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Why is the presidential nominating system such a mess?

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INTRODUCTION

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Every four years, each major political party nominates someone to run for president of the United States. And every four years, new voters as well as those who have voted many times find themselves asking: why is the presidential nominating system such a mess? Who thought up this ridiculous system that lasts from February to June, then goes into a summer convention? Why does every state seem to do it somewhat differently? Why don't the states have their primaries on one day? Why don't states in the same region have primaries on the same day? What are delegates anyway? And do they even matter?

Absent some sort of meltdown in the current process, a more rational system is not likely any time soon.

So, as the lawyers say, let's stipulate that there are many different ways to organize a presidential nominating system and almost all of them are more rational and orderly than the hodgepodge of systems that voters experience today. But the bottom line is that, absent some sort of meltdown in the current process, a more rational system is not likely any time soon, for reasons we will see later on in this paper.

Let's start with a short description of some of the better, more rational systems.

THE NATIONAL PRIMARY

The most confusing part of the modern presidential nomination system is that, unlike any other system in the American democracy, the nomination system is a sequential system: it unfolds over a period of months, translates into convention delegates and is ratified by a convention. The simpler more straightforward approach would be to simply hold an election on the same day in all fifty states and allow voters to choose which primary they wish to vote in. The idea was first proposed in 1911 and has been introduced in Congress over a hundred times since then, with the same result every time. Party leaders are so opposed to this idea that no legislation has ever been successful and most proposals have never even made it out of committee and to the floor for a vote.

Proposals for a national primary often entail complex plans for how to actually count the votes. Unlike the general election where two candidates generally face off against each other and the majority vote winner in the electoral collage prevails, party primaries tend to have multiple candidates running in them and the plurality winner may not be the preferred candidate. And so, suggestions for national primaries are often accompanied by different kinds of proposals for counting the votes such as: having a runoff primary if no one meets a certain threshold, having approval voting, or having some method for ranking candidates. These ideas seemed truly out to lunch in the days before computers. But these days, ranked voting is quite feasible—logistically that is.

THE REGIONAL PRIMARY

Among party leaders and elected officials, the idea of a regional primary has been more popular than the idea of a national primary, in part because it preserves the sequential nature of the nomination process which allows for a longer look at the potential candidates and for less prominent national candidates to emerge. In 1999 the National Association of Secretaries of State (NASS) proposed the Regional Presidential Primaries Plan. This proposal divided the country into four regions: East, South, Midwest, and West. Following a drawing by lottery to establish the initial order of voting, the first region would hold its primaries on a single date in March, the second on a single date in April, and so on. Every four years the regions would move one position in the sequence: the region that was first would go last and the other regions would move forward.

In the NASS plan and the version of it introduced into Congress as the Regional Primaries Act of 2007, Iowa and New Hampshire would be allowed to hold their contests before the first regional primaries, in order to allow lesser-known candidates a chance to create early momentum. (A slightly different version of the NASS plan was introduced to the Republican Rules Committee; this one did not include a special exemption for Iowa and New Hampshire.)

At an April 2008 conference at Harvard University's Kennedy School of Government, Todd Rokita, Secretary of State of Indiana, defended the NASS plan against one of the most common criticisms: that a candidate who happened to come from the region that voted first that year would have an enormous advantage, otherwise referred to as the "regional favorite-son or daughter issue." Rokita argued, "I think the media and the voters would see that home town advantage and certainly the media would point that out and I think that would be calculated objectively and discounted to the extent necessary for that particular candidate."[1] He's probably right, since traditionally the "expectations game" played by the media tends to correct for a candidate's win in a home state or home region. For instance, in 1988

1 Proceedings: Symposium on the Future of Presidential Primaries, Harvard University, Kennedy School of Government, Institute of Politics, April 29, 2008

Senator Al Gore did not get much of an advantage by winning states in his home region of the South, but Michael Dukakis of Massachusetts got a huge boost from winning contests in Florida and Texas.

In addition to the Secretaries of State, members of Congress have gotten into the act of creating regional primary plans. For some years, members of the Michigan congressional delegation and the Florida congressional delegation forcefully questioned the privileged place of Iowa and New Hampshire in the nomination system. The Michigan Plan (also known as the Levin/Nelson Presidential Primary Reform Bill, the Fair and Representative Presidential Primaries Act of 2007, and the Anuzis-Dingell Plan, each with different sponsors) is one of the most complicated proposals because it tries to solve a variety of problems.

