political parties should eliminate caucuses because they are difficult to administer and create hurdles to citizen participation. State political parties currently have a choice between hosting caucuses or primaries to award their states' delegates. Caucuses are local meetings where registered party members declare their support for their chosen candidates.¹⁰⁸ Caucuses do not always follow the same rules. The 2020 Iowa caucuses illustrate the divergent approaches that state political parties can take. Republican caucus-goers simply wrote their choices on ballots, while the Democratic contest used a far more complex process. At each caucus site, Democratic caucus-goers gathered in groups based on their chosen candidates. If a candidate did not attract the support of 15 percent of the caucus-goers at a given location, that candidate's supporters were allowed to join a different candidate's group of supporters. All candidates who exceeded 15 percent support were awarded delegates based on a formula.¹⁰⁹

Proponents of caucuses hail caucuses' uniquely democratic nature because supporters can directly advocate for their candidates and share their political opinions with fellow caucus-goers.¹¹⁰ Critics argue that caucuses are undemocratic because they eliminate anonymity, potentially putting voters at risk of manipulation; they are inconveniently timed for those who have work or childcare obligations that prevent them from taking part in the contests that can sometimes last for hours; they might exclude certain religious observers when held on weekends; and they favor highly motivated voters, potentially encouraging candidates to take more-extreme positions to appeal to these voters.¹¹¹ Additionally, if voters are even one minute late to a caucus, they might be disenfranchised.¹¹² Turn-out is generally lower in caucuses than in primaries for these reasons.¹¹³ There are logistical issues with how votes are counted under certain caucus rules. When delegates are divided among multiple candidates, equations to determine that division may lead to candidates who attract the support of many more caucus-goers than other candidates receiving similar numbers as delegates as the other candidates.¹¹⁴

¹⁰⁸ Candice Norwood, *Presidential Caucuses Are Complicated. Why Do Some States Use Them?*, PBS (Jan. 9, 2020, 7:00 PM), <https://www.pbs.org/newshour/politics/presidential-caucuses-are-complicated-why-do-some-states-use-them>.

¹⁰⁹ *Id.*

¹¹⁰ *All Things Considered: Caucuses or Primaries? Why States Might Pick One or the Other*, NPR (Feb. 5, 2020), <https://www.npr.org/2020/02/05/803183343/caucuses-or-primaries-why-states-might-pick-one-or-the-other>.

¹¹¹ Sean Wilentz & Julian E. Zelizer, *A Rotten Way to Pick a President*, WASH. POST (Feb. 17, 2008), <https://www.washingtonpost.com/wp-dyn/content/article/2008/02/14/AR2008021401595.html>.

¹¹² Ian Millhiser, *The 2020 Iowa Caucus Should Be the Last*, VOX (Feb. 4, 2020, 1:10 PM), <https://www.vox.com/2020/2/4/21122219/iowa-caucus-last-anti-democratic-abolish>.

¹¹³ *See id.*; *All Things Considered*, *supra* note 110.

¹¹⁴ *See* Millhiser, *supra* note 112.

1. Existing Proposals

Supporters of caucuses propose introducing virtual caucuses to allow those who are unable to attend in person to cast their vote by phone or app.¹¹⁵ The Iowa Democratic Party advanced a plan for remote participation before the 2020 caucuses, hoping it would make the caucuses more accessible and inclusive by allowing citizens who were not physically present in Iowa or who had conflicting commitments to still cast ballots.¹¹⁶ Critics of the proposal asserted that it was overly complex. They also took issue with a rule that capped the weight of remote votes at ten percent of the overall votes in the caucuses, regardless of how many people participated remotely.¹¹⁷ Regardless, the Democratic National Party rejected this proposal for implementation in the 2020 Iowa caucus due to security concerns.¹¹⁸

2. Our Recommendation: Eliminate Caucuses

We recommend eliminating caucuses in favor of primaries. The benefits of shifting to primaries in the few states that still hold caucuses is clear; primaries allow for far greater participation among a more diverse range of citizens and they are less prone to administrative mishaps, such as those seen in Iowa in 2020.¹¹⁹

The political parties should take it upon themselves to eliminate caucuses because there are potential constitutional objections to laws banning the contests. The Supreme Court has held that the right to associate under the First and Fourteenth Amendments extends to political parties,¹²⁰ which gives them significant leeway to determine how to select their nominees. In

¹¹⁵ Mitti Hicks, *Iowa Dems Could Upend Caucus Tradition, Consider Letting Delegates Vote by App or Phone*, Fox News (Mar. 6, 2019), <https://www.foxnews.com/politics/iowa-democrats-announce-historic-changes-to-2020-caucus>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Adam Levy, Dan Merica & Veronica Stracqualursi, *DNC Recommends Rejecting Iowa and Nevada Virtual Caucus over Security Concerns*, CNN (Aug. 30, 2019, 3:36 PM), <https://www.cnn.com/2019/08/30/politics/dnc-iowa-virtual-caucus/index.html>.

