

THE UNSCRIPTED EVOLUTION OF PRESIDENTIAL NOMINATIONS: FROM FOUNDING-ERA IDEALISM TO THE DOMINANCE OF PARTY PRIMARIES

The field of election law enjoyed something of a renaissance over the first ten years of this young century¹—perhaps unsurprising given that the decade was bookended by historic rulings in *Bush v. Gore*² and *Citizens United v. FEC*.³ In addition to reawakening the legal academy’s dormant interest in the subject,⁴ these divisive cases permeated public consciousness to an extent that is rare for even the most prominent of legal controversies.⁵ What’s more, the Supreme Court seems intent on sustaining this reinvigorated focus on election law. Just this Term, for example, the justices expounded on the practical meaning of the

1. See Richard L. Hasen, *The Supreme Court’s Shrinking Election Law Docket, 2001–2010: A Legacy of Bush v. Gore or Fear of the Roberts Court?*, 10 ELECTION L.J. 325, 325 (2011).

2. 531 U.S. 98 (2000) (per curiam) (resolving the Florida recount controversy of the 2000 presidential election).

3. 558 U.S. 310 (2010) (invalidating the 2002 Bipartisan Campaign Reform Act’s restrictions on independent political expenditures by nonprofits, unions, and corporations based on the First Amendment’s protection of political speech).

4. See Daniel P. Tokaji & Paul Gronke, Editorial, *The Party Line: A Decade of Election Law*, 10 ELECTION L.J. 323, 323 (2011) (“In a sense, *Bush v. Gore* spawned [the *Election Law Journal* and] . . . led to a renaissance of scholarly and public attention to election law, election administration, and election policy.”).

5. For a sampling of both popular and academic reaction to *Bush v. Gore*, see, for example, Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219, 1219 n.2 (2002) (providing a list of both liberal and conservative attacks on the decision but defending it nonetheless); Lawrence H. Tribe, *Bush v. Gore and Its Disguises*, 115 HARV. L. REV. 170, 222 (2001) (discussing the “‘where the hell did that come from?’ reaction of many voters, lawyers, and academics” to the decision on the basis of a “flawed and peculiar . . . equal protection claim”); Gary Rosen, *Reconsidering Bush v. Gore*, WALL ST. J. (Nov. 7, 2001), <http://www.wsj.com/articles/SB122660756506625469> [<http://perma.cc/6FHF-PGCX>] (concluding that it is “unlikely in the aftermath of *Bush v. Gore* that either of the ‘great parties’ will see the Supreme Court in the same light”).

For a similar overview of the response to *Citizens United*, see, for example, Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 31 (2012) (“The popular reaction to *Citizens United* was swift and overwhelmingly negative.”); Anthony Dick, *Defending Citizens United*, NAT’L REV. ONLINE (Jan. 25, 2010), <http://www.nationalreview.com/benchmemos/49322/defending-citizens-united-anthony-dick> [<http://perma.cc/E8TU-W3PM>] (outlining and rebutting “a rogue’s gallery” of popular arguments against the majority’s opinion); Samuel Issacharoff, *Clarity About Super PACs, Independent Money and Citizens United*, ELECTION L. BLOG (Jan. 10, 2012, 8:51 AM), <http://electionlawblog.org/?p=27675> [<http://perma.cc/S3EK-UGC9>] (concluding that “the opinion has come to serve as a popular shorthand for all that is wrong with the campaign finance system.”).

“one person, one vote” standard,⁶ and this is only one of a number of important election law decisions in the past few years.⁷

While applauding this revival of interest in election law and acknowledging the unquestionable significance of the issues at stake in recent cases—which range from campaign finance and political speech to vote-counting procedures and apportionment—it is imperative to illuminate other areas of the field that have been woefully neglected by the public and the legal academy alike. For no subject has the disparity between relative importance and attention received been more acute than for the law applicable to the presidential nomination process, and caucuses in particular.⁸ Regrettably, this gap exists despite the literature’s clear emphasis on how much the rules of the nomination game matter in shaping ultimate electoral outcomes.⁹ In fact, Professor

6. See *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016). In deciding whether “one person, one vote” allows states to use total population versus the number of eligible voters in drawing legislative districts, the Court unanimously held that states *may* rely on total population but declined to consider whether they *must* do so. See *id.* at 1133; see also Adam Liptak, *Supreme Court Rejects Challenge on ‘One Person One Vote’*, N.Y. TIMES (Apr. 4, 2016), <http://nyti.ms/1ZZZn7f> [<http://perma.cc/5RJM-XFQ9>].

7. See, e.g., *Harris v. Ariz. Indep. Redistricting Comm’n*, 136 S. Ct. 1301 (2016) (announcing that the Constitution “does not demand mathematical perfection” and allowing for population deviations of less than ten percent from perfect equality in legislative districts for good reason, such as compliance with the Voting Rights Act); *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (striking down the Federal Election Campaigns Act’s aggregate limits on individual contributions for failing to advance a sufficiently compelling government interest to justify the abridgement of contributors’ First Amendment rights); *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (finding section 4(b) of the Voting Rights Act unconstitutional as its coverage formula was based on data too outdated to justify the burden of pre-clearance on the principles of federalism and equal sovereignty of states).

8. Deferring to a recent and particularly artful assessment of the field: “Like the treasures in grandma’s attic, the literature on presidential nominations is valuable but badly in need of updating” DAVID P. REDLAWSK ET AL., *WHY IOWA?: HOW CAUCUSES AND SEQUENTIAL ELECTIONS IMPROVE THE PRESIDENTIAL NOMINATING PROCESS* 20 (2011). Moreover, although this passage appropriately underscores the need for further study across the spectrum of nomination topics, Professor James Davis makes clear that scholarship on the caucus-convention system remains especially elusive. See JAMES W. DAVIS, *U.S. PRESIDENTIAL PRIMARIES AND THE CAUCUS-CONVENTION SYSTEM*, at x (1997).

9. See, e.g., REDLAWSK ET AL., *supra* note 8, at 9, 13 (“We know from the literature on election reform that the rules matter by structuring outcomes in politics A system run under different rules could likely result in different campaign strategies, different candidates, and different outcomes.”); Costas Panagopoulos, *Are Caucuses Bad for Democracy?*, 125 POL. SCI. Q. 425, 425 (2010) (“Put more bluntly, the rules of the game matter.”). For more tangible evidence, see Bruce E. Cain, *Reform, Perhaps: Two Studies on the Presidential Nomination Process*, 9 ELECTION L.J. 153, 154 (2010)

James Davis goes so far as to suggest that candidate selection might have more impact on the country's future than presidential elections themselves.¹⁰

Given its peculiarities, the 2016 election season has engendered a rare focus on America's presidential-nomination process, with numerous calls for change to the mechanics of candidate selection coming from both the right and the left.¹¹ However, would-be reformers generally have underestimated the complexity of their crusade due to various misapprehensions of the current system. And this is hardly surprising. As American political scientist Austin Ranney once observed, "[I]n America, the presidential nominating game is played under by far the most elaborate, variegated, and complex set of rules in the world. They include national party rules, state statutes (especially those governing presidential primaries), and a wide variety of rulings by national and state courts."¹² To fully appreciate the current nomination process—and before attempting to transform it—reformers would be wise to consider how the system became what it is today. Although there are some wonderful resources on specific aspects of nomination history and several brief overarching chronicles, extensive research has uncovered no comprehensive investigation of the evolution of America's approach to candidate selection. Thus, this Note seeks to address the current dearth of understanding of the nomination process by examining the manner in which the complex web of nomination rules and regulations was woven

(book review) (developing the "theme that rules can shape outcomes in important ways" by noting that, in 2008, "Hillary Clinton would have beaten Barak Obama" under winner-take-all rules and that "John McCain would have been locked into a much closer race with Mitt Romney under the Democratic proportionality rules") (citing Jack Citrin & David Karol, *Introduction to NOMINATING THE PRESIDENT* 1, 9 (Jack Citrin & David Karol eds., 2009)).

10. See DAVIS, *supra* note 8, at 1–2; see also Austin Ranney, *Changing the Rules of the Nomination Game*, in *CHOOSING THE PRESIDENT* 71, 71 (James David Barber ed., 1974) ("The nominating game is the most important stage of the presidential selection process.").

11. Jeremy W. Peters, *Reeling from 2016 Chaos, G.O.P. Mulls Overhaul of Primaries*, N.Y. TIMES (May 24, 2016), <http://nyti.ms/1s7KHHp> [<http://perma.cc/NH53-8PLX>] ("Normally overlooked and largely irrelevant in recent presidential elections, party rules gained considerable scrutiny this year Given the dissatisfaction . . . in both parties . . . some combination of changes for 2020 is almost certain.").

12. Ranney, *supra* note 10, at 72.

over the course of American history, from the Founding Era to the modern day.

The following sections proceed chronologically, beginning with the Framers' designs for presidential elections and the nomination process. As many readers will know, what little guidance the Constitution provides on presidential elections presumes the absence of political parties. The second section thus discusses how the young Republic grappled with the emergence of factions and the resulting rise of partisan nominations. The Note then explores three eras of nomination reform—the birth of the caucus-convention system, the Progressive push for primaries, and the McGovern-Fraser revolution of the late 1960s—before concluding with “goalposts” for reform based on insights from the past two presidential election cycles.

I. EARLY IDEALISM: ANTI-FACTIONAL DOGMA AND THE CONSTITUTION'S SILENCE ON NOMINATIONS

The architects of the Constitution devoted considerable time and energy to the issue of presidential selection. Indeed, according to political historian Richard McCormick, “No problem caused more perplexity for the delegates [of the Constitutional Convention] than that of determining how the President should be elected.”¹³ If the means were uncertain, however, the goal was clear from the outset; the Framers endeavored to devise a method “that would be impervious to faction, intrigue, or any unwholesome form of manipulation . . . a method of presidential selection that would defy politicization.”¹⁴

After initially resolving that the President would be chosen by Congress,¹⁵ the Convention rejected this parliamentary scheme as “radically and incurably wrong.”¹⁶ Summarizing the prevailing objections, James Madison observed that a successful bid for president under such a system would require “intrigue with the Legislature,” meaning that the Chief Executive

13. RICHARD P. MCCORMICK, *THE PRESIDENTIAL GAME: THE ORIGIN OF AMERICAN PRESIDENTIAL POLITICS* 17 (1982).

14. *Id.* at 24; see also *Cal. Democratic Party v. Jones*, 530 U.S. 567, 591 n.2 (2000) (Stevens, J., dissenting) (“Parties ranked high on the list of evils that the Constitution was designed to check.”).

15. MCCORMICK, *supra* note 13, at 17–18.

16. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 109 (Max Farrand ed., 1911) (statement of Elbridge Gerry on July 25, 1787).

“would derive his appointment from the predominant faction [in Congress], and [thus] be apt to render his administration subservient to its views.”¹⁷ To inhibit both legislative capture and partisan influence,¹⁸ the Framers went on to devise the more diffuse and state-centric procedure of the Electoral College.

Under the final version of Article II, Section 1, electors representing the total number of Representatives and Senators from each state would cast two ballots for president, with the top vote-getter winning the presidency and the runner-up securing the second office.¹⁹ Several aspects of this novel electoral mechanism served to safeguard the Republic from the evil of faction. First, the Framers specified that the electors were to “meet in their respective States” and cast votes on the same day.²⁰ Given the sluggish postal system of the day, this physical dispersion virtually precluded factional collaboration²¹—a practical restraint of which the Constitution’s proponents were keenly aware.²² Second, the Constitution granted state legislatures the power to prescribe their own methods for selecting presidential electors. Thus, in addition to innate home-state biases, the diversity of state electoral laws would give rise to divergent incentives among the members of the College and make cooperation

17. *Id.* (statement of James Madison on July 25, 1787).

18. MCCORMICK, *supra* note 13, at 18.

19. U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled . . .”).

20. *Id.* art. II, § 1, cl. 3 (“The Electors shall meet in their respective States, and . . . they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate . . .”); MARTY COHEN ET AL., *THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM* 49 (2008). For a helpful mixed critique and defense of *The Party Decides*, see Nate Silver, *The Republican Party May be Failing*, FIVETHIRTYEIGHT (Jan. 25, 2015, 4:39 PM), <http://fivethirtyeight.com/features/the-republican-party-may-be-failing/> [<http://perma.cc/F22W-7WP6>].

21. COHEN ET AL., *supra* note 20, at 49. See also Tadahisa Kuroda, *Electoral College*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 244, 244 (David F. Forte & Matthew Spalding eds., 2d ed. 2014).