Led by Michigan Congressman Sander Levin, Michigan politicians have waged war on the privileged position enjoyed by Iowa and New Hampshire—to no avail. Not surprisingly his legislation does not preserve those states' traditional first-in-the nation status. Instead it divides the country into six pods in order to give each state the chance to be part of the first voting group. Voting takes place starting in March and goes through June. States can hold their nominating contest at any time during or after their designated month—but not earlier. Each pod contains approximately the same number of electoral votes. In addition, each pod combines states from all across the country. For example, one pod contains two eastern states, Connecticut and Rhode Island; a mid-Atlantic state, West Virginia; two southern states, Arkansas and Georgia; and Oklahoma, Idaho, Nevada, and Utah, for a total of 75 electoral votes. This aspect of the plan, according to Sander Levin, makes it more representative: "Trying to have a representative system . . . meant that you could not do it region by region because there are simply too many differences among the regions. To have the South go first and the Midwest go last or the Midwest go first and the South go last was not going to create a representative system."[2]

Three objections have been raised to the Michigan plan as it was discussed in party meetings. One was that the cost of travel is enormous since each pod would require candidates to campaign all over the country. But Levin points out that the cost of travel in the current system is already enormous. A similar plan was introduced in the Senate by Senator Bill Nelson of Florida, where, like Michigan, political leaders had joined together in opposition to the dominance of the two early states of Iowa and New Hampshire in the nomination system.

Regional primary plans proliferated in advance of the 2008 presidential election, mostly due to a great deal of creative activity in the Republican Party. In 2008, for example, Bill Crocker, a Republican National Committeeman from Texas developed a national primary plan that he submitted to the Republican Rules Committee. Like the NASS plan, it divided the country into four groups; and like the NASS plan, the order in which each group voted would rotate every four years.

However, there are two important differences between this plan and the NASS proposal. The first is in the composition of the groups. Rather than group states by geographic region, the "Texas plan" as it was called, created four roughly comparable groups—that is, groups that as near as practicable had the same number of states, the same number of delegate votes, the same number of electoral votes, and the same ratio of Republican to Democratic states.[3] According to Crocker, "We wound up with balanced groupings of states in each of the four groups, north-

2 Ibid.

3 For example: Group #1 would consist of American Samoa, Arizona, California, Colorado, Delaware, Guam, Hawaii, Kansas, Maryland, Nevada, New Mexico, New York, The Northern Mariana Islands, Pennsylvania and Utah.

south, east-west, red-blue, racially diverse."[4] The second big difference is that the Texas Plan does not require all the states in a group to hold primaries on the same date. States in the first group can have their contests at any time after the first of March, states in the second group any time after the first of April, states in the third group any time during the month of May, and states in the fourth group any time in the month of June. One criticism of the Texas Plan is that the states in each group are geographically far-flung. But Crocker maintains, "The expense of having to appeal to a diverse group of states is far better than, for instance, all of the New England states going first and producing candidates with momentum, at least, if not quasi decisions made for the parties, that appeal to that unique population."[5]

Another variation on the regional primary theme was a plan sponsored by the late Robert T. Bennett, the long-serving chairman of the Ohio Republican Party. This plan was adopted by the Republican Rules Committee on April 2, 2008. However, the McCain campaign signaled, through RNC chairman Mike Duncan, that it did not support the measure and, to the surprise of many, after a fairly rancorous meeting of the Convention Rules Committee, the proposal failed. Not surprisingly, Bennett felt he'd been misled, and the McCain campaign had to deal with the fact that they had a very unhappy party chair of Ohio, a critical state, on their hands. And so, after some acrimonious negotiations between Bennett and the campaign, the Republican reformers got a 15-member commission that would report to the RNC (Republican National Committee) in 2010 and permission for the RNC to write the 2012 rules.

The Ohio plan got farther than many other plans. It allowed Iowa and New Hampshire to retain their traditional first-in-the-nation status. It also permitted Nevada and South Carolina (which the DNC included as early states in the 2008 season) to retain their special status since those two states bring geographic and racial diversity to the early voting period. After that, however, the Ohio plan creates four pods. The first pod consists of 15 small states and territories, each with three to five electoral votes.[6] These states, which collectively hold 55 electoral votes, would be allowed to have contests starting no earlier than the third week in February. They are allowed to go early in order to guarantee a "retail politics" phase in the nomination race. Following the four early states and the group of small states, three other groups of states would rotate through the remaining months.