¹¹⁹ See Maura Barrett & Ben Popken, *How the Iowa Caucuses Fell Apart and Tarnished the Vote*, NBC News (Feb. 21, 2020, 3:58 PM), <https://www.nbcnews.com/politics/2020-election/how-iowa-caucuses-fell-apart-tarnished-vote-n1140346>.

¹²⁰ See *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973) (“There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of ‘orderly group activity’ protected by the First and Fourteenth Amendments.”); see also *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975); *Smith v. Allwright*, 321 U.S. 649, 656 (1944) (“Since the right to organize and maintain a political party is one guaranteed by the Bill of Rights of this state, it necessarily follows that every privilege essential or reasonably appropriate to the exercise of that right is likewise guaranteed, including, of course, the privilege of determining the policies of the party and its membership.”) (quoting *Bell v. Hill*, 123 Tex. 531, 546 (1934)).

California Democratic Party v. Jones, the Court held that any burden on political parties' right to associate must be "narrowly tailored to serve a compelling state interest."¹²¹

But there are plausible arguments that caucuses present constitutional problems. For example, Heather R. Abraham argues that caucuses violate the First, Fourteenth, and Twenty-Fourth Amendments.¹²² First, she asserts that "the associational rights of voters outweigh those of party associational rights." Second, she argues "caucuses may violate the equal protection doctrine by allocating unequal weight to votes." Because arbitrary discrimination can unintentionally "[target] a suspect class" and attendance is mandatory at caucuses, there is a risk of excluding persons based on "factors like wealth, health, and geography," which might violate the Fourteenth Amendment's Equal Protection Clause.¹²³ As the Supreme Court stated in *Bush v. Gore*, "It must be remembered that the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."¹²⁴ Third, Abraham observes that the financial burdens of caucuses may constitute a poll tax," which would violate the Twenty-Fourth Amendment.¹²⁵ Legal challenges to political parties' methods for appointing delegates are not foreclosed. The Fourth Circuit Court of Appeals, in *Bachur v. Democratic National Party*, left the door open to such challenges, despite political parties' associational rights.¹²⁶

D. Opening Primaries to Independent Voters

Whether independent voters may participate in a political party's presidential primary or caucus affects how representative a party's presidential nominee is of constituents. Fully closed presidential primaries, in which participation is limited to party members, are "skewed to the parties' base constituencies," and often lead to the selection of more partisan presidential nominees who may be less representative of the party as a whole.¹²⁷ If independent voters play no role in the selection of a party's presidential nominee, it is unlikely that the presidential nominee selected by either political party will reflect the platform and will of independent voters.

¹²¹ See generally 530 U.S. 567, 568 (2000).

¹²² Heather R. Abraham, *Legitimate Absenteeism: The Unconstitutionality of the Caucus Attendance Requirement*, 95 MINN. L. REV. 1003, 1018-20 (2011).

¹²³ *Id.* at 1015, 1023.

¹²⁴ 531 U.S. 98, 105 (2000) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)) (internal quotation marks omitted).

¹²⁵ Abraham, *supra* note 122, at 1017.

¹²⁶ 836 F.2d 837, 841. See generally Abraham, *supra* note 122, at 1011.

¹²⁷ See Mark A. Siegel, *How Closed Primaries Further Polarize Our Politics*, WASH. POST (Sept. 4, 2011), https://www.washingtonpost.com/opinions/how-closed-primaries-further-polarize-our-politics/2011/09/02/gIQARBPb2J_story.html.

1. Existing Proposals

In February 2020, Republican state representatives from Missouri and South Carolina suggested that the states “close” their presidential primaries to prevent “voting raiding.” They wanted to prevent Republican voters who felt confident that Trump would become the Republican Party’s presidential nominee from casting votes in Democratic primary contests aimed at having the Democrats select a weaker nominee.¹²⁸ The bill proposed in South Carolina would have limited voters’ ability to switch party registration, permitting them to shift it no more than once every two years.¹²⁹

2. Our Recommendation: Permit Independents and Party Members to Vote in Primaries

Although proposals to reform presidential primaries should take the possibility of vote raiding into consideration, closing presidential primaries entirely to independent voters may lead to the selection of extremely partisan presidential nominees. Additionally, voters may have many valid reasons for shifting their party membership, and it would be undemocratic and unjust to prevent voters from shifting their party registration at will.