22. See, e.g., 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 112 (Jonathan Elliott ed., 2d ed. 1863) (quoting from a speech given by William R. Davie of North Carolina) (“[The President] is elected on the same day in every state, so that there can be no possible combination between the electors.”).

more difficult.²³ Additionally, in the event that the final tally of electoral votes yielded a tie or fell short of the required majority, the House of Representatives was to “immediately” break the deadlock.²⁴ With no time to cobble together a coalition, the House presumably would be forced to select among the candidates based on individual merits rather than factional interests.²⁵

In retrospect, it may seem obvious that the emergence of organized political parties would soon unravel these carefully laid plans, but the delegates in Philadelphia believed they had created a “Constitution against parties.”²⁶ As such, there was no apparent need to formulate a process for partisan nominations.²⁷ The Framers simply assumed that presidential elections would be limited to a handful of obviously qualified candidates who naturally would rise like cream to the surface based on personal aptitude and previous civil service²⁸—a misjudgment only

23. See, e.g., STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 514 (1993) (discussing divergent incentives among electors in 1796 based on the diversity of state electoral laws).

24. See U.S. CONST. art. II, § 1, cl. 3 (“The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President”) (emphasis added).

25. COHEN ET AL., *supra* note 20, at 49.

26. RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM* 1, 40–73 (1970). For example, in a pair of essays appearing early in *The Federalist* series, Alexander Hamilton and James Madison extolled the structural impediments to party formation as among the chief virtues of the proposed Constitution. See THE FEDERALIST NO. 9 (Alexander Hamilton); THE FEDERALIST NO. 10 (James Madison). In the more celebrated of the two papers, *Federalist No. 10*, Madison acknowledged “the violence of faction” as a pervasive “disease[] under which popular governments have everywhere perished,” but he went on to argue that the very nature of a large and diverse republic like the Union makes the “vicious arts” of electioneering less effective. THE FEDERALIST NO. 10, at 77, 82 (James Madison) (Clinton Rossiter ed., 1961).

27. DAVIS, *supra* note 8, at 9; REDLAWSK ET AL., *supra* note 8, at 217.

28. DAVIS, *supra* note 8, at 9. Imagine how horrified the Founders would be at both the number and overall unfitness of candidates this presidential election cycle. For a small smattering of the countless critiques of the 2016 field from across the political spectrum, see Jamilah Lemieux, *2016’s Terrible, Horrible, Very Bad, No-Good Presidential Election*, EBONY (Feb. 19, 2016), <http://www.ebony.com/news-views/election-2016-worst#axzz42otBDAZQ> [<http://perma.cc/A3A5-TXJM>]; Jena McGregor, *Voters Skeptical That 2016 Candidates Would Make Good Presidents.* (*That’s not an Onion headline.*), WASH. POST (Jan. 21, 2016), <http://www.washingtonpost.com/news/on-leadership/wp/2016/01/21/voters-skeptical-that-2016-candidates-would->

reinforced by a conception of the presidential office based on its presumptive inaugural occupant, George Washington.²⁹ Unfortunately, these expectations prevailed for only the nation's first election cycle,³⁰ after which the "disease" of faction afflicted the presidential game and made conspicuous the absence of a constitutional mechanism for nominations.

make-good-presidents-thats-not-an-onion-headline/ [http://perma.cc/4FHG-E6EY] (covering Pew Center report that found that no more than eleven percent of voters believed that any candidate would make a "great" president); Frank Newport & Lydia Saad, "Dishonest" and "Socialist" Lead U.S. Reactions to Dems, GALLUP (Feb. 23, 2016), http://www.gallup.com/poll/189524/dishonest-socialist-lead-reactions-dems.aspx?g_source=position3&g_medium=related&g_campaign=tiles [http://perma.cc/AR73-D8YL]; Jonathan Swan, *Poll: Most Americans dissatisfied with '16 field*, THE HILL (Mar. 15, 2015), <http://thehill.com/blogs/ballot-box/presidential-races/272978-poll-most-americans-dissatisfied-with-16-field> [http://perma.cc/C6U7-USY7]; Matt Taibbi, *Inside the GOP Clown Car*, ROLLING STONE (Aug. 12, 2015), <http://www.rollingstone.com/politics/news/inside-the-gop-clown-car-20150812> [http://perma.cc/MS48-YKJA]; Jessica Taylor, *Why No One Likes The 2016 Presidential Field*, NPR (Aug. 18, 2015), <http://www.npr.org/sections/itsallpolitics/2015/08/18/432719996/why-no-one-likes-the-2016-presidential-field> [http://perma.cc/TQN5-Y552].

29. See MICHAEL STOKES PAULSEN & LUKE PAULSEN, *THE CONSTITUTION: AN INTRODUCTION* 10 (2015) ("When the delegates at Philadelphia were creating the Presidency, they had Washington in mind as the likely first President of the United States."); see also ELKINS & MCKITRICK, *supra* note 23, 33–34, 516.

30. In fact, Cohen et al. claim that the Electoral College *never* functioned as designed, given that Alexander Hamilton worked behind the scenes in the months before the nation's first presidential election to ensure both that each state chose electors who would support Washington for President and that enough electors would withhold their votes from Adams to ensure that he became Vice President. See COHEN ET AL., *supra* note 20, at 50. While it may be true that the Framers did not anticipate such surreptitious maneuvering, however, the Election of 1789 comported with their broader electoral expectations, as Washington was widely considered the best candidate, and partisan machinations had little to do with his selection. Cohen et al. would likely take issue with this latter point based on their assertion that "the Framers were a party." *Id.* Rather than historical reality, however, their sweeping assertion reflects the artistic license needed to craft a vignette, see *id.* at 51, to support their broader theory that political parties should be conceived "as coalitions of [a] larger set of actors" than simply candidates, officials, and party bosses, see *id.* at 15.

More convincingly, McCormick suggests that Hamilton and his fellow Federalists—a loose confederation of the most ardent supporters of the Constitution—mobilized out of a genuine concern that the opponents of ratification would mount a challenge to Washington in an effort to undermine the new federal charter. See MCCORMICK, *supra* note 13, at 32–40. Nevertheless, although the Federalists and Anti-Federalists might in hindsight resemble political parties, the Founders did not view them as such. At least during this first election cycle, factional politics were seen as "disruptive, subversive, and wicked." ELKINS & MCKITRICK, *supra* note 23, at 263; see also HOFSTADTER, *supra* note 26, at 8–9. Further, the real competition in the Election of 1789 was for the number two spot, and the dismal showing of the Anti-Federalist candidate, Governor George Clinton, demonstrated that fears of an all-out partisan showdown were overblown. MCCORMICK, *supra* note 13, at 37.

II. A SYSTEM TAINTED: FACTIONAL FAULT LINES AND THE DAWN OF PARTY NOMINATIONS

Although President Washington remained devoted to anti-partisan dogma throughout his presidency,³¹ Congress quickly descended into factional politics, thanks largely to the competing policies and personalities of the General's top lieutenants: Secretary of the Treasury Alexander Hamilton and Secretary of State Thomas Jefferson. At first, the emerging "parties of notables"³² were little more than temporary alliances between ideological allies;³³ these incipient coalitions neither exhibited party structure nor represented defined constituencies.³⁴ Nevertheless, over the course of Washington's first term, once-ephemeral battle lines hardened into something more enduring,³⁵ cemented by schisms over issues ranging from the National Bank to competing affections for Britain and France.³⁶ Federalist and Democratic-

31. ELKINS & MCKITRICK, *supra* note 23, at 266. For claims that Washington eventually caved to partisan motives, see *id.* at 489–97. Defending his own record, Washington maintained, "I was no party man myself, and the first wish of my heart was, if parties did exist, to reconcile them." Letter from George Washington to Thomas Jefferson (July 6, 1796), 25 THE WRITINGS OF GEORGE WASHINGTON 118, 119 (John C. Fitzpatrick ed., 1931) [hereinafter WRITINGS OF WASHINGTON].

32. MCCORMICK, *supra* note 13, at 41.

33. Indeed, according to the thoughtful analysis of Professor Noble Cunningham, voting records from the First Congress reveal no meaningful evidence of recurrent party groupings. NOBLE E. CUNNINGHAM, JR., THE JEFFERSONIAN REPUBLICANS: THE FORMATION OF PARTY ORGANIZATION, 1789-1901, at 7 (1957) (reinterpreting tables of congressional roll call votes originally published in O. G. Libby, *Political Factions in Washington's Administrations*, 3 Q.J. UNIV. N.D. 293, 297–98 (1913)). It was only during the first session of the Second Congress that voting patterns began to indicate factional decay, with about half the Members of Congress either voting regularly with or against the position taken by Madison—a leading Democratic-Republican. *Id.* at 22 (corresponding to tables in Libby, *supra*, at 301, 304–05). In Professor Cunningham's own words: "It is clear that Congress was not sharply divided into two parties, but the appearance of two rival groups in which members were beginning to act in concert was the first step in that direction . . ." *Id.*

34. MCCORMICK, *supra* note 13, at 41–42, 45–46.

35. ELKINS & MCKITRICK, *supra* note 23, at 257 (noting that the twelve-month period between the fall of 1791 and the fall of 1792 bore witness to the emergence of the young Republic's first clearly discernable "opposition").

36. COHEN ET AL., *supra* note 20, at 52–54 (discussing clashes over the advisability of the National Bank, the scope of the federal government, and the role of popular classes); ELKINS & MCKITRICK, *supra* note 23, at 257, 269 (highlighting divisions over the National Bank, assumption, relations with Britain, strict construction, and populism). Cunningham, however, emphasizes the Bank as the principal origin of acrimony between Jefferson and Hamilton—statesmen who enjoyed

Republican caucuses emerged in Congress;³⁷ contemporary observers took note of American “parties” for the first time;³⁸ and partisan activities like the Philadelphia newspaper war³⁹ and the subsequent emergence of anti-Federalist “societies”⁴⁰ united each faction while cementing the divisions between them.

By the fall of 1792, about the only issue on which the rival camps could agree was that the young nation desperately needed its first President at the helm for another term to weather the growing partisan storm.⁴¹ Having prevailed upon Washington to forego his planned retirement,⁴² however, the party chieftains

some measure of cooperation early on in the Washington Administration. CUNNINGHAM, *supra* note 33, at 4–9.

37. COHEN ET AL., *supra* note 20, at 52 (“Although the word ‘caucus’ was not applied to these party gatherings, they were caucuses in all but name.”) (quoting RALPH VOLNEY HARLOW, *THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825*, at 144 (1917)); *see also* CUNNINGHAM, *supra* note 33, at 22.

38. CUNNINGHAM, *supra* note 33, at 20–22 (noting Jefferson’s reference to “the heats and tumults of conflicting parties,” Oliver Wolcott’s comments on “faction and diversity of opinion,” and Hamilton’s complaints of a Madisonian “faction decidedly hostile to me and my administration”). In a fascinating discussion of Madison’s role in legitimizing parties, Elkins and McKittrick analyze a series of eighteen essays penned by Madison in the *National Gazette*, which they contend represents a fundamental revision of his earlier *Federalist No. 10*. *See* ELKINS & MCKITRICK, *supra* note 23, at 263–70. For example, Madison declared the inevitability of parties in “every political society,” posited that the “natural” number of parties is two, and emphasized the value of “making one party a check on the other.” *Id.* at 266–68.

39. *See* ELKINS & MCKITRICK, *supra* note 23, at 282–88 (suggesting that “the demon of partisanship” was brought into relief by the feud between the Republican-founded *National Gazette* and the Federalist-sympathizing *Gazette of the United States*); *see also* COHEN ET AL., *supra* note 20, at 55–56 (describing the papers in terms of party formation and highlighting their role in making debates accessible to a wider audience); CUNNINGHAM, *supra* note 33, at 13–19 (tracing the rise of the *National Gazette* and concluding that the newspapers “did much to speed the formation of political parties”); MCCORMICK, *supra* note 13, at 42 (describing the launch of the *National Gazette* as “[t]he first overt sign of the new partisanship.”).

40. First founded in early 1793, these French-inspired, pro-Republican clubs marked an early attempt at grassroots, activist politics. COHEN ET AL., *supra* note 20, at 55–58; ELKINS & MCKITRICK, *supra* note 23, at 455–61.