The logic behind the Ohio Plan was to group states of similar electoral size together with one or two significantly larger "anchor" states. The states in the first group would conduct their contests starting the first full week of March, the second group would vote beginning in the fourth full week of March, and the final group would vote beginning in the third full week of April. According to its author, Bob Bennett, the Ohio plan is a hybrid of many other plans created in the past. Bennett argued its virtues as follows: "If you look at the Delaware plan [discussed below], the big states never get the opportunity to go first, never get an opportunity to make a decision. If you look at California, New York, Texas, Florida, they are going to be put in last continuously. If you look at the rotating NASS plan, the rotating regional plan, the objection that I've heard from many people here is that, since one region becomes dominant four years ahead of time, a governor or a senator who is very popular in that region can work that region [well] and in effect, block out a strong candidate from another region."[7]

The Ohio plan failed at the 2008 Republican convention because the nominee, John McCain, like another nominee, before him, George W. Bush, felt no need to alter the system that had just awarded him the nomination. In 2000,

4 OpCit. Symposium on the Future of Presidential Primaries.

5 Ibid.

6 The small states are Alaska, Delaware, District of Columbia, Hawaii, Idaho, Maine, Montana, Nebraska, New Mexico, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, Wyoming, and the territories.

7 OpCit, Symposium on the Future of Presidential Primaries

another regional primary plan, dubbed the Delaware Plan, was favored by the Republican Party's Rules Committee but defeated by last-minute opposition from George W. Bush's team. The Delaware Plan would have allowed Iowa and New Hampshire to go first and then grouped states into four pods according to population. The first pod contained small states totaling 14 million people and the final one contained large states totaling 160 million people. The plan was first proposed by Robert D. Loevy in a 1992 book on the presidential nominating process.[8] Some years later it was adopted by Basil Battaglia, Republican state party chairman from Delaware, and presented to the 1999 Republican Party's Advisory Commission on the Presidential Nominating Process.

The Delaware plan picked up adherents in the Republican Party but failed ultimately for three reasons. First, big states, coming at the end of the process, feared that their role would be minimized. Second, there was concern that the Democrats would pick a plan that would allow them to select a nominee early and use the remaining months of the Republican contest to mount a general election campaign. And finally, at the eleventh hour, the 2000 Republican nominee, George W. Bush, said no. Like presidential candidates before and after him, he had concluded that there was nothing wrong with a system that had nominated him. Ron Thornburgh, Kansas secretary of state, who presented the Delaware Plan before the RNC Rules Committee in 2000, recalls: "I left the room feeling good and big old Joe Allbaugh sidles up to me with the flat-top haircut and the cowboy boots and said, 'Ron, that was nice but we ain't gonna do it.' And I said, 'But Joe it was great,' and he said 'I know, but we are going to the convention and we don't want any fights over anything; this is to give our candidate a bounce.' And that's what it boiled down to."[9]

THE CONSTITUTIONAL PROBLEM

Most of the ambitious regional plans outlined above seek to preserve the sequential nature of the nominating process while removing the biases in it—especially the biases introduced by having Iowa and New Hampshire always go first. They seek to do away with these biases by creating a particular sequence of state contests. Such a sequence would be difficult, if not impossible, to achieve through voluntary actions on the part of 50 state legislatures. Therefore, most of these plans would require congressional action.

There is considerable constitutional ambiguity surrounding Congress's ability to play a role in this area. Supreme Court Justice Antonin Scalia, writing in 1981 (before he was on the Court), put the issue as follows: "There are three major legal issues bearing upon the ability of the political parties to reform the presidential nominating process. First, what restrictions does the Constitution itself place upon the parties? Second, what restrictions may the states constitutionally impose? And third, what may federal legislation do, by way of restricting either the states or the parties, or by way of facilitating the nominating process? I am sorry to report the answer to none of these questions is entirely clear."[10]

For much of American history, political parties and their activities were treated as private, not public, matters. Indeed, prior to the widespread use of binding presidential primaries—which didn't happen until the 1970s—the entire pre-reform-era nomination system was essentially a semi-private, if not entirely private, enterprise.[11] As state legislatures introduced primaries at the turn of the century, spurred on by the Progressive reform movement, the result was a

8 *The Flawed Path to the Presidency: Unfairness and Inequality in the Presidential Selection Process,* (Albany: State University of New York Press, 1992.)

9 OpCit, Symposium on the Future of the Presidential Primaries

10 "The Legal Framework for Reform," *Commonsense* 4, No. 2, (1981):40.

11 A binding presidential preference establishes the preferences of convention delegates, prior to the 1970s most presidential primaries were beauty contests only.

certain degree of regulation through statutes creating the primaries. But by and large the federal government stayed out of the business of party nominations at all levels.