Presidential primaries should be opened, in some capacity, to independent voters for a number of reasons. Presidential primaries and caucuses that permit some participation by independent voters increase voter turnout.¹³⁰ In states in which independent voters were permitted to participate in the primaries and caucuses held by both political parties, the average voter turnout was 38 percent.¹³¹ In contrast, in states that held fully closed primaries and caucuses, the average voter turnout was 18 percent.¹³² Furthermore, only approximately half of young voters (aged 18 to 24) register to join either major political party; the rest choose to remain politically independent.¹³³ States that permit independents to vote in primaries are more likely to select presidential candidates who address policy issues that affect voters of various ages and demographics.

¹²⁸ Brendan Crowley, *Bill Seeks to ‘Close’ Missouri Primaries*, NEWS TRIB. (Feb. 20, 2020, 12:05 AM), <https://www.newstribune.com/news/local/story/2020/feb/20/bill-seeks-to-close-missouri-primaries/817498/>; Nicholas Papantonis, *SC Bill Proposes Closing Partisan Primaries*, ABC15 NEWS (Feb. 25, 2020), <https://wpde.com/news/local/sc-bill-proposes-closing-partisan-primaries>.

¹²⁹ See Papantonis, *supra* note 128.

¹³⁰ See Larry J. Sabato, *Primaries Versus Caucuses: The Score So Far in 2016*, UVA CTR. FOR POL. (Apr. 21, 2016), <http://centerforpolitics.org/crystalball/articles/primaries-versus-caucuses-the-score-so-far-in-2016/>.

¹³¹ Data taken from the UVA Center for Politics were imported into Excel, sorted by type of primary or caucus, and average voter turnout was calculated for each type of primary/caucus.

¹³² Data taken from the UVA Center for Politics were imported into Excel, sorted by type of primary or caucus, and average voter turnout was calculated for each type of primary/caucus.

¹³³ *Young People’s Ambivalent Relationship with Political Parties*, CIRCLE (Oct. 24, 2018), <https://circle.tufts.edu/latest-research/young-peoples-ambivalent-relationship-political-parties>.

Some states prefer closed primaries and caucuses to prevent vote raiding.¹³⁴ But if primaries are opened to independent voters, state political parties have legal authority to take steps to lower the risk of vote raiding. In the Supreme Court’s decision in *California Democratic Party v. Jones*, Justice Scalia reasoned that vote raiding poses a “clear and present danger” in presidential primaries and leads to the selection of candidates whose views “diverge from those of the party faithful.”¹³⁵ In reaching this conclusion, Justice Scalia cited a survey of voters in California’s blanket primary, which indicated that 37 percent of Republicans planned to vote in the state’s Democratic gubernatorial primary and 20 percent of Democratic voters planned to vote in the state’s Republican Senate primary.¹³⁶ In 1997, two professors at University of California, Riverside, published a study analyzing exit polls to determine how many voters who self-identified with one political party “crossed over” to vote in the other political party’s primary.¹³⁷ Their study suggested that, in states holding closed presidential primaries, only approximately two to three percent of voters voting in one party’s primary in states holding closed presidential primaries identified themselves with the other political party.¹³⁸

Vote raiding is difficult to study because voters who cross over to the other party’s primary to choose a weak candidate are unlikely to admit what they are doing to researchers. Furthermore, politicians, celebrities, or influential party members may attempt to mobilize vote-raiding movements on a large scale in future presidential primaries.¹³⁹ States, therefore, remain concerned about vote raiding and should pass delayed enrollment statutes to prevent vote-raiding.

In 1973, in *Rosario v. Rockefeller*, the Supreme Court upheld N.Y. Election Law § 186, New York State’s delayed enrollment statute.¹⁴⁰ Section 186 required voters to register to a party at least 30 days before the general election that preceded the primary in which the voter wished to vote.¹⁴¹ The Court noted that because the deadline required voters to register to join a political party before the preceding general election, it was unlikely that the voters would have the “foresight” to join a political party to engage in vote raiding in a primary that could be a long way off.¹⁴²

¹³⁴ *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973).