41. ELKINS & MCKITRICK, *supra* note 23, at 292.

42. In May 1792, the General asked Madison to draft a valedictory (much of which was incorporated into the famed Farewell Address four years later), as he was determined to escape the weight of public life. *Id.* at 290, 490. However, partisan strife reached such a fever pitch that some feared a contested presidential election could spark civil war. *See* MCCORMICK, *supra* note 13, at 46 (recounting dire warnings from Jefferson and Attorney General Edmund Randolph). These fears—as well as the personal urging of Madison, Jefferson, and Hamilton—prevailed upon Washington, and he implicitly consented to running for a second term by not stating his intention otherwise. ELKINS & MCKITRICK, *supra* note 23, at 292.

could not help but engage in a lower-stakes skirmish over the vice presidency. For the Jeffersonian Republicans, this contest bore particular significance, as a challenge against incumbent Vice President John Adams would represent something of a referendum on Federalist policies.⁴³ In this first experiment with partisan nominations,⁴⁴ however, the fledgling Republican coalition struggled to unite behind a single candidate.⁴⁵ Only two months before the election, an informal assembly of the party's "principal movers" convened in Philadelphia to "finally and definitively" break the impasse,⁴⁶ tapping New York Governor George Clinton over the rascalion Aaron Burr.⁴⁷ The Federalists, on the other hand, coalesced around Adams with little fanfare.⁴⁸ In the end, the Republicans came up just short of unseating Adams,⁴⁹ but they had succeeded—albeit inadvertently—in irrevocably warping federal elections into partisan affairs.⁵⁰

43. MCCORMICK, *supra* note 13, at 46. In Jefferson's words, "The occasion of electing a Vice President [stands] as a proper one for expressing the public sense on the doctrines of the monocrats." Letter from Thomas Jefferson to Thomas Pinckney (Dec. 3, 1792), in 7 THE WORKS OF THOMAS JEFFERSON 191, 192 (Paul Leicester Ford ed., 1904).

44. See CUNNINGHAM, *supra* note 33, at 45. *But see* Ronald P. Formisano, *Federalists and Republicans: Parties, Yes—System, No*, in PAUL KLEPPNER ET AL., THE EVOLUTION OF AMERICAN ELECTORAL SYSTEMS 33, 33–35 (1981) (arguing that the "idol of origins" fallacy has led scholars to wrongly attribute the term "party" to the Federalists and Jeffersonian Republicans, as they lacked sufficient institutional development and maturity to qualify as such). *See generally* William N. Chambers, *Parties and Nation-Building in America*, in 1 POLITICAL PARTIES IN AMERICAN HISTORY 6, 14–19 (Winfred E.A. Bernhard ed., 1973) (discussing the implications of contending that the factions of the 1790s were or were not the first modern parties).

45. MCCORMICK, *supra* note 13, at 46–48 (recapping the divide between Virginia, New York, and Pennsylvania Republicans over a VP candidate); *see also* CUNNINGHAM, *supra* note 33, at 45–49 (tracing related correspondence among party leaders).

46. *See* Letter from John Beckley to James Madison (Oct. 17, 1792), in 14 THE PAPERS OF JAMES MADISON 383, 383 (Robert A. Rutland & Thomas A. Mason, eds. 1983) (emphasis omitted).

47. CUNNINGHAM, *supra* note 33, at 48–49; MCCORMICK, *supra* note 13, at 48. Although Jefferson expressed some interest in the position, the Republicans strategically passed on their leader, given that electors could cast only one of their two votes for a fellow state citizen, and Jefferson neither wished to nor could effectively challenge the President, a fellow Virginian. Rachel Yff, *Presidential Election of 1792*, in 2 ENCYCLOPEDIA OF U.S. CAMPAIGNS, ELECTIONS, AND ELECTORAL BEHAVIOR 550, 551 (Kenneth F. Warren ed., 2008) [hereinafter ENCYCLOPEDIA OF U.S. CAMPAIGNS].

48. *See* MCCORMICK, *supra* note 13, at 46; THOMAS HUDSON MCKEE, THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES 4 (1906).

49. *See* MCCORMICK, *supra* note 13, at 49; MCKEE, *supra* note 48, at 5.

50. *See* MCCORMICK, *supra* note 13, at 41, 49.

The Republic careened even further toward party polarization over the course of Washington's second term.⁵¹ Despite his last-ditch attempt to put the partisan genie back in the bottle with his Farewell Address,⁵² the General's retirement opened the floodgates to all-out factional warfare.⁵³ Preparing for a showdown in the Election of 1796, each party nominated a pair of candidates through informal processes led by their nascent congressional caucuses.⁵⁴ In a reversal of roles from the previous election, the Federalists fractured over candidate selection, with a splinter group led by Hamilton conspiring to replace John Adams with Thomas Pinckney at the top of the ticket.⁵⁵

51. See CUNNINGHAM, *supra* note 33, at 71, 75–76, 85; see also MCCORMICK, *supra* note 13, at 50 (outlining several “political battles” that “served to clarify and harden divisions in Congress”). As proof of factional entrenchment, Cohen et al. observe that the Fourth Congress displayed stronger party-line voting than the Third Congress, despite Hamilton's departure from the Washington Administration. See COHEN ET AL., *supra* note 20, at 54.

52. Interestingly, Washington's legendary Farewell Address was never delivered in person. Rather, it was disseminated by newspaper throughout the country. ELKINS & MCKITRICK, *supra* note 23, at 489. In his remarks, a worn-down Washington admonished the young Republic “in the most solemn manner against the baneful effects of the Spirit of Party” See George Washington, Farewell Address, in 35 WRITINGS OF WASHINGTON, *supra* note 31, at 214, 226. Specifically, he cautioned, “The alternate domination of one faction over another, sharpened by the spirit of revenge natural to party dissension . . . is itself a frightful despotism.” See *id.* at 227. More concerning to Washington, however, was the “more formal and permanent despotism” that arises when citizens of popularly elected governments “seek security and repose in the absolute power of an Individual . . . the chief of some prevailing faction” See *id.* In a final plea, the General warned that the partisan spirit is like a “fire” that “instead of warming . . . consume[s].” See *id.* at 228.

53. See Letter from Fisher Ames to Sen. Oliver Wolcott (Sept. 26, 1796), in 1 MEMOIRS OF THE ADMINISTRATIONS OF WASHINGTON AND JOHN ADAMS 384, 384 (George Gibbs ed., 1846) [hereinafter MEMOIRS] (“The address of the President . . . will serve as a signal, like dropping a hat, for the party racers to start”); COHEN ET AL., *supra* note 20, at 58 (“The election of 1796 . . . brought the first clear instance of what can be called party activity—that is, an organized attempt to get control of government.”); ELKINS & MCKITRICK, *supra* note 23, at 516–18 (describing Washington's impact on the formation of parties).

54. See COHEN ET AL., *supra* note 20, at 63; CUNNINGHAM, *supra* note 33, at 89–93; DAVIS, *supra* note 8, at 9–10; ELKINS & MCKITRICK, *supra* note 23, at 515–16; MCCORMICK, *supra* note 13, at 51–53.

55. ELKINS & MCKITRICK, *supra* note 23, at 515–16; MCCORMICK, *supra* note 13, at 52. Adams, like Washington, disdained parties and feared the impact their rise would have on the American political system. As such, he only reluctantly associated with the Federalists, and this shaky commitment caused concern for Hamilton and other party leaders. Abbe Allen DeBolt, *Presidential Election of 1796*, 2 ENCYCLOPEDIA OF U.S. CAMPAIGNS, *supra* note 47, at 552, 552. For an account of Hamilton's antics and the resulting electoral impact, see MCCORMICK, *supra* note 13, at 52–56.

Meanwhile, the Democratic-Republicans quickly united behind Jefferson as their pick for president,⁵⁶ although they still could not muster consensus on a suitable vice-presidential candidate. As a result, the Republicans went on to squander numerous ballots under the dual-vote procedure of the as-yet-unamended Article II, Section 1.⁵⁷ In the end, dissent in the Federalist ranks coupled with the Republicans' strategic blunder as to their second votes produced the anomalous result of a split-party administration—with Adams winning the presidency, and Jefferson besting Pinckney for vice president.⁵⁸

Initially, it seemed that the duo of Adams and Jefferson—two old friends—might salve the now-festering partisan wounds.⁵⁹ Four years on, however, the factional decay had only spread,⁶⁰ with virtually every Member of Congress identifying as either Federalist or Republican.⁶¹ Thus, instead of the peaceable transition from Adams to Jefferson that might have been, the Election of 1800 featured an inimical rematch of the 1796 contest, with two key differences.⁶² First, the congressional caucuses were more fully developed and more firmly in control of the nomination process than before.⁶³ And second, the Election of 1800 revealed a signifi-

56. CUNNINGHAM, *supra* note 33, at 90–91; ELKINS & MCKITRICK, *supra* note 23, at 515; MCCORMICK, *supra* note 13, at 51.

57. CUNNINGHAM, *supra* note 33, at 91–92; ELKINS & MCKITRICK, *supra* note 23, at 515. Surprisingly, the Republicans viewed the contest for second office with manifest indifference. MCCORMICK, *supra* note 13, at 52.

58. For an overview of results from the Election of 1796, see MCCORMICK, *supra* note 13, at 56; MCKEE, *supra* note 48, at 7.

59. MCCORMICK, *supra* note 13, at 58.

60. *Id.* at 58–60; DAVIS, *supra* note 8, at 10.

61. MCCORMICK, *supra* note 13, at 58.

62. Although the two developments described above bear particular relevance for this Note, other significant changes had occurred since 1796. For example, state legislatures became a key battleground in the presidential contest given their control over election laws; there was a marked increase in voter participation; and the “parties of notables” had become well-organized and broad-based machines, operating both nationally and in the states. *Id.* at 70–75.

63. See DAVIS, *supra* note 8, at 10. Remarkably, Hamilton’s ring once again withheld support from Adams—the sitting president—and instead backed Thomas Pinckney’s brother, Major General Charles Cotesworth Pinckney. MCCORMICK, *supra* note 13, at 64. In a snub to their party leader, the Federalist caucus agreed to support both Adams and Pinckney “without giving one a preference to the other.” See CUNNINGHAM, *supra* note 33, at 165 (quoting a letter written by Secretary of War James McHenry, who was driven to resign by the President Adams for his role in the scheme). For further discussion of the machinations of the Federalist caucus, see *id.* at 164–66; MCCORMICK, *supra* note 13, at 63–64; MCKEE, *supra* note

cant tightening in party control and discipline.⁶⁴ In fact, the Republicans learned from past mistakes a little too well;⁶⁵ thanks to the unanimous support of their electors, Jefferson and Burr deadlocked with seventy-three votes apiece.⁶⁶ In one of the greatest ironies of American electoral history, this unanticipated party loyalty threw the tied election to the lame-duck, Federalist-controlled House of Representatives⁶⁷—another anomaly caused by “the preposterous mode of election” set out by the original Article II, Section 1.⁶⁸ Only after thirty-five rounds of balloting over six days did enough Federalists yield in their obstructionist designs to hand Jefferson the presidency,⁶⁹ thereby enabling a “revolutionary” first peaceful transfer of power.⁷⁰

Though unbeknownst at the time, the “Revolution of 1800”⁷¹ resulted in two notable casualties. First, the Federalists suffered what proved to be a permanent defeat in the presidential game,

48, at 8. For similar coverage of the less-divisive Republican caucus, see ELKINS & MCKITRICK, *supra* note 23, at 740; MCCORMICK, *supra* note 13, at 64–65; MCKEE, *supra* note 48, at 8.

64. CUNNINGHAM, *supra* note 33, at 239; DAVIS, *supra* note 8, at 10; ELKINS & MCKITRICK, *supra* note 23, at 741. For example, in 1796, the Electoral College cast more than thirty percent of its votes for nine candidates who had not been nominated by either party, whereas in 1800, only one stray vote went to John Jay. See MCKEE, *supra* note 48, at 7, 9.

65. MCCORMICK, *supra* note 13, at 58.

66. CUNNINGHAM, *supra* note 33, at 239. For more detailed election results, see MCKEE, *supra* note 48, at 9.

67. CUNNINGHAM, *supra* note 33, at 239; ELKINS & MCKITRICK, *supra* note 23, at 746–47; MCCORMICK, *supra* note 13, at 68.

68. This phrase was used by a contemporary Federalist Congressman to express his exasperation with constitutional procedure in the immediate aftermath of the Election of 1796. See Letter from Rep. Chauncey Goodrich to Sen. Oliver Wolcott (Dec. 17, 1796), in 1 MEMOIRS, *supra* note 53, at 411, 412. Although the Federalists had toyed with the notion of a constitutional amendment to fix the glitch of the split-party results in 1796, it was not until the Eighth Congress convened in the fall of 1803 that the amendment process got underway. Fiercely divided along party lines, the Republican-controlled Congress rammed through the measure over Federalist protestations and won ratification of the Twelfth Amendment in the states the next year. The rule change would forever alter the balance of power between parties, as it virtually precluded the possibility of a Federalist takeover in 1804 and likely accelerated the party’s eventual demise. See MCCORMICK, *supra* note 13, at 82–87.

69. For a fuller description of this intriguing episode, see CUNNINGHAM, *supra* note 33, at 240–46; ELKINS & MCKITRICK, *supra* note 23, at 749–50; MCCORMICK, *supra* note 13, at 68–69.