Then, in 1944, the Supreme Court ruled in *Smith* v. *Allwright* that political parties are state actors and cannot discriminate.[12] At the time, many southern Democratic state parties restricted participation to whites, effectively disenfranchising African Americans. By prohibiting them from voting in primary elections, the state parties, for all practical purposes, prevented African Americans from having any say in the electoral process, given the Democrats' uncontested control of the South. The Supreme Court saw a compelling interest in protecting the right to vote and intervened to prohibit all-white primaries. The Court has also intervened in the political process in several other important cases. In *Burroughs* v.*United States,* decided in 1934, the Court found the Federal Corrupt Practices Act constitutional on the grounds that Congress had the authority to protect the election process from corruption.[13] Similarly in *Buckley* v. *Valeo* (1974) the Court ruled that parts of the new campaign finance law were constitutional because they empowered Congress to prevent corruption in the nominating system.[14] And in *Oregon* v. *Mitchell* (1970) the Court ruled that states had the power to extend the right to vote to those who were 18 years old.[15] Finally, those who argue that the Court would permit Congress to determine the order of voting in the presidential nomination system point to Article II, section I, of the Constitution: "The Congress may determine the Time of chusing [sic] the Electors, and the Day on which they shall give their Votes; which Day shall be the same through the United States."

Proponents of congressional action argue that the above cases, in addition to the Constitution's directives on the Electoral College and on congressional elections, provide plenty of precedent for Congress to be able to set the calendar for presidential nomination contests. Richard Hasen, a law professor, argues that Article 2 of the Constitution, which gives Congress the right to set the date for choosing presidential electors could also be construed to allow Congress to set the date for primaries. "If Congress has the power to set the date for choosing electors, it should also have the power . . . to set the date for choosing primaries."[16]

Opponents of congressional action generally point to two Court cases that support the primacy of political parties in setting their own nomination rules. In *Ray* v. *Blair* (1952) the Supreme Court ruled that it was constitutional for a state to allow a state party to make potential electors to the electoral college sign a pledge of loyalty to that party.[17] In *Cousins* v. *Wigoda* (1974), the Court ruled that political parties have the authority to set their own rules for their nomination process, including the rules that determine how delegates are seated at the national convention, and that such party rules trump state laws.[18] Political scientist William Mayer argues that, since *Cousins* v. *Wigoda:*

> *"…*the Supreme Court has quite consistently upheld the claims of political parties almost every time they have come in conflict with state law. In 1981, it overruled the Wisconsin Supreme Court's attempt to assert the supremacy of that state's 'open primary' law against national Democratic rules. In 1986, the Court allowed the Connecticut Republican party to open up its primaries to independent voters, even though state law limited primaries to registered party members. In 1989, the Court invalidated California laws that dictated the organization and composition of party governing bodies

12 *Smith v. Allbright* 321 U.S. 649, 1944.
13 *Burroughs v. United States,* 290 U.S. 534 (1934).
14 *Buckley v. Valeo,* 424 U.S. 1 (1976).
15 *Oregon v. Mitchell,* 400 U.S. 112 (1970).
16 Opcit, Symposium on the Future of Presidential Primaries.
17 *Ray v. Blair,* 343 U.S. 214 (1952).
18 *Cousins V. Wigoda,* 419 U.S. 477 (1974).

and prohibited those bodies from making endorsements before a primary. In 2000, it declared that the state of California could not compel the Democratic and Republican parties to nominate their candidates through a so-called 'blanket' primary."[19]

Since 2000, the Supreme Court has not heard any cases involving presidential primaries. Thus, as this abbreviated discussion illustrates, both proponents and opponents of federal action on the presidential nomination system can find an argument for their point of view in constitutional law. No one will be certain of the constitutionality of this issue, however, until after Congress acts; and that too is problematic.

CONGRESS

The constitutional ambiguity persists because Congress's authority to regulate the nominating process has never really been put to the test. Over the years, lawmakers have introduced more than 300 bills in the House and Senate to transform the presidential nomination system, and not one of them has seen the light of day.[20] The reason is simple: members of Congress have no interest in putting themselves at odds with the leaders of their party, and party leaders have been reluctant to hand over the nomination process to Congress and thus to the federal government. One reason, as Professor Thomas Patterson argues, has to do with the flexibility available under the current system: "The problem you have with congressional action is that once you do it, then it's kind of hard to change. And parties are much more flexible instruments. One advantage of federalism, whatever else we may think of it, it also allows for states to experiment with different ways of doing things."[21]