¹³⁵ *See* 530 U.S. 567, 578 (2000).

¹³⁶ *Id.*

¹³⁷ R. Michael Alvarez & Jonathan Nagler, *Analysis of Crossover and Strategic Voting* 10 (1997), <https://web.archive.org/web/20100625234325/http://polmeth.wustl.edu/media/Paper/alvar99b.pdf>.

¹³⁸ *See id.* at 11.

¹³⁹ *See, e.g.*, Alexander Mooney, *Rush Limbaugh Urges Vote for Obama*, CNN (May 5, 2008), <https://www.cnn.com/2008/POLITICS/05/07/limbaugh.obama/>.

¹⁴⁰ *See* 410 U.S. 752 (1973).

¹⁴¹ *Id.* at 753.

¹⁴² *Id.* at 760-61 (citing *Rosario v. Rockefeller*, 458 F.2d 649, 653 (2d Cir. 1972)).

The Court held that § 186 did not constitute an unconstitutional burden on voters' freedom of association.¹⁴³ Requiring a delayed enrollment period was permissible because it furthered an important state goal, inhibiting party "raiding," and placing a delayed enrollment deadline after the preceding general election would fail to have the same deterrent effect on party raiding.¹⁴⁴

In *Tashjian v. Republican Party of Connecticut*, the Supreme Court held that, under their First Amendment right to associate, political parties may open state and federal primaries to independent voters.¹⁴⁵ The Court recognized that it is in a party's interest to "appeal to the independent voter" and that permitting independent voters to participate in a presidential primary will increase the likelihood that the primaries "produce the candidate and platform most likely to achieve that goal."¹⁴⁶

In *Storer v. Brown*, the Supreme Court upheld California Elections Code § 6830(d), a provision that prevented independent candidates in state and federal elections from being included on ballots if the independent candidate had been affiliated with a political party "within one year prior to the immediately preceding primary election."¹⁴⁷ The Court, citing *Rosario*, held that California Elections Code § 6830(d) "protects the direct primary process" and the "one-year disaffiliation provision furthers the State's interest in the stability of its political system."¹⁴⁸ Although *Storer* directly impacts the rights of independent candidates, and not independent primary voters, the Court's holding nonetheless suggests that the Court will give broad discretion to political parties to regulate or limit the rights of independents seeking to participate in and affiliate or disaffiliate with them at will.

A similar party disaffiliation requirement should be imposed for voters in primaries, permitting participation by party members and independent voters who have not been affiliated with

¹⁴³ *Id.* at 757-58.

¹⁴⁴ *Id.* at 761-62. In September 2019, New York Governor Andrew Cuomo signed N.Y. Election Law 5-304, which extended voters' ability to change their party registration in advance of the 2020 presidential primary. N.Y. Elec. Law 5-304(3); see also Samar Khurshid, *Deadline for New York Voter Party Enrollment Change is Rapidly Approaching*, GOTHAM GAZETTE (Jan. 31, 2020), <https://www.gothamgazette.com/state/9084-deadline-for-new-york-voter-party-enrollment-change-is-just-two-weeks-away>.

¹⁴⁵ 479 U.S. 208 (1986).

¹⁴⁶ *Id.* at 221. On the other hand, in *Nader v. Schaffer*, the Supreme Court affirmed a U.S. District Court for the District of Connecticut decision that dismissed an action brought by two Connecticut residents challenging § 9-431 as an unconstitutional violation of their right to vote and their freedom not to associate with a political party. See 417 F. Supp. 837, 842 (D. Conn. 1976), *aff'd* 429 U.S. 989 (1976). The district court held that § 9-431 does not violate the voters' freedom of association rights because "enrollment in Connecticut imposes absolutely no affirmative party obligations" and that "[t]he voters' name, however, may be erased from the party's enrollment list on a . . . showing that he does not support the party's principles or candidates." See *id.* at 843-44. *Tashjian* and *Schaffer* indicate that the Supreme Court believes that under the First Amendment, the right to set the parameters of association belongs to the association and not to non-members.

¹⁴⁷ 415 U.S. 724, 726 (1974).