70. CUNNINGHAM, *supra* note 33, at 248; ELKINS & MCKITRICK, *supra* note 23, at 750.

71. Jefferson was known to have employed this term, even if he did not coin it himself. ELKINS & MCKITRICK, *supra* note 23, at 691.

as they would soon lose their prominent role in national politics.⁷² More enduringly, the Framers' plans for a factionless utopia had withered on the vine, given that parties would never relinquish their clutch on presidential nominations.⁷³ As a result, America's political parties became architects of the rules and procedures for this quadrennial task, beginning with the precedents established in the Founding Era elections described above. What followed in the years to come was a series of ad hoc reforms driven more by the self-interest of parties and candidates than by concern for the public good.⁷⁴ Thus, at least from an institutional perspective, the candidate-selection practices that have since emerged were never rationally designed.⁷⁵ However, as Professor Davis suggests, the evolution of the nomination process can be logically understood as "a chronicle of . . . reforms that have gradually permitted greater public participation."⁷⁶ To highlight the most significant of these developments, the remainder of this historical account will focus on three major electoral overhauls: (1) the rise of the caucus-convention system, (2) the Progressive push for primaries, and (3) the 1968 McGovern-Fraser Commission revolution.⁷⁷

III. THE FIRST ERA OF REFORM: JACKSONIAN DEMOCRACY AND THE BIRTH OF THE CAUCUS-CONVENTION SYSTEM

The emergence of the convention system during the 1830s and 1840s marked the first major post-Founding Era reform to America's presidential nomination process. To set the scene, Thomas Jefferson's electoral triumph in 1800 had ushered in three decades of single-party rule,⁷⁸ and for the first twenty years of this period, the Democratic-Republicans were content

72. MCCORMICK, *supra* note 13, at 80.

73. During the single-party era that emerged after the Election of 1800, some contemporaries believed that the country might yet achieve the Framers' high ideals, but their hopes were soon dashed by intraparty rivalries. *Id.* at 117-18.

74. *Id.* at 80.

75. REDLAWSK ET AL., *supra* note 8, at 217.

76. DAVIS, *supra* note 8, at 10; *see also* REDLAWSK ET AL., *supra* note 8, at 217.

77. For a similar distillation of developments in the party-nomination process to three distinct periods, *see* REDLAWSK ET AL., *supra* note 8, at 217-18.

78. *See* MCKEE, *supra* note 48, at 10-26. For a detailed description of Democratic-Republican party organization during the early years of this period, *see* NOBLE E. CUNNINGHAM, JR., *THE JEFFERSONIAN REPUBLICANS IN POWER: PARTY OPERATIONS, 1801-1809* (1963).

to continue entrusting the role of party kingmaker to their congressional caucus.⁷⁹ However, the same forces that ultimately would fragment the Jeffersonian Republicans also sowed the seeds for a transformation in the method by which the party—and the country—would choose candidates.

In the run-up to the Election of 1824, a combination of personal ambition, regional rifts, and squabbles over patronage touched off an avalanche of candidates for the presidency.⁸⁰ Although Senator Martin Van Buren revived a rump section of the congressional caucus in an effort to support Treasury Secretary William H. Crawford,⁸¹ the other major contenders derided “King Caucus” as a vestige of aristocratic privilege that stifled the popular will and instead turned to friendly state party conventions and legislatures for their nominations.⁸² Andrew Jackson would go on to win a plurality both of the electors and of the popular vote,⁸³ but John Quincy Adams ultimately prevailed in the House through personal lobbying and what Jackson deemed a “corrupt bargain” with Speaker Henry Clay.⁸⁴ For the Jackson-Adams rematch in 1828, the rival camps did not even

79. DAVIS, *supra* note 8, at 10.

80. See COHEN ET AL., *supra* note 20, at 65–66 (discussing the role of patronage); DAVIS, *supra* note 8, at 10 (sectionalism); MCCORMICK, *supra* note 13, at 117–18 (party factions, regionalism, and ambition). To capture the unprecedented breadth of the field, McCormick points to an early 1822 edition of a Baltimore news magazine that identified eight candidates for the presidency, not including Andrew Jackson. See MCCORMICK, *supra* note 13, at 118 (citing to and quoting from 21 NILES' WEEKLY REGISTER 337, 338 (Hezekiah Niles ed., 1857) (issue dated Jan. 26, 1822)). In the end, however, only four candidates meaningfully competed for the first office. *Id.* at 119.

81. COHEN ET AL., *supra* note 20, at 65–66. Convening in the House Chamber, sixty-six of the total 261 Members of Congress gathered to support Crawford in the bungled caucus. MCCORMICK, *supra* note 13, at 133; MCKEE, *supra* note 48, at 20.

82. See COHEN ET AL., *supra* note 20, at 66; DAVIS, *supra* note 8, at 11; MCCORMICK, *supra* note 13, at 119, 133–34. In addition to their antidemocratic nature, the congressional caucus faced scrutiny for violating separation-of-powers principles and for creating a void in representation for constituents of legislators from the opposite party. See Wayne P. Steger, *Nomination Process, Presidential*, in 2 ENCYCLOPEDIA OF U.S. CAMPAIGNS, *supra* note 47, at 456, 456.

83. MCCORMICK, *supra* note 13, at 120; MCKEE, *supra* note 48, at 21–22.

84. MCCORMICK, *supra* note 13, at 120. Jackson's allegation was based on the fact that Clay had been offered and accepted the position of Secretary of State while the election was pending. *Id.* Old Hickory was furious, and he suggested that Clay, “the Judas of the West[,] has closed the contract and will receive the thirty pieces of silver.” *Id.* Filled with scorn for the new administration, Jackson began campaigning almost at once for his next shot at the presidency—the Election of 1828—bolstered by the newfound support of Senator Van Buren. COHEN ET AL., *supra* note 20, at 66.

bother to convene congressional caucuses, opting instead to continue the short-lived experiment with state-based nominations.⁸⁵

It was only during the Election of 1832 that the convention system finally emerged. Although Jackson once again received nominations from state caucuses and conventions in 1830, an emerging minor party, the Anti-Masons, turned to a national convention because they lacked the political influence to garner state-sponsored nominations.⁸⁶ The Jacksonian Democrats and the opposition National Republicans followed suit but with the purpose of unifying the factional remnants of the now-defunct Democratic-Republican Party.⁸⁷ The national conventions also quenched a growing thirst for a greater popular role in selecting presidential candidates⁸⁸—playing to the larger common-man theme of Jacksonian Democracy.⁸⁹ Thus, although frequently maligned today,⁹⁰ the multilayered caucus-convention

85. See DAVIS, *supra* note 8, at 11; MCCORMICK, *supra* note 13, at 120, 134–35. For an account of the campaign and results from the Election of 1828, see MCCORMICK, *supra* note 13, at 120–21; MCKEE, *supra* note 48, at 25–26.

86. MCCORMICK, *supra* note 13, at 136–37; see also MCKEE, *supra* note 48, at 30–31.

87. With Adams sidelined, the anti-Jackson forces united behind Clay and took on the name “National Republicans.” MCCORMICK, *supra* note 13, at 122–23. Convening in Baltimore in December 1831, the new party’s convention formally nominated Clay, tapped John Sergeant for vice president, and adopted the first ever party platform. *Id.* at 137–38; see also MCKEE, *supra* note 48, at 28–30. Jackson’s supporters were the last to convene a national convention, waiting until May 1832. Also hosted in Baltimore, the Jacksonians gathered for the main purpose of forging a consensus on their VP candidate. MCCORMICK, *supra* note 13, at 123, 138–41. The convention also crafted an “address” to the country, selected the name “Democratic Party,” and adopted a set of convention rules that would have a lasting impact on future Democratic conventions. *Id.* at 138–41; MCKEE, *supra* note 48, at 27–28; Dallace W. Unger, Jr., *Presidential Election of 1832*, in 2 ENCYCLOPEDIA OF U.S. CAMPAIGNS, *supra* note 47, at 568, 568.

88. DAVIS, *supra* note 8, at 11. As Citrin and Karol explain, “The move to conventions was democratizing, as control shifted from several dozen elected officials to several hundred and later thousands of state and local party leaders and activists.” See Citrin & Karol, *supra* note 9, at 5. However, this progress should not be overemphasized, as it represented more of a devolution of power to state and local party leaders than anything resembling modern popular elections. See Steger, *supra* note 82, at 456. Still, the move to conventions marked a first step—albeit small—in the direction of a great popular role in the nomination process.

89. See, e.g., MCCORMICK, *supra* note 13, at 15, 124, 148–49; Dallace W. Unger, Jr., *Presidential Election of 1828*, in 2 ENCYCLOPEDIA OF U.S. CAMPAIGNS, *supra* note 47, at 567, 567.

90. DAVIS, *supra* note 8, at 53 (discussing both pros and cons of caucuses); Panagopoulos, *supra* note 9, at 427 (noting “anemic participation,” “difficulty navigating . . . arcane rules and procedures,” and the propensity for “ideologically extreme participants” as among the chief complaints about the caucus-convention

system that had matured by the 1840s was seen at the time as a progressive mechanism that represented the “popular will,” as delegates to these conclaves were chosen by the party membership at the local level rather than by remote caucuses in Washington, D.C., or the state capitals.⁹¹

IV. A SECOND SHIFT: THE PROGRESSIVE PUSH FOR PRIMARIES

The rise of primaries over the first half of the twentieth century marked the second major shock to the presidential nomination system. Despite the progress that the caucus-convention system represented when first adopted in the 1840s, the electoral mechanism incubated a range of undesirable side effects. Most damningly, party conventions became an instrument of control for state and city party chiefs, who—following in the footsteps of Boss Tweed—notoriously traded political favor for graft in a vicious cycle of corruption.⁹² Conventions were also ripe for manipulation, strong-arming, and bribery; often led to antidemocratic outcomes; and tended to attract unsavory characters.⁹³ Further, a common populist critique was that conventions were insider games, with low overall participation and key decisions often brokered in fabled “smoke-filled rooms.”⁹⁴

The resulting decline in party legitimacy⁹⁵—coupled with urbanization and other demographic changes⁹⁶—spawned a new era in which political parties were reconceived as “public utilities,” rather than purely private associations beyond the ambit

system but concluding based on voter-turnout data that “caucuses are not especially undemocratic”).

91. DAVIS, *supra* note 8, at 11; *see also id.* at 48. It is worth noting that no presidential candidate has been elected without receiving a nomination from a national party convention since 1832. *Id.* at 48.

92. *See id.* at 11–12; LEON D. EPSTEIN, *POLITICAL PARTIES IN THE AMERICAN MOLD* 159 (1986); ALAN WARE, *THE AMERICAN DIRECT PRIMARY* 70–73 (2002). Systematic patronage was championed by Senator Van Buren and formally implemented by President Jackson. COHEN ET AL., *supra* note 20, at 65; MCCORMICK, *supra* note 13, at 138, 173, 203–04; Unger, *supra* note 89, at 568. Patronage would flourish under the convention system.

93. *See* DAVIS, *supra* note 8, at 12; EPSTEIN, *supra* note 92, at 161; WARE, *supra* note 92, at 73–76.

94. *See* MCCORMICK, *supra* note 13, at 224; WARE, *supra* note 92, at 65–70.

95. *See* DAVIS, *supra* note 8, at 12; EPSTEIN, *supra* note 92, at 159.

96. *See* WARE, *supra* note 92, at 21–22, 26, 63.

of state control.⁹⁷ At first, the shift was subtle, with limited or even optional state regulations of party-nomination procedures.⁹⁸ After repeated failures to effect meaningful change, however, reformers turned to the more radical statutory imposition of direct primaries for state and local officials as a means of reigning in vested interests.⁹⁹ Although some scholars maintain that party leaders were complicit in and benefitted from the adoption of these new regulatory schemes,¹⁰⁰ primaries were seized on by Progressives as a silver bullet for curing all manner of government ills, which they attributed to party machines.¹⁰¹

A period of experimentation with mandatory primaries got underway with an 1899 Minnesota statute requiring the use of

97. See DAVIS, *supra* note 8, at 12, 48; MCCORMICK, *supra* note 13, at 211–12. *But see* WARE, *supra* note 92, at 90–94 (rejecting the label of “public utilities” as inaccurate, even as primaries and other reforms were adopted in states across the country, based on his larger hypothesis that parties were willing participants in creating these regulations and because parties have since “remained free to control most areas of their activities”). *See generally* EPSTEIN, *supra* note 92, at 155–99.

98. EPSTEIN, *supra* note 92, at 161–62; WARE, *supra* note 92, at 57. For example, some states adopted statutes prescribing duties for primary inspectors and creating sanctions for illegal voting and bribery. EPSTEIN, *supra* note 92, at 161–62.