Another reason is, simply, the party leaders' desire to preserve their own authority. As David Norcross of the RNC puts it, "Any time Congress begins to sniff around your yard and front door, you'd better be aware of the fact that they'll soon be inside eating your lunch."[22] This sentiment is particularly strong among Republicans. According to Saul Anuzis, congressional action in this realm could become "a rallying cry for Republicans and [lead to] a massive challenge, state by state, of Republican Congress members even considering taking away party rights."[23]

But the reluctance to surrender any power to Congress is not all on the Republicans' side. As Jim Roosevelt, chair of the DNC's Rules Committee, observes, "I don't think members of the Democratic Party would be any more interested in having Congress do this on its own than Republicans would be."[24]

Beyond opposition from the parties, there are other political obstacles to getting Congress to act on any kind of presidential primary legislation. While a few members of Congress, such as Senator Carl Levin of Michigan, have been intensely interested in reforming the nominating system, most are not. Congressional action to create some form of regional primary system would most likely involve Congress picking up the tab for those elections—a move that would probably decrease, not increase, congressional interest in the reform. Reform proposals also bring up the question of sanctions. Suppose, for instance, New Hampshire decided it did not want to be part of a congressionally

19 Willima G. Mayer, "Written statement on Federal Primary Legislation, Submitted to the Senate Rules Committee" September 19, 2007.

20 Kevin Coleman, "Presidential Nominating Process: Current Issues and Legislation in 106th Congress," *Congressional Research Service Report,* March 21,2000.

21 OcCit, Symposium on the Future of Presidential Primaries.

22 Ibid.

23 Ibid.

24 Ibid.

mandated New England primary? What would Congress do? Cut off its highway funding? Close down the Portsmouth Naval Shipyard? Highly unlikely.

THE VOTERS

A final reason for the lack of congressional action is the fact that there is no public clamor for an alternative to the current nominating process—even though Americans regularly lament its complexity. Public opinion is divided on the advisability of regional primaries. In a January 2000 poll, 46 percent of respondents indicated that they preferred the current system to a system of rotating regional primaries (which was favored by 44 percent); two months later, 47 percent expressed a preference for regional primaries.[25] In contrast, a majority has consistently supported a national primary over the past 50 years, with the percentage favoring this option over the existing system ranging from 56 percent to 76 percent.[26] But an alternative to the current nomination system is simply not a high priority for most voters. This helps explain why Congress has never taken significant action on the issue.

WHAT COMES NEXT?

Every one of the alternatives outlined above, and many more that well-meaning activists and scholars have come up with over the years, is more rational and more orderly than the current system. And yet none of these alternatives has ever come close to being implemented and probably never will. Why? The answer is simple. No one is really in charge of the presidential nominating system; there is no "decider." As we've seen, Congress is reluctant to act on the matter. The national political parties and state political parties often do not see eye-to-eye. Nor do they always act in concert with state legislatures, which set primary dates and appropriate funding for primaries. State secretaries of state have tried from time to time to collaborate on a more sensible system, only to find their plans thwarted by their own legislatures or by one or more of their state parties. In a federal system where the power to control elections has historically been vested in the states, the absence of central control has been the normal state of affairs.

At the federal level the potential actors are: the Congress, the Republican National Committee and the Democratic National Committee. At the state level there are 50 Democratic State Committees and 50 Republican State Committees and 50 state legislatures. That gives us 153 separate actors in this process—not to mention the court system which gives us even more.

Thus, change in the nomination process will continue in the same way that it has come in the past: through the complex interaction of presidential hopefuls (past and present) and the internecine struggles of party politics at the state and national levels and the legislative bodies both federal and state. In 2012, Democrats made very few changes to their system. But they did give states bonus delegates for going later in the system—a tactic that, in combination with the Republicans' decision to punish states by cutting the number of delegates in states that went too early and by forbidding winner-take-all states until April, actually seems to have worked to prevent more frontloading.

Whatever happens in 2016, the presidential nomination process will be the source of frustration and the object of criticism. The losing party is often more interested in reform than the winning party, for obvious reasons. The losing party's first tendency is to try and blame the system for producing a less than optimal candidate. But in the end, some sort of more rational mega-system is unlikely to prevail mostly because the presidential nomination process is the

25 Costas Panagopoulos, "The Polls-Trends: Electoral Reform," *Public Opinion Quarterly* (Winter 2004): 623.
26 *New York Times/CBS polls* cited at: http://graphics.nytimes.com/packages/pdf.politics/20070719_poll_results.pdf [April 27, 2009]

result of the interplay of state and national political parties, legislatures, courts, reformers, and presidential hopefuls. The result? Anything is possible in a system that is as innovative and unpredictable as the country that produced it.

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