¹⁴⁸ *Id.* at 735.

either major political party since the preceding general election (a period of between four and seven months, depending on when in the primary calendar a state is holding its primary). Requiring a period of party disaffiliation for independent voters who wish to participate in a primary may limit the impact of vote raiding because it is unlikely that voters would be planning to vote for one party in the general election while simultaneously planning to raid another party's election the following year. This independent voter disaffiliation requirement should be coupled with a delayed enrollment deadline, requiring all voters to register to join a political party no less than ten weeks prior to a state's primary. Vote raiding may even be limited in years in which there is an incumbent president, because voters will likely still want to vote for other "down-ballot" candidates. As the Supreme Court noted in *Tashjian*, a party's decision to permit independent voters to participate in presidential primaries provides the party with a "substantial benefit . . . in seeking to choose successful candidates."¹⁴⁹

E. Ensuring Majority Support for Nominees

Were a candidate to win a primary election without winning a majority of votes, it could lead to the nomination of a less representative and less popular candidate than could be otherwise selected.¹⁵⁰ A candidate might win a primary without the support of most of the electorate due to vote splitting, a phenomenon where having multiple ideologically similar candidates running can decrease the chances of any of them winning.

1. Our Recommendation

The political parties should implement ranked-choice voting ("RCV") in the primaries. RCV, and more specifically, instant runoff voting ("IRV"), is a system in which voters pick their first-choice candidate and then can rank other candidates in order of their preferences. If a candidate receives more than half of the first choices, that candidate wins. If there is no majority winner after counting first choices, then the candidate with the fewest votes is eliminated, and voters who picked that candidate as their first choice will have their votes count for their next choice. This process continues until a candidate wins with more than half of the votes.¹⁵¹ An IRV ballot would look like the below example, with voters filling in up to five bubbles in preference order, filling in at most one per column. In our recommended IRV model, when a candidate receives 50 percent of votes in a given district, he or she wins that district. And if no candidate receives 50 percent of the vote, candidates with the least votes, who would be mathematically unable to win, are eliminated. After a candidate is eliminated, the votes of those who placed that

¹⁴⁹ See *Tashjian*, 479 U.S. at 221.

¹⁵⁰ Sacha Urbach, *Instant Runoff Voting, New York City's Primary Elections and the Constitutionality of Election Law*, 46 *FORDHAM URB. L.J.* 1295, 1302 (2019).

¹⁵¹ *Ranked Choice Voting 101*, FAIRVOTE, https://www.fairvote.org/rcv#how_rcv_works.

candidate as their first choice go to those voters' second choice candidate. This process continues until a winner eventually emerges.

| Sample Primary Election Ballot | | | | | |
|---|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| Rank up to 5 candidates in the order of your preference. Mark no more than 1 oval in each column. | | | | | |
| | 1st | 2nd | 3rd | 4th | 5th |
| Candidate 1 | <input type="radio"/> |
| Candidate 2 | <input type="radio"/> |
| Candidate 3 | <input type="radio"/> |
| Candidate 4 | <input type="radio"/> |
| Candidate 5 | <input type="radio"/> |

Usually when IRV is implemented, the winner would have also won in a plurality voting system, receiving more than 50 percent of first choice votes; other times IRV leads to a different winner from the winner who would have been selected by the plurality system. In cases where IRV would result in a different winner, the winner ends up being a more representative, less polarizing candidate. In these cases, IRV leads to the victory of a candidate who ends up receiving a majority vote, when the plurality candidate would not have. That is what happened in the 1990 Irish presidential election, which Mary Robinson won with 38.9 percent of the vote, when Brian Lenihan received 44.1 percent and Austin Currie received 17 percent.¹⁵²

Critics raise concerns about voter confusion, and question whether voters can sufficiently understand how IRV works. Another criticism of IRV is that it could lead to the least popular candidate winning. This seemingly hypothetical issue became a reality in the 2009 Burlington, Vermont, mayoral election when Bob Kiss won despite being neither the plurality winner nor the Condorcet victor.¹⁵³

Another potential drawback of IRV is that it could limit the representation of third-party candidates and ideological minorities within a party. Under the current system, candidates may need to make concessions or appeals to third-party voters and ideological minorities in order to defeat their opponent, allowing these groups to have a degree of influence on policy. Under

¹⁵² *Presidential Election November 1990*, ELECTIONSIRELAND.ORG, <https://www.electionsireland.org/result.cfm?election=1990P&cons=194>.

¹⁵³ The candidate who wins the vote when directly compared head-to-head against every other candidate in an election.