99. EPSTEIN, *supra* note 92, at 168–69; Eser Sekercioglu, *Presidential Primaries*, in 2 ENCYCLOPEDIA OF U.S. CAMPAIGNS, *supra* note 47, at 669, 670; WARE, *supra* note 92, at 57.

100. Professor Alan Ware, for example, rejects the traditional “heroic” account that “direct primary legislation was sponsored by Progressive reformers who were intent on curbing the power of political parties,” insisting that “[p]arty politicians were not the ‘victims’ of antiparty reformers who somehow imposed a debilitating reform on them.” *See* WARE, *supra* note 92, at 15, 257. Instead, he suggests that the true explanation is both “less dramatic” and “more complex.” *See id.* at 22. Although the veracity of his argument is by no means as simple to determine as Professor Ware implies, he not only offers a convincing explanation for why generations of scholars have mistakenly remained faithful to the orthodox narrative, *see id.* at 16–18, but he also provides a plausible description of why party elites might have seen the adoption of primaries as aligned with their own interests, *see id.* at 256–57. According to Professor Ware, some politicians favored primary legislation to make parties more effective, while others saw it as a means of advancing their own careers, and yet others used it as a means of undermining opponents. *See id.* at 257. Further, the early forms of primaries tended to bear features that advanced party interests (for example, most primaries were closed to non-party members). *Id.* at 246. Thus, in Professor Ware’s view, the objective of direct-primary statutes was not “to punish parties for their misdeeds” but to address the erosion of a bygone face-to-face society in a way that decentralized parties could not themselves achieve. *See id.* at 25–26; *see also* REDLAWSK ET AL., *supra* note 8, at 217–18. Ultimately, however, the truth seems to lie somewhere between Professor Ware’s claims and the traditional account. *See* EPSTEIN, *supra* note 92, at 171–72 (undermining at least some of Professor Ware’s arguments).

101. DAVIS, *supra* note 8, at 12; EPSTEIN, *supra* note 92, at 170–71.

primaries for officials in Minneapolis's Hennepin County.¹⁰² According to Professor Ware, the training wheels were fully off by 1906, with both Wisconsin and Oregon requiring the direct nomination of most state and local officials and a significant group of other states legislating for primary elections in some manner.¹⁰³ By 1915, primaries had become the most widely employed nominating mechanism in the United States,¹⁰⁴ and in 1917, all but four states had direct-primary laws covering at least some state offices.¹⁰⁵

The adoption of *presidential* primaries lagged somewhat behind this trend for state and local officials.¹⁰⁶ By 1912, however, at least a dozen states had enacted legislation providing for either the direct election of national-convention delegates in primaries or the expression of candidate preference through "beauty contests," or both.¹⁰⁷ Thus, from a national perspective, a "mixed" nomination system had replaced the "pure" caucus-convention process that had reigned since the time of Jackson.¹⁰⁸ Although this early wave of presidential primaries empowered rank-and-file voters like never before,¹⁰⁹ party insiders would retain effective control over nominations,¹¹⁰ as the majority of national convention delegates continued to be selected through caucuses¹¹¹ and even many of the primaries were advisory rather than binding.¹¹² Further, the primary movement lost ground after the First World War,¹¹³ with eight states abandoning their presidential primaries before the outbreak of World

102. WARE, *supra* note 92, at 110–17.

103. *Id.* at 117.

104. *Id.* at 227.

105. EPSTEIN, *supra* note 92, at 169.

106. WARE, *supra* note 92, at 248. For a discussion of early presidential primary reforms, see *id.* at 248–54; DAVIS, *supra* note 8, at 12–15.

107. DAVIS, *supra* note 8, at 13, 15; MCCORMICK, *supra* note 13, at 212; WARE, *supra* note 92, at 248.

108. EPSTEIN, *supra* note 92, at 91–95; Steger, *supra* note 82, at 456; WARE, *supra* note 92, at 251–52, 260–61.

109. DAVIS, *supra* note 8, at 12.

110. COHEN ET AL., *supra* note 20, at 158; EPSTEIN, *supra* note 92, at 91–92; WARE, *supra* note 92, at 251–52.

111. EPSTEIN, *supra* note 92, at 90; WARE, *supra* note 92, at 251.

112. DAVIS, *supra* note 8, at 59–60; EPSTEIN, *supra* note 92, at 90; Steger, *supra* note 82, at 456.

113. DAVIS, *supra* note 8, at 15–17; MCCORMICK, *supra* note 13, at 212.

War II.¹¹⁴ Nonetheless, the emergence of presidential primaries permanently transformed American nominations,¹¹⁵ as the traditional party function of candidate selection had fallen under the yoke of state regulation, and rank-and-file partisans had gained an initial foothold in the nomination process.¹¹⁶

Following the primary movement's ebb tide during the interwar years, presidential primaries enjoyed a resurgence after 1945, with a string of outsider candidates turning to primaries in hope of vaulting their insurgent candidacies.¹¹⁷ The majority of these dark-horse contenders would come up short. Republican Governor Harold Stassen and Democratic Senator Estes Kefauver, for example, both failed to secure their parties' nominations despite strong primary performances in 1948 and 1952, respectively.¹¹⁸ However, General Dwight Eisenhower demonstrated the efficacy of this approach when he suddenly emerged as the GOP frontrunner after his impressive victory in the New Hampshire primary—a contest he won while serving as NATO Supreme Commander in Europe and despite not having his name on the ballot.¹¹⁹ Similarly, John F. Kennedy used a seven-for-seven primary record to prove his viability as a candidate to party leaders skeptical of his Catholic faith and youthful inexperience.¹²⁰ Some commentators have gone so far as to suggest that Kennedy effectively “forced” himself on an unwilling Democratic Party through this primary strategy.¹²¹ Yet, although presidential primaries had unquestionably emerged as a significant force in major-party nominations by the 1960s,¹²² their ascendancy over caucuses, as well as a more

114. DAVIS, *supra* note 8, at 16; MCCORMICK, *supra* note 13, at 212.

115. WARE, *supra* note 92, at 227.

116. See DAVIS, *supra* note 8, at 12; WARE, *supra* note 92, at 57.

117. DAVIS, *supra* note 8, at 13, 17; MCCORMICK, *supra* note 13, at 212–13; WARE, *supra* note 92, at 251.

118. DAVIS, *supra* note 8, at 17; MCCORMICK, *supra* note 13, at 212–13.

119. See COHEN ET AL., *supra* note 20, at 133, DAVIS, *supra* note 8, at 17; MCCORMICK, *supra* note 13, at 212–13.

120. See COHEN ET AL., *supra* note 20, at 124–29, 347; DAVIS, *supra* note 8, at 13; EPSTEIN, *supra* note 92, at 91–92.

121. COHEN ET AL., *supra* note 20, at 125–26. *But see id.* at 125–27, 180 (arguing that Kennedy had not “forced the hand of the party” but rather that party insiders chose him over his rivals based on his strong track record in the primaries).

122. EPSTEIN, *supra* note 92, at 92–93.

profound takeover of the system by rank-and-file partisans, would come only after the dramatic events of the late 1960s.

V. A MODERN SYSTEM EMERGES: THE MCGOVERN-FRASER COMMISSION'S ACCIDENTAL REVOLUTION

The third great burst of nomination reform came in direct response to the tumultuous 1968 Democratic National Convention in Chicago. Priming the fuse for this explosive episode was a confluence of historical developments: the increasingly acrimonious Vietnam protest movement, President Lyndon Johnson's abrupt withdrawal from the presidential race, newly empowered civil and women's rights movements, and the assassinations of both Martin Luther King, Jr., and Robert Kennedy.¹²³ Also significant was the counterculture emphasis on "openness" and arrogating "power to the people" at the expense of traditional authorities¹²⁴—an outlook reinforced by growing expectations of a popular role in the nomination process, thanks in part to the precedent set by JFK and Eisenhower. Thus, when Vice President Hubert Humphrey beat out his antiwar rival, Senator Eugene McCarthy, for the 1968 Democratic nomination without having entered a single primary contest, the powder keg of frustration exploded.¹²⁵ Complaints about the legitimacy of Humphrey's victory and other inequities in the nomination process generated sympathy across a broad swath of Democrats,¹²⁶ but it was a small band of McCarthy loyalists who led the charge for change.¹²⁷

Smarting from what they perceived as an unjust result at the Connecticut Democratic State Convention, the McCarthyites decided to stand up an ostensibly "neutral" investigative commission to produce a report on party rules and delegate selection that would anchor a credentials challenge at the National Convention.¹²⁸ Formally christened the Commission on the Democratic Selection of Presidential Nominees,¹²⁹ the so-called Hughes

123. See COHEN ET AL., *supra* note 20, at 127–28, 157; DAVIS, *supra* note 8, at 20, 60.

124. See COHEN ET AL., *supra* note 20, at 2; MCCORMICK, *supra* note 13, at 229.

125. COHEN ET AL., *supra* note 20, at 1, 157–58, 163; DAVIS, *supra* note 8, at 20, 60.

126. See COHEN ET AL., *supra* note 20, at 158; DAVIS, *supra* note 8, at 60.

127. See BYRON E. SHAFER, QUIET REVOLUTION 13 (1983).

128. *Id.* at 13–16.

129. *Id.* at 16; DAVIS, *supra* note 8, at 20.

Commission was an “evanescent entity,”¹³⁰ convening for only one day and completing its work over a few short weeks.¹³¹ Nevertheless, the Commission’s impact would prove enduring.

The resulting report, entitled *The Democratic Choice*, pronounced that the Democratic convention process stood “on trial” and indicted the party’s delegate selection mechanisms and convention procedures for “display[ing] considerably less fidelity to the basic democratic principles than a nation which claims to govern itself can safely tolerate.”¹³² To remedy the ills of the nomination process, the Hughes Commission urged the Democratic National Convention to require state parties to comply with five principles in selecting delegates: (1) “meaningful access,” including clearly prescribed rules and truly open party meetings; (2) “clarity of purpose,” referring to the separation of delegate elections from other party votes; (3) “timely selection,” meaning that delegates must be chosen within six months of the Convention (as one-quarter of the 1968 delegates had been tapped at least two years in advance); (4) “fair apportionment,” based on the standard of “one man, one vote”; and (5) “fair representation of voter preferences,” which would require the adoption of proportional-representation over winner-take-all schemes and the elimination of the “unit rule,”¹³³ under which the majority of a state’s delegates could cast the vote of the entire delegation as a bloc.¹³⁴ The Commission also called for the abolition of delegate-selection procedures allowing for the direct appointment of delegates by party executives,¹³⁵ lamenting that four state

130. SHAFER, *supra* note 127, at 14.

131. *Id.* at 14, 19, 21.

132. See COMM’N ON THE DEMOCRATIC SELECTION OF PRESIDENTIAL NOMINEES, THE DEMOCRATIC CHOICE 2 (1968) [hereinafter HUGHES COMM’N REPORT]. For an overview of the singular convening of the Hughes Commission in late August 1968 and of the drafting process behind *The Democratic Choice*, see SHAFER, *supra* note 127, at 21–25.

133. The report discusses these five principles in two chapters. See HUGHES COMM’N REPORT, *supra* note 132, at 5–6, 18–19. It also details the problems affecting political minorities, which overlap with the fifth principle, in a separate section. See *id.* at 30–32.

134. *Id.* at 3, 47; DAVIS, *supra* note 8, at 21; SHAFER, *supra* note 127, at 26. For a brief history of the unit rule’s development and use in both parties, see HUGHES COMM’N REPORT, *supra* note 132, at 47–49.

135. See HUGHES COMM’N REPORT, *supra* note 132, at 5, 20–23.

executive committees and two governors had selected their entire delegations to the 1968 National Convention.¹³⁶

At the Convention itself, the reform forces wielded an influence disproportionate to their numbers. In an effort to restore party unity¹³⁷—or more cynically, to undercut the McCarthyites¹³⁸—Humphrey declared his support for an end to the unit rule.¹³⁹ As a further sop to the dissidents, establishment Democrats “conceded that something should be done” regarding delegate selection¹⁴⁰ and agreed to proposals calling for a commission of inquiry on the subject.¹⁴¹ However, the reformers scored their biggest victory on the floor of the Convention, where a confluence of brilliant strategy and sheer luck led to the adoption of the McCarthyite-drafted Minority Report of the Rules Committee.¹⁴² Aside from its significance as “the only insurgent victory of the [C]onvention,”¹⁴³ the Report called for concrete requirements that would be imposed on state parties in 1972 and thereafter. Thus, according to Professor Byron Shafer, the Minority Report “was to become the ‘mandate’—the hunting license, really—for the greatest systematic change in presidential nominating procedures in all of American history.”¹⁴⁴

The “revolutionary change” to which Professor Shafer alludes was brought about by the celebrated McGovern-Fraser Commission,¹⁴⁵ which was convened only after Richard Nixon

136. *See id.* at 20–23; *see also* DAVIS, *supra* note 8, at 21.