IRV, however, third-party candidates and candidates representing ideological minorities would likely be eliminated in early tabulations, and voters who ranked them first would have their votes go to their second-choice candidate, reducing the need for candidates to seriously consider those voters' policy preferences.¹⁵⁴

But the potential downsides of IRV are outweighed by its numerous advantages. The primary benefit is the possibility of electing consensus candidates who appeal to a broader range of the electorate and reducing fracturing within the party. Most importantly, IRV would reduce the risk of vote splitting, which could lead to the nomination of a candidate who has only won a plurality of votes and who the majority of voters disfavor. Additionally, IRV can increase voter turnout, which would help lead to the election of a more representative nominee. IRV also has been shown to lead to greater civility and less negative campaigning between primary candidates. A candidate who runs a negative campaign is less likely to be a secondary or tertiary preference of opposing candidates' supporters, helping the party ultimately unify and rally around the eventual nominee.¹⁵⁵ IRV could push candidates to focus on the entire electorate, rather than running campaigns focused on their core supporters.¹⁵⁶ IRV has already been implemented in major elections in several states, such as Nevada, and in many city council and mayoral elections, with promising results.¹⁵⁷

F. Balancing the Input of Voters and Party Establishments

There are several ways elite party members can influence the outcome of primaries. Mayors, governors, members of the House of Representatives, senators, influential donors, and other party insiders can use endorsements, fundraising, and other tactics to shape primary elections. Additionally, the Democratic and Republican parties permit elected officials from their parties and other established party members to vote as "superdelegates," whose votes give the party establishments a role in the selection of presidential nominees. Because it is unlikely that party elites would support an unelectable, unqualified, extremist candidate, superdelegates help ensure that the parties select candidates who are qualified and represent the parties' platforms. But superdelegates' role may make it more difficult for a representative candidate outside the party establishment to prevail, even if the candidate has significant popular support.

¹⁵⁴ ADAM CREPEAU & LIAM SIGAUD, ME. HERITAGE POL'Y CTR., *A FALSE MAJORITY: THE FAILED EXPERIMENT OF RANKED-CHOICE VOTING* 24-25 (2019).

¹⁵⁵ See Jacey Fortin, *Why Ranked-Choice Voting Is Having a Moment*, N.Y. TIMES (Feb. 10, 2020), <https://www.nytimes.com/2020/02/10/us/politics/ranked-choice-voting.html>; *Ranked Choice Voting 101*, *supra* note 151.

¹⁵⁶ Urbach, *supra* note 150, at 1312.

¹⁵⁷ Sarah John & Andrew Douglas, *Candidate Civility and Voter Engagement in Seven Cities with Ranked Choice Voting*, NAT'L CIVIC REV. 25, 25 (2017).

Depending on the rules the parties use, superdelegates can drastically reduce the role of voters in the selection of presidential nominees.¹⁵⁸ Under the rules the Democratic Party used in 2016, superdelegates were permitted to “pledge” to support a candidate prior to the Democratic National Convention.¹⁵⁹ Supporters of candidate Bernie Sanders repeatedly called the 2016 system “undemocratic,” citing, for example, the 2016 New Hampshire primary. In that contest, Sanders won over 60 percent of the popular vote, and Clinton received 38 percent.¹⁶⁰ New Hampshire had 24 pledged delegates, which were awarded based on the popular vote, and six elected officials voting as superdelegates.¹⁶¹ All six superdelegates voted for Clinton.¹⁶² Even though Sanders won 55,000 more popular votes than Clinton, Sanders and Clinton each received 15 delegates from the New Hampshire primary.¹⁶³

Following the 2016 election and outrage from Sanders and his supporters, the Democratic National Committee voted, nearly unanimously, to prevent superdelegates from voting at the 2020 Democratic National Convention, unless no candidate received a majority of the pledged delegates to the convention during the presidential primaries and caucuses.¹⁶⁴ The rule change is intended to give the voters, not elected officials and other party elites, the ultimate say in selecting a presidential nominee.¹⁶⁵

1. Existing Proposals

Existing proposals for increasing peer review, which refers to the parties’ ability to impact nominee selection, include pre-primary endorsements and pre-primary votes of confidence. Pre-primary endorsements and pre-primary votes of confidence would involve a party convention held in January of an election year for the party establishment to weigh in on their prospective presidential candidates. In the pre-primary endorsement model, the candidate with the most support would receive the party’s endorsement, and candidates failing to receive at

¹⁵⁸ Antonio Moore, *How Democratic Superdelegates Decided the 2016 Election*, HUFFPOST (May 23, 2016, 6:53 PM), https://www.huffpost.com/entry/how-super-delegates-decid_b_10098414.

¹⁵⁹ *Democrats Change Superdelegates Rules that Enraged Sanders Supporters*, GUARDIAN (Aug. 25, 2018, 3:02 PM), <https://www.theguardian.com/us-news/2018/aug/25/democrats-rules-superdelegates-sanders>.

¹⁶⁰ JM Rieger, *Bernie Sanders Pushed for a Contested Convention in 2016. Now He Wants to Avoid One*, WASH. POST (Mar. 1, 2020, 4:15 PM), <https://www.washingtonpost.com/politics/2020/02/20/bernie-sanders-pushed-contested-convention-2016-now-he-wants-avoid-one/>; Moore, *supra* note 158.

¹⁶¹ Lily Mihaik et al., *Results from the 2016 New Hampshire Primary*, L.A. TIMES (Feb. 8, 2016), <https://graphics.latimes.com/election-2016-new-hampshire-results/>; Moore, *supra* note 158.

¹⁶² Moore, *supra* note 158.

¹⁶³ *Id.*

¹⁶⁴ Adam Levy, *DNC Changes Superdelegate Rules in Presidential Nomination Process*, CNN (Aug. 25, 2018, 7:33 PM), <https://www.cnn.com/2018/08/25/politics/democrats-superdelegates-voting-changes/index.html>

¹⁶⁵ *Democratic Superdelegate Rule Changes for 2020*, 270TOWIN, <https://www.270towin.com/content/superdelegate-rule-changes-for-the-2020-democratic-nomination>.

least 15 percent of votes would be precluded from appearing on the primary ballot.¹⁶⁶ A pre-primary vote of confidence would have the party take a less decisive role. It would allow the party to interview the candidates to determine if they were adequately qualified and whether their ideals corresponded with those of the party.¹⁶⁷ Party members could also evaluate whether each candidate was capable of fulfilling the obligations of the presidency.¹⁶⁸ Unlike the pre-primary endorsement model, however, candidates who did not meet the threshold could still appear on the parties' primary ballot, giving the voters, rather than the party, the final say. But the parties would still have discretion to exclude candidates from the debates, which could severely hinder a candidate's campaign.¹⁶⁹

2. Our Recommendation: Superdelegate Reform

We endorse the Democratic Party's pre-2020 superdelegate reform because it strikes a sensible balance between the party's discretion and the influence of voters. As discussed, the reform only allows superdelegates to vote at the Democratic National Convention if no candidate receives a majority of pledged votes through states' primaries and caucuses.¹⁷⁰ If no candidate secures a majority of votes, all delegates become unbound, and superdelegates may exert some influence in selecting a candidate who the party believes is representative, qualified, and able to prevail in a general election.

Critics of peer review typically object to replacing the voice of the voters with the voice of party officials, and the 2016 presidential primaries demonstrated that superdelegates may exert so much influence on presidential primaries that they effectively take the vote away from the people. Nonetheless, it is appropriate for established party leaders and party members to play a role in selecting a presidential candidate if primary voters are unable to reach a majority consensus. Superdelegates can also make it more difficult for an unelectable extremist candidate to become the party's nominee, and they can guarantee that a party's presidential nominee has some party-wide support. Superdelegates should, however, only play a role in selecting a presidential nominee after all the states have voted and pledged delegates have been assigned. The voters should have the first say in selecting a representative and qualified presidential nominee and, if no candidate has received a majority of pledged delegates, then elected party members should cast votes as superdelegates.

¹⁶⁶ Elaine Kamarck, *Returning Peer Review to the American Presidential Nomination Process*, 93 N.Y.U. L. REV. 709, 726 (2018).

¹⁶⁷ *See id.* at 727.

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*

¹⁷⁰ 270TOWIN, *supra* note 165.

III. Implementing Reform

Currently states run their own primaries and political parties run caucuses. However, this system sows competition between states, even though the competition should be between the candidates. Because states and state political parties can determine the method and date of their respective presidential candidate selection process, states are encouraged to battle each other to the front of the calendar and determine their own rules for voting. Because our proposed reforms are extensive and would likely disadvantage some states, it is unlikely that states will willingly agree to surrender their autonomy in this process. Our reforms would not have their intended effects unless every state implemented them. This Part explores the potential for a unified, national implementation of our recommendations through congressional action or pressure from national political parties.