137. *See* DAVIS, *supra* note 8, at 21, 60.

138. *See* SHAFER, *supra* note 127, at 26.

139. Roy Reed, *Humphrey Asks Abolition of Unit Rule at Convention*, N.Y. TIMES, July 30, 1968, at 1.

140. *See* DAVIS, *supra* note 8, at 60.

141. *See* WARE, *supra* note 92, at 252. As Professor Shafer explains in detail, the McCarthyites on the Rules Committee failed to win adoption of the Hughes Commission recommendations, but mainstream Democrats agreed to slate many of the issues for future study. *See* SHAFER, *supra* note 127, at 29–30 (providing a copy of the Majority Report of the Rules Committee). Concurrently, with a sympathetic delegate assigned the pen for the Majority Report of the Credentials Committee, the reformers succeeded in calling for a “Special Committee” on delegate selection. *Id.* at 31–32 (providing a copy of the Majority Report of the Credentials Committee).

142. SHAFER, *supra* note 127, at 30–38 (providing a copy of the Minority Report of the Rules Committee).

143. *Id.* at 34.

144. *See id.* at 28 (emphasis omitted); *see also id.* at 4–6 (comparing this third wave of reform to the invention of convention system in the 1830s and the introduction of primaries in 1900s).

145. *See id.* at 4.

defeated Humphrey in November 1968 and the leadership at the Democratic National Committee had turned over.¹⁴⁶ With the blessing of Humphrey, still the titular leader of his party, the reform-minded Senator Fred Harris became the new Democratic National Chairman in January 1969.¹⁴⁷ Upon his election, Harris quickly set off to the delicate task of standing up the prescribed commission and selecting its membership—most importantly, the compromise chairman, George McGovern.¹⁴⁸ Officially known as the Commission on Party Structure and Delegate Selection, this task force was formally appointed in February 1969 and set off to work the next month.¹⁴⁹ Based on field hearings in seventeen cities and extensive staff work, the McGovern-Fraser Commission adopted a set of reform Guidelines in November 1969.¹⁵⁰

The Commission's report, *Mandate for Reform*, first addressed the shortcomings in the delegate-selection process of 1968, which it broke into three categories: (1) procedural irregularities—the biggest source of abuse; (2) discrimination based on race, gender, and age; and (3) structural irregularities.¹⁵¹ Procedural irregularities included, for example, the absence or inadequacy of written rules for delegate selection;¹⁵² the abuse of proxy voting at state party meetings;¹⁵³ and the inadequacy of public noticing for precinct caucus times and locations.¹⁵⁴ Second, the Commission lamented that the representation of blacks, women, and youths was substantially below their relative proportions of the general population.¹⁵⁵ Finally, and re-

146. DAVIS, *supra* note 8, at 60–61.

147. SHAFER, *supra* note 127, at 47–51.

148. For an intensive discussion of the politics and process that shaped the makeup of the Commission, as well as a full list of commissioners, see *id.* at 52–67.

149. See *id.* at 59; COMM'N ON PARTY STRUCTURE & DELEGATE SELECTION TO THE DEMOCRATIC NAT'L COMM., MANDATE FOR REFORM 10, 14–15 (1968) [hereinafter MCGOVERN-FRASER COMM'N REPORT]; see also Davis, *supra* note 8, at 22.

150. MCGOVERN-FRASER COMM'N REPORT, *supra* note 149, at 15–16.

151. See *id.* at 17–32; see also DAVIS, *supra* note 8, at 20–21.

152. See MCGOVERN-FRASER COMM'N REPORT, *supra* note 149, at 21–22 (finding that ten states had no written rules whatsoever).

153. See *id.* at 11, 23 (citing one caucus at which proxy votes outnumbered attendees by more than a three-to-one ratio and led to a different outcome); see also DAVIS, *supra* note 8, at 21.

154. See MCGOVERN-FRASER COMM'N REPORT, *supra* note 149, at 11, 23; see also DAVIS, *supra* note 8, at 20–21.

155. See MCGOVERN-FRASER COMM'N REPORT, *supra* note 149, at 11, 26–29.

hashing a number of the Hughes Commission's findings, the Report identified a number of structural irregularities, such as the untimely selection of delegates,¹⁵⁶ the automatic appointment of unbound ex officio delegates,¹⁵⁷ apportionment of districts inconsistent with the principle of one person, one vote;¹⁵⁸ and the indirect method of appointing of delegates by party committee.¹⁵⁹ Given the scope and depth of these problems, the Commission reached the general conclusion that "meaningful participation of Democratic voters in the choice of their presidential nominee was often difficult or costly, sometimes completely illusory, and, in not a few instances, impossible."¹⁶⁰

To a varying extent, these evils all became targets for reform in the Commission's eighteen Guidelines for delegate selection, which were "designed to eliminate the inequities in the delegate selection process" and to "open the door to all Democrats."¹⁶¹ At the broadest level, the Guidelines are significant because the National Convention had provided that these "recommendations" would be binding on all state Democratic parties.¹⁶² Thus, for the first time in American history, a political party orchestrated a large-scale overhaul of the nomination process and achieved some degree of standardization across state lines.¹⁶³ More concretely, the Guidelines gave rank-and-file partisans a direct voice in the process like never before—at last fulfilling the Progressive dream of transforming nominations from an elite-controlled institution to one of mass participation.¹⁶⁴ Critical in this regard was the Commission's requirement that delegates run pledged to particular candidates. This reform spelled the end of brokered conventions,¹⁶⁵ as delegates now

156. *See id.* at 10, 29–30 (showing that delegates from twenty-four states—accounting for thirty-three percent of the total 1968 National Convention delegation—were selected before the election year); *see also* DAVIS, *supra* note 8, at 21.

157. *See* MCGOVERN-FRASER COMM'N REPORT, *supra* note 149, at 31; *see also* DAVIS, *supra* note 8, at 22.

158. *See* MCGOVERN-FRASER COMM'N REPORT, *supra* note 149, at 31–32.

159. *See id.* at 32.

160. *See id.* at 10.

161. *Id.* at 12, 33, 49.

162. *See id.* at 8, 12.

163. *See* SHAFER, *supra* note 127, at 524 ("The formal changes were clearly the most extensive in 140 years; they were the most extensive *planned* changes in the entire history of American parties."); *see also* DAVIS, *supra* note 8, at 60.

164. DAVIS, *supra* note 8, at 61; REDLAWSK ET AL., *supra* note 8, at 218.

165. COHEN ET AL., *supra* note 20, at 161–62; DAVIS, *supra* note 8, at 61–62.

owed fealty to candidates themselves rather than to state party leaders.¹⁶⁶ Equally important for the devolution of control over nominations, the McGovern-Fraser Commission unintentionally touched off a major wave of mandatory primary laws.¹⁶⁷ The new national rules created a variety of incentives for state party officials to lobby their legislatures to mandate primaries rather than reform caucus procedures.¹⁶⁸ As a result, primaries rapidly became the dominant means of delegate selection. In 1968, sixteen states held primaries, but that number was up to thirty by 1976.¹⁶⁹ As Professor Davis summarizes this radical change:

[I]nstead of nearly three quarters of the national convention delegates being chosen in the caucus-convention states, as was the case in 1968, the ratio was almost completely reversed. By 1980, almost three quarters of the national convention delegates were now elected by the voters in primary states and pledged to specific presidential candidates Presidential primaries became the name of the game.¹⁷⁰

Further, given that three-fifths of state legislatures were dominated by Democrats in the late 1960s,¹⁷¹ the adoption of primary laws pulled Republicans along with tide of reform.¹⁷²

In sum, despite limited fanfare at the time of their adoption, the McGovern-Fraser reforms overturned 130 years of the traditional brokered conventions,¹⁷³ fundamentally shifted power

166. COHEN ET AL., *supra* note 20, at 161–62; DAVIS, *supra* note 8, at 28.

167. DAVIS, *supra* note 8, at x, 28; *see also* SHAFER, *supra* note 127, at 198–99 (“[T]he assumption among those commission personnel who focused on the issue was that participatory conventions . . . would become the dominant device for delegate selection nationwide.”).

168. Professor Davis, for example, explains that state party leaders feared that the new “ground rules” would lead to more extreme nominees under the caucus-convention system and thus turned to the primary for its moderating effect. *See* DAVIS, *supra* note 8, at 35. Professor Ranney, on the other hand, suggests that officials pushed for primaries out of expediency: “[some] state Democratic parties . . . decided that rather than radically revise their accustomed ways of conducting caucuses and conventions . . . it would be better to split off the process for selecting national convention delegates and let it be conducted by a state-administered primary which the national party would have to accept.” *See* Ranney, *supra* note 10, at 74.

169. REDLAWSK ET AL., *supra* note 8, at 218.

170. DAVIS, *supra* note 8, at 34–36.

171. *Id.* at 35.

172. *See id.* at 35, 61; REDLAWSK ET AL., *supra* note 8, at 218.

173. DAVIS, *supra* note 8, at 62; *see also* COHEN ET AL., *supra* note 20, at 8 (“The traditional instrument of party control, the party nominating convention, was eviscerated by reform.”).

from party bosses and insiders to rank-and-file partisans and primary voters,¹⁷⁴ and—a few minor subsequent adjustments notwithstanding¹⁷⁵—gave America the nomination system that prevails today.

VI. CONNECTING HISTORY TO TODAY: TWO GOALPOSTS FOR REFORMING THE PRESIDENTIAL NOMINATION PROCESS

To demonstrate how the academic rubber of this Note meets the road of reality—and hopefully to steer recent overtures for reform onto a more productive path—this concluding section turns to two recent cases in which candidate selection rules have generated significant controversy. In addition to validating the continued relevance of this topic, both anecdotes yield a variety of useful policy insights. Most importantly, when considered together, these stories help to define two goalposts demarking the sweet spot for future reform. Stated simply, the nomination process still needs further updating, but political parties must lead the reform charge—that is, unless and until America is ready to fundamentally reconsider the partisan-nomination process that has reigned since the early days of the Republic.

A. *The Near Goalpost: Missouri's Raucous Caucus and the Need for Further Reform*

The first vignette comes from the events that originally inspired this research topic four years ago. During the run-up to the 2012 elections, a combination of state law, national party rules, political gamesmanship, and a remarkable degree of stubbornness conspired to subject Missouri voters to a nomination process that can be described as nothing less than bizarre.¹⁷⁶ The Midwestern bellwether ultimately featured a

174. Sekercioglu, *supra* note 99, at 669–70; Steger, *supra* note 82, at 456.

175. Heather R. Abraham, *Legitimate Absenteeism: The Unconstitutionality of the Caucus Attendance Requirement*, 95 MINN. L. REV. 1003, 1009 (2011) (“While party attempts to reform delegate selection have not subsided, recent changes have been more incremental.”); THOMAS GANGALE, FROM THE PRIMARIES TO THE POLLS: HOW TO REPAIR AMERICA’S BROKEN PRESIDENTIAL NOMINATION PROCESS 21 (2008) (surmising that parties have only “tinker[ed] around the edges” with nomination reform since the McGovern-Fraser revolution).

176. The Author of this Note experienced the confusion and excitement of the Missouri caucus process firsthand, working as a director of caucus-convention

mixed primary-caucus-convention system with a nonbinding primary open to all voters and Republican-only caucuses and conventions that determined the state's real victor.¹⁷⁷ The root of this madness can be traced to a seemingly innocuous statute that required Missouri election officials to hold a "statewide presidential preference primary . . . on the first Tuesday after the first Monday in February of each presidential election year."¹⁷⁸ Unfortunately for the Show Me State, although this law had been on the books since 2002, it ran afoul of rules adopted by the Democratic and Republican National Committees (DNC and RNC, respectively) in 2010 to protect the status of four early-voting "carve out" states.¹⁷⁹

operations in Missouri for the Romney campaign, before joining the Iowa field staff for the 2012 general election.

177. See generally Chris Blank, *Missouri goes ahead with primary in spite of cost, low impact*, COLUMBIA MISSOURIAN (Oct. 22, 2011), http://www.columbiamissourian.com/news/missouri-goes-ahead-with-primary-in-spite-of-cost-low/article_dab442ec-b82f-5f3e-992e-16df6552927f.html [<http://perma.cc/D4XE-EUXK>]; Chris Good, *Why Missouri Is Holding a 'Meaningless' Primary*, ABC NEWS (Feb. 7, 2012), <http://abcnews.go.com/blogs/politics/2012/02/why-missouri-is-holding-a-meaningless-primary/> [<http://perma.cc/2AQH-KD7D>]; Jo Mannies, *Missouri Republican Party sticks with its plan to ignore Feb. 7 primary*, ST. LOUIS BEACON (Dec. 27, 2011), http://www.stlbeacon.org/#!/content/14388/missouri_republican_party_sticking_with_its_plan_to_ignore_feb_7_primary [<http://perma.cc/7G53-ED3T>]; Virginia Young, *Republicans angered over Jay Nixon veto of primary bill*, ST. LOUIS POST-DISPATCH (July 12, 2011), http://www.stltoday.com/news/local/govt-and-politics/article_32045f02-ad71-5ccb-99d3-15980f190840.html [<http://perma.cc/3T9E-58LS>]; Jeff Zeleney, *In Missouri, the G.O.P. Fight for Delegates Enters Round 2 (Post-Beauty Contest)*, N.Y. TIMES (Mar. 16, 2012), http://www.nytimes.com/2012/03/17/us/politics/in-missouri-the-gop-fight-for-delegates-enters-round-2-post-beauty-contest.html?_r=0 [<http://perma.cc/EZC6-R9H4>].

178. See MO. REV. STAT. § 115.755 (2012) (amended Aug. 28, 2015); see also *id.* § 115.123(2) (2012) (amended Aug. 28, 2015).

179. See DEMOCRATIC NAT'L COMM., DELEGATE SELECTION RULES FOR THE 2012 DEMOCRATIC NATIONAL CONVENTION 10 (2010) (as adopted by the Democratic National Committee on Aug. 20, 2010) (Rule 11) ("No meetings, caucuses, conventions or primaries . . . may be held prior to the first Tuesday in March or after the second Tuesday in June in the calendar year of the national convention [except Iowa, New Hampshire, Nevada, and South Carolina]."); REPUBLICAN NAT'L COMM., THE RULES OF THE REPUBLICAN PARTY 18 (2010) (as adopted by the 2008 Republican National Convention on Sept. 1, 2008, and amended by the Republican National Committee on Aug. 6, 2010) (Rule 15(b)(1)) [hereinafter GOP RULES] ("No primary, caucus, or convention to elect, select, allocate, or bind delegates to the national convention shall occur prior to the first Tuesday in March in the year in which a national convention is held. Except Iowa, New Hampshire, South Carolina, and Nevada may begin their processes at any time on or after February 1"); see also Mannies, *supra* note 177.

Missouri Democrats were quickly spared from this conflict of authorities, as they received a reprieve on the rule violation from the DNC.¹⁸⁰ The Missouri GOP, however, found no such saving grace. As a result, Republicans were left scrambling to bring state law into compliance with party rules. Interestingly, the primary motive animating state party leaders was preserving access to the GOP's hotel bloc and other National Convention privileges,¹⁸¹ although they also hoped to avoid losing half of the state's delegation to the Convention.¹⁸² Yet, despite several attempts to find a legislative solution, the Republican-dominated Missouri Legislature failed to reach a compromise with Democratic Governor Jay Nixon.¹⁸³ Left with no clear alternative, the Missouri Republican Party seized on a statutory loophole to avert hotel catastrophe; given that the state primary was not technically binding,¹⁸⁴ party officials simply would treat the vote as a "beauty contest" and hold a series of caucuses and conventions to determine a winner among the field of GOP hopefuls.¹⁸⁵

Aside from the pitfall of wasting seven million dollars of state funds on an irrelevant primary that would draw only

180. See Frank Leone, *DNC RBC Approves State Plans*, DEMRULZ (Dec. 11, 2011), <http://demrulz.org/dnc/dnc-rbc-approves-state-plans> [<http://perma.cc/A4LG-MXW3>]; see also Mannies, *supra* note 177.

181. Such sanctions are provided for in *The Rules of the Republican Party*. See GOP RULES, *supra* note 179, at 26 (Rule 16(e)(3)). Access to the RNC's hotel bloc, in particular, can serve as a powerful cudgel because other accommodations in the convention host city are generally in short supply. See Philip Rucker, *Uncertain 2012 primary calendar creates chaos for Republican leaders*, WASH. POST (Aug. 4, 2011), http://www.washingtonpost.com/politics/uncertain-2012-primary-calendar-creates-chaos-for-republican-leaders/2011/08/04/gIQA3px4uI_story.html [<http://perma.cc/4CUB-W68M>].

182. See GOP RULES, *supra* note 179, at 24–25 (Rule 16(a)).

183. For an overview of the efforts to amend the Missouri Code between January and September 2011, including one bill that passed both Chambers of the Missouri Legislature but was vetoed by Governor Jay Nixon, see *Election 2012 - Presidential Primaries, Caucuses, and Conventions*, THE GREEN PAPERS (last modified June 25, 2012, 11:55 AM), <http://www.thegreenpapers.com/P12/> [<http://perma.cc/DZC5-U5BG>]. See also Good, *supra* note 177; Mannies, *supra* note 177; Young, *supra* note 177; *2012 Republican Delegate Allocation: Missouri*, FRONTLOADING HQ (Feb. 7, 2012, 11:45 PM), http://frontloading.blogspot.com/2012/02/2012-republican-delegate-allocation_5174.html [<http://perma.cc/6HF6-MVGP>] [hereinafter *2012 MO GOP Delegate Allocation*].

184. See MO. REV. STAT. § 115.755 (2012) (providing for a presidential preference primary); see also Mannies, *supra* note 177.

185. See MO. REPUBLICAN STATE COMM., *2012 CALL TO CONVENTION* (2012); see also Blank, *supra* note 177; Good, *supra* note 177; Mannies, *supra* note 177.

eight percent of registered voters,¹⁸⁶ this creative parsing of Missouri's primary law at first seemed to be a clever means of avoiding party sanctions. That is, until Republicans discovered that their institutional memory for caucusing had all but evaporated since Missouri's last caucus in 1996.¹⁸⁷ As the *St. Louis Post-Dispatch* aptly put it, "The state party ha[d] not used a caucus to select its choice for presidential preference in 16 years—and the rust showed."¹⁸⁸

Delays, confusion, and acrimony were widely reported across the state,¹⁸⁹ but the epicenter of caucus chaos was undoubtedly St. Charles County—a suburban area near St. Louis and the largest single prize in the first round of the caucus-convention process.¹⁹⁰ The meeting of roughly 2,500 Republicans, which convened at a local high school, was shut down by police before any substantive votes could be taken due to increasingly heated opposition to how the caucus was being run.¹⁹¹ Driven mostly by candidate preference, around half of the caucus objected to a voice vote on the meeting's chair, as well as a rule banning the use of cell phones, video cameras, and other recording devices.¹⁹²

186. Paul Hackbarth, *List of candidates in Missouri presidential primary finalized*, ROLLA DAILY NEWS (Jan. 10, 2016), <http://www.therolladailynews.com/article/20160110/NEWS/160119985> [<http://perma.cc/KV4E-BB8U>].

187. See 2012 MO GOP Delegate Allocation, *supra* note 183. For a brief history of the various nomination mechanisms the Show Me State has employed over the years, see Jo Mannies, *Missouri's Longstanding Dispute Over Presidential Primaries May Be Resolved*, ST. LOUIS PUBLIC RADIO (June 4, 2014), <http://news.stlpublicradio.org/post/missouris-longstanding-dispute-over-presidential-primaries-may-be-resolved> [<http://perma.cc/3DPR-8GQE>].

188. *Raucous GOP caucus in St. Peters is shut down*, ST. LOUIS POST-DISPATCH (Mar. 17, 2012), http://www.stltoday.com/news/local/govt-and-politics/raucous-gop-caucus-in-st-peters-is-shut-down/article_a8eb35ec-7050-11e1-acac-0019bb30f31a.html [<http://perma.cc/9RJ4-MNC8>] [hereinafter *Raucous Caucus*].

189. See, e.g., *Contention, confusion mar Missouri caucuses*, USA TODAY (Mar. 17, 2012), <http://usatoday.com/news/politics/story/2012-03-17/missouri-GOP-caucus/53587822/1> [<http://perma.cc/8RLX-6QHE>] [hereinafter *Contention, Confusion Mar Caucuses*]; *Raucous Caucus*, *supra* note 188.

190. *Raucous Caucus*, *supra* note 188.

191. See *Contention, Confusion Mar Caucuses*, *supra* note 189; *Raucous Caucus*, *supra* note 188; Jim Salter, *Missouri GOP reschedules St. Charles County caucus after raucous first go-around*, COLUMBIA MISSOURIAN (Mar. 23, 2012), http://www.columbiainmissourian.com/news/missouri-gop-reschedules-st-charles-county-caucus-after-raucous-first/article_bf0c6811-281a-5ee6-8504-4b54f4f779e7.html [<http://perma.cc/GY2W-PZVB>].

192. See *Contention, Confusion Mar Caucuses*, *supra* note 189; *Raucous Caucus*, *supra* note 188; Salter, *supra* note 191.

USA Today recounts the mayhem that ensued after the protest reached a fever pitch:

Two off-duty St. Peters police officers, who had been hired for the event by Republicans, called in for support from five law enforcement agencies, including the Missouri State Highway Patrol. A police helicopter arrived at the scene. [The chairman] made a motion to adjourn the caucus, and two people were arrested for trespassing after they refused to leave¹⁹³

More succinctly, in the words of one caucus-goer, “It was a joke. It was a complete joke.”¹⁹⁴

In addition to its entertainment value, this colorful episode leads unavoidably to the section’s first policy prescription. Although St. Charles Republicans ultimately reconvened their caucus without issue,¹⁹⁵ their frustrating false start—along with similar, if less dramatic, experiences across the state—demonstrates the need for clearer rules and transparency-promoting measures to ensure a smooth nomination process, especially when caucuses are involved. Further, despite the many changes to the nomination process highlighted in the sections above, the very fact that such a mixed primary-caucus-convention system is even possible makes clear that there is more work to be done. Thus, the first goalpost of reform is that *some additional degree of regulation by some authority remains necessary* if the American candidate-selection process is to promote the fundamental goal of free and fair elections.

B. *The Far Goalpost: Recent Critiques and the Limits of Reform in a System of Party Nominations*

Pushing in the opposite direction, and marking the far goalpost of reform, *government-driven regulation cannot alone remedy the remaining woes of candidate selection—at least not under the current system of partisan nominations*. Advocates of reform must bear in mind that there are important limits to state and federal regulatory authority over party nominations and that the rights of participants in primaries and caucuses differ from those of general-election voters. The 2016

193. See *Contention, Confusion Mar Caucuses*, *supra* note 189.

194. See *Raucous Caucus*, *supra* note 188.

195. See Salter, *supra* note 191.

presidential campaign has been replete with confusion regarding both of these points.

Most prominently, the Trump and Sanders campaigns have deemed the current nomination process “unfair,” “undemocratic,” “rigged,” or worse, without sufficient justification.¹⁹⁶ The accuracy of these labels aside, the specific charges alleged by both camps demonstrate a clear misunderstanding of *partisan* nominations. For better or for worse, America long ago delegated the responsibility for tapping presidential candidates to political parties. Thus, until reformers begin advocating for an alternative, apolitical nomination process, the system will continue to favor party interest and not esoteric values like fairness and democracy. As Bruce Cain plainly surmises, “[I]n the end,

196. For a selection of Mr. Trump’s views on the nomination process, see, for example, Tim Hains, *Trump: The Two-Party Political System Is 100% Rigged, “It’s A Crooked Deal,” “I See It With Bernie Too”*, REALCLEAR POLITICS (Aug. 11, 2016), http://www.realclearpolitics.com/video/2016/04/11/trump_the_two-party_political_system_is_rigged_a_crooked_deal_and_i_see_it_with_bernie_too.html [<http://perma.cc/7L9Z-6N27>] (“The system is rigged. I see it now, 100%. And not just on our side, but I think it is worse on the Republican side.”); Tara Setmayer, Editorial, *Trump’s hypocrisy on delegate count in New York*, CNN (Apr. 21, 2016), <http://www.cnn.com/2016/04/20/opinions/trump-delegate-complaint-hypocrisy-setmayer/> [<http://perma.cc/7FGA-BBJU>] (discussing the Trump campaign’s allegations that Cruz won “voterless victories” in Colorado and other states); strieff, *Donald Trump Thinks It Is Unfair That He Needs To Win the Most Delegates*, RED-STATE (Mar. 20, 2016), <http://www.redstate.com/strieff/2016/03/20/video-donald-trump-thinks-unfair-needs-win-delegates/> [<http://perma.cc/XB9B-F3MM>] (distilling Mr. Trump’s complaints regarding the procedures of the Republican National Convention).