A. Implementation by National Parties

The national political parties should encourage their state parties to implement the reforms uniformly. National parties' ability to control their state and local parties is limited. But if the national parties are not satisfied with the way state parties run their presidential nominating conventions, the national parties may refuse to recognize the delegates those state parties send to the Republican National Convention or the Democratic National Convention.¹⁷¹ It is in each major political party's interest to promote the selection of electable, qualified, and representative presidential nominees.

1. Congressional Action

Congress has authority to regulate national elections under the Constitution's Article II.¹⁷² First, Congress has the power to determine the time and day on which presidential electors are chosen.¹⁷³ Second, Congress has the power to regulate the "Times, Places and Manner" of elections for senators and representatives in Congress.¹⁷⁴ In 1976, the Supreme Court held in *Buckley v. Valeo* that "Congress has power to regulate Presidential elections and primaries."¹⁷⁵ Even before *Buckley*, various Supreme Court cases confirmed Congress' broad power to regulate federal elections and primaries.¹⁷⁶

¹⁷¹ *The Role of National and State Parties*, PBS (Dec. 15, 2003, 12:00 PM), https://www.pbs.org/newshour/politics/politics-july-dec03-parties_12-15.

¹⁷² Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 YALE L. & POL'Y REV. 331, 374 (1996).

¹⁷³ U.S. CONST. art. II § 1, cl. 4.

¹⁷⁴ U.S. CONST. art. I § 4, cl. 1.

¹⁷⁵ Stark, *supra* note 172, at 373 n.177 (citing *Buckley v. Valeo*, 424 U.S. 1, 143 (1976)).

¹⁷⁶ *Id.* at 375.

In *Burroughs & Cannon v. United States*, petitioners, who had failed to comply with bookkeeping requirements of the Federal Corrupt Practices Act, challenged Congress's authority to regulate presidential elections.¹⁷⁷ The Court disagreed with plaintiff's contention, and held that it was critical for Congress to have some authority to regulate presidential elections.¹⁷⁸ In the majority opinion, Justice Sutherland wrote:

To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction . . .¹⁷⁹

The Court confirmed Congress's authority to regulate primary elections a few years later, in *United States v. Classic*.¹⁸⁰ Where primary elections are integral to the selection of a candidate in the general election, the Court held that congressional authority over the general election includes the authority to regulate primaries.¹⁸¹ The Court extended its constitutional interpretation of Congress' authority over presidential elections in *Oregon v. Mitchell*;¹⁸² citing *Classic*, the Court stated that the authority "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the [the right to vote]" was "augmented" by the Necessary and Proper Clause.¹⁸³

There are, of course, counterarguments to the contention that Congress has the authority to regulate presidential primaries, namely that congressional action would interfere with the parties' First Amendment right to political association.¹⁸⁴ In considering the parties' right to political association, courts would look to whether there is a compelling interest that outweighs this right.¹⁸⁵ Some compelling interests might include "protecting the opportunity of voters in all states to participate in the election of the national leader, preserving the opportunity of

¹⁷⁷ 290 U.S. 534, 540-42 (1934).

¹⁷⁸ *Id.* at 545.

¹⁷⁹ *Id.*

¹⁸⁰ 313 U.S. 299 (1941).

¹⁸¹ *Id.* at 321-22.

¹⁸² 400 U.S. 112 (1970).

¹⁸³ *Id.* at 122 (citing *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). See also U.S. CONST. art. 1 § 8 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."); *Oregon*, 400 U.S. at 120.

¹⁸⁴ For more discussion on the parties' First Amendment right to political association, see *supra* Part III.B.

¹⁸⁵ *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring).

candidates to compete for the presidency, and preserving the legitimacy of the office, the electoral process, and the political system.”¹⁸⁶

IV. Conclusion

The president leads the entire country, not merely the states he or she won in the election or factions of his or her political party. Furthermore, presidents must have the qualifications needed to effectively discharge the office’s responsibilities. Accordingly, our recommendations aim to reform the primaries to allow the parties to nominate the most representative and qualified candidates as possible.

The primary calendar reform aims to give each state a more equal say in selecting nominees, rather than allowing some early voting states to set the trajectory for the race while leaving later voting states out of the equation. Reforming debates would create an effective platform to inform the public. The elimination of caucuses and opening of primaries to independent voters would ensure that those who want to support candidates for the nomination can have their voices heard. The IRV proposal would make primary nominees respond to a broader swath of the electorate and unify their party, rather than doubling down on appealing to their core supporters. The superdelegate reform would allow the party establishments to still play a crucial role if needed, without overshadowing the will of the people.

¹⁸⁶ Stark, *supra* note 172, at 379.