For a similar sampling of condemnation from Senator Sanders and his supporters, primarily focusing on Democratic superdelegates, see Peter Grier, *Bernie Sanders says superdelegates are unfair. True?*, CHRISTIAN SCI. MONITOR (May 2, 2016), <http://www.csmonitor.com/USA/Politics/Decoder/2016/0502/Bernie-Sanders-says-superdelegates-are-unfair.-True> [<http://perma.cc/6QA9-BESW>] (noting that Senator Sanders has argued “that the free-to-choose ‘superdelegates’ should align with the voters within their own states”); Ben Norton, *“This system is so rigged”: Outrage as undemocratic superdelegate system gives Clinton unfair edge over Sanders*, SALON (Apr. 12, 2016), http://www.salon.com/2016/04/12/this_system_is_so_rigged_outrage_as_superdelegate_system_undermines_democracy_giving_clinton_unfair_edge_over_sanders/ [<http://perma.cc/UJ9N-FUYH>] (describing superdelegates as “unelected party nobility” and bemoaning that although “Sanders won 8 of the 9 past primary contests by double digits . . . Hillary got more delegates. Even MSNBC is angry.”); Jeff Stein, *Bernie Sanders’s war with Nevada Democrats, explained*, VOX (May 17, 2016), <http://www.vox.com/2016/5/17/11680904/bernie-sanders-nevada-convention> [<http://perma.cc/W34Y-5GQE>] (“Even before Sanders himself decried Nevada’s particular rules, his supporters were echoing complaints he’s made for months now about the fairness of the Democratic Party’s primary contest.”).

the bottom line for parties is winning or losing, not the quest for perfect rules.”¹⁹⁷

The fact that nominations are driven by party interest should be unsurprising to even the most casual observer of American elections. Consider the nature of caucuses, in particular. These are *party* meetings that convene not to “vote” in the usual sense of the term, but rather, to conduct all manner of *party* business, including the selection of delegates who will ultimately pick the *party’s* standard-bearer.¹⁹⁸ Primaries admittedly present a more muddled case, especially given that these state-run elections grew out of the Progressive conception of parties as public utilities. Nonetheless, the end result of a primary is the same as a caucus; primary voters cast their ballots to select candidates to represent *political parties* in the general election. And regardless of whether reform advocates find this theoretical argument convincing, the Supreme Court has put the matter to rest; the First Amendment protects the right of political parties, as private associations, to make decisions as to candidate selection in all but the most extreme cases.¹⁹⁹

197. See Cain, *supra* note 9, at 155.

198. See, e.g., DAVIS, *supra* note 8, at 45; REDLAWSK ET AL., *supra* note 8, at 10, 24.

199. Starting in the 1970s, the Court has cut back against the treatment of political parties as public utilities. William G. Mayer & Andrew E. Busch, *Can the Federal Government Reform the Presidential Nomination Process?*, 3 ELECTION L.J. 613, 620–21 (2004) (“Through the first six decades of the twentieth century, in short, courts gave every indication that they regarded political parties as public entities, subject to whatever regulations a state chose to impose upon them. Beginning in the early 1970s, however, the pendulum began to swing back in the opposite direction.”) As Justice Stewart later explained, the First Amendment freedom of association guarantees autonomy to political parties in deciding their own nominating procedures, absent a compelling state interest to justify such interference. See *Democratic Party of the U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981).

For recent cases following this pattern, see *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196, 202 (2008) (“A political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform.”); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (declaring that California could not compel Democrats and Republicans to nominate candidates through a blanket primary); *Bachur v. Democratic Nat’l Party*, 836 F.2d 837, 841 (4th Cir. 1987) (finding that a “vote for delegates is some steps removed from a vote for an actual candidate for public office. Delegates for practical purposes constitute the National Party—they make its rules, adopt its platform, provide for its governance, as well as nominate candidates.”). See also Richard L. Hasen, *Whatever Happened to “One Person, One Vote”?*, SLATE (Feb. 5, 2008), <http://www.slate.com/id/2183751> [<http://perma.cc/73PY-3V35>] (“Aside from some really egregious no-nos, such as weighting candidate delegate strength according to the race of their supporters,

Still, the critical notes sounded by the Trump and Sanders campaigns have resonated with many Americans, so it is worth briefly explaining why their songs of lamentation miss the mark. Although rarely described in such terms, the majority of these critiques stem from unease with the clash between the nomination procedures of both major parties and the principle of one person, one vote.²⁰⁰ For example, during an interview on Fox News, Mr. Trump protested the results of the Colorado Republican Convention, alleging that “[t]he system is rigged, it’s crooked That’s not the way democracy is supposed to work.”²⁰¹ He elaborated in an op-ed the next day: “Colorado had an ‘election’ without voters A planned vote had been canceled. And one million Republicans in Colorado were sidelined.”²⁰² Yet, in reality, the Colorado Republican Party merely had swapped its presidential preference primary for a caucus system,²⁰³ still allowing party members to “vote,” just by another means. Thus, Mr. Trump’s allegation that Senator Ted Cruz ran away with “voterless” victories in several states is patently false.²⁰⁴ More defensibly, some observers have noted with unease

courts are likely to stay out of disputes over the rules for choosing the parties’ presidential nominees.”).

200. This standard has been interpreted by the Supreme Court as an implicit guarantee of the Equal Protection Clause of the Fourteenth Amendment. *See generally* *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (offering the most recent elucidation of the principle’s meaning); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (establishing the principle on equal-protection grounds and famously stating that “[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.”).

201. John Whitesides, *Trump blasts ‘rigged’ rules on picking Republican delegates*, REUTERS (Apr. 12, 2016), <http://www.reuters.com/article/us-usa-election-idUSKCN0X81HE> [<http://perma.cc/RSM3-H6HD>].

202. Donald J. Trump, Opinion, *Let Me Ask America a Question*, WALL ST. J. (Apr. 14, 2016), <http://www.wsj.com/articles/let-me-ask-america-a-question-1460675882> [<http://perma.cc/KD3T-Q9JG>].

203. Alan Gathright, *Trump calls Colorado caucus system ‘rigged,’ but there’s no proof rules favor anyone*, POLITIFACT (Apr. 19, 2016, 6:20 PM), <http://www.politifact.com/colorado/statements/2016/apr/19/donald-trump/trump-calls-colorado-caucus-system-rigged-theres-n/> [<http://perma.cc/NT49-X5HJ>].

204. For a powerful rejoinder to Mr. Trump’s claims, see Marc A. Thiessen, Opinion, *Trump’s ‘voterless’ election myth*, WASH. POST (Apr. 18, 2016), http://www.washingtonpost.com/opinions/trumps-voterless-election-myth/2016/04/18/e7e1295e-0567-11e6-bdcb-0133da18418d_story.html [<http://perma.cc/7H4N-P946>] (“These rules were not set by national party elites or big-money donors trying to rig the delegate selection process. They were decided by state and local leaders—soccer moms and teachers, ranchers and Rotarians, pastors and community leaders, small-business owners and elected officials—all of whom participate in local

that caucus votes command more purchasing power than primary votes due to differences in turnout. As *FiveThirtyEight's* Harry Enten explains, while “it’s true that some Republican votes are worth a lot more than others . . . [o]ne person, one vote’ — or the idea that every voter should have equal say in an election — is not the rule in the GOP primary system.”²⁰⁵ The key point that many critics miss is that the Republican Party of Colorado, as a private association, has every right to set the procedural rules it sees fit—as unfair or unwise as the result might seem. If Trump supporters still care about change now that he has effectively clinched the nomination, they must convince fellow Republicans to adopt reforms at the Republican National Convention this year in Cleveland. Otherwise, the candidate’s repeated diatribes will have been for naught.

The Sanders camp’s complaints about the nomination process draw on similar themes. Jane Sanders, for example, has called for same-day registration and more open primaries, suggesting that the Democratic nomination contest “would be very different” if more independents could vote.²⁰⁶ This claim is undoubtedly true, but her appeal misses the point. Senator Sanders is running for the *Democratic* nomination; although state parties are free to open their processes to party outsiders, *Democrats* ultimately control the selection of their party’s standard-bearer. Similarly, although it is easy to criticize the role of Democratic superdelegates as undemocratic, the unelected representatives make perfect sense from a party-building perspective. Deferring again to the wisdom of *FiveThirtyEight*, Nate Silver explains that “[s]uperdelegates were created in part to give Democratic party elites the opportunity to put their finger on the scale and prevent nominations like those of George McGovern in 1972 or Jimmy Carter in 1976” who might be popular among liberals but

Republican Party politics The truth is, there are no voterless elections—there are only hapless campaigns.”).

205. Harry Enten, *Trump’s Right That The GOP Primary Is Unfair — It Favors Him*, FIVETHIRTYEIGHT (Apr. 14, 2016), <http://fivethirtyeight.com/features/trumps-right-that-the-gop-primary-is-unfair-it-favors-him/> [http://perma.cc/UZV4-TP3X] (adding that “[t]he irony . . . is that Trump has benefited from this imbalance”).

206. See Nolan D. McCaskill, *Jane Sanders agrees with Trump on delegate woes*, POLITICO (Apr. 28, 2016), <http://www.politico.com/story/2016/04/jane-sanders-donald-trump-delegates-222605> [http://perma.cc/JEH6-NMD6] (demonstrating that Jane Sanders actually agrees with Mr. Trump on at least one issue: “Now, Donald Trump has a point. The electoral process, the way it’s conducted now, in both parties, is not good It’s not [d]emocratic. It’s not smart.”).

are less electable come November.²⁰⁷ What Jane Sanders and other critics fail to explain is why it would be fairer for independent voters to dictate the outcome of the Democratic nomination than it is for a majority of Democrats to establish the rules and procedures that guide the process for selecting their standard-bearer. Political parties not only have the right to base such decisions on self-interest, but they are also wise to do so if they care about winning the election every fourth November.

Sanders, Trump, and their supporters are certainly entitled to make these arguments for rhetorical effect.²⁰⁸ However, for those who genuinely care about understanding and actually reforming the nomination process, such superficial commentary should be cast aside. Whether good, bad, or indifferent, America has delegated the function of candidate selection to political parties for nearly its entire history. As a result, those hoping to change the system must either appeal directly to the political parties themselves or assume the heavy burden of designing an alternative to what is likely the least bad mode of candidate selection possible.

CONCLUSION

Significantly, as this Note has demonstrated, the American nomination system was never rationally designed. The vast majority of significant reforms to the process occurred on an ad hoc basis, and they were generally motivated by short-term interests rather than a genuine desire to promote the welfare of the country. That said, the evolution of American nominations

207. See Nate Silver, *Superdelegates Might Not Save Hillary Clinton*, FIVETHIRTYEIGHT (Feb. 12, 2016), <http://fivethirtyeight.com/features/superdelegates-might-not-save-hillary-clinton/> [<http://perma.cc/C3Z6-RGPQ>]; see also Walter F. Mondale, Opinion, *Primaries Are No Test of Character*, N.Y. TIMES, Feb. 26, 1992, at 21 (noting that the superdelegate category was created “to reduce the influence of the primaries and boost the influence of party leaders” and arguing for a strengthening of such rules).

208. Indeed, some commentators have suggested that critiques of both candidates have been motivated purely by self-interests. See, e.g., Setmayer, *supra* note 196 (insinuating that Mr. Trump’s criticism is more about dissatisfaction with outcomes than actual concern for the process); Jeff Stein, *Let’s clear up some confusion about the superdelegates and Bernie Sanders*, VOX (May 6, 2016), <http://www.vox.com/2016/5/6/11597550/superdelegates-bernie-sanders-clinton> [<http://perma.cc/5MBX-XGJK>] (suggesting that complaints about Democratic superdelegates “may be just a way for Sanders to argue that he has a path for the nomination and a reason for staying in the race.”).

is not without external logic, as each successive iteration of the process has involved the redistribution of political power and a push toward greater democratization in candidate selection. From King Caucus to the caucus-convention system, and from the emergence of primaries to their ascension in the wake of the McGovern-Fraser Commission, rank-and-file partisans have emerged as perhaps *the* key players—although certainly not the only ones—in the nomination process. The election this November may give reformers pause as to whether it is wise to continue this trend, as the role of independent voters enabled the insurgent candidacies of both Donald Trump and Bernie Sanders to sprout wings. And indeed, the GOP will entertain proposals to forbid non-Republicans from participating in its primaries during the next nomination process. Alternatively, these insurgent candidacies might just have ushered in a fourth wave of reform, perhaps even one in which political parties for the first time lose their grip on presidential nominations.

Whatever comes next, it is critical that anyone hoping to change the candidate-selection system understand where the American nomination process came from before attempting to direct where it will go next.

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