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## What Do We Want in a Presidential Primary? An Election Law Perspective

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Election Law Perspective

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## WHAT DO WE WANT IN A PRESIDENTIAL PRIMARY? AN ELECTION LAW PERSPECTIVE

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Chad Flanders\*

*Although the 2008 presidential primaries were in many ways a resounding success in terms of turnout, attention, and sheer excitement, many noted the pressing need for reform. States were rushing to hold their primaries sooner than ever, giving rise to “Super-Duper Tuesday,” where twenty-four states had their primaries on the same day. The Democratic nominee at one point looked like it might be decided by the votes of so-called “Superdelegates”—party regulars beholden to no one. As the Democratic nomination contest wore on, Rush Limbaugh, in “Operation Chaos,” encouraged his “dittoheads” to raid the party primaries of the Democrats, tilting the vote against Obama, the presumptive nominee. And there were continued grumblings about the disproportionate influence Iowa and New Hampshire had on the whole process.*

*Fortunately, reform is in the air. The Democratic National Committee’s “Commission for Change” has released its proposals for altering how the Democrats run their primaries. It is unclear how, if at all, the Republicans will follow suit. But how are we to evaluate such proposals? What do we want in a presidential primary?*

*My Article, borrowing from the vital field of election law, proposes a set of values by which we should evaluate the presidential primaries. By investigating the various players in the nomination process—voters, parties, and the state—I isolate three major sets of “constitutional values” that are implicated in the presidential primary system: (1) the right of voters to an effective and meaningful vote, (2) the interests of the political parties in their autonomy and ideological purity (as well as in electoral victory), and (3) the concern of state and federal governments that the nomination process be legitimate, competitive, and produce a candidate who is capable of governing.*

*Finally, I propose a master value—that of “deliberation”—that both explains and unifies the various competing values at play in the primaries. And I analyze the two major proposals for reforming the primaries, a national primary and a series of regional primaries, as well as the recommendations of the Democratic National Committee, in light of the goal of achieving “deliberative primaries.”*

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*Last question—and I’m not sure if you even have a sense or if it’s even appropriate to speculate—but do you think the new rules will favor a certain type of candidate? Does it favor a candidate who surges early like in the old Iowa and New Hampshire model, or a candidate who is strong regionally, or a candidate with wide but not deep support across the whole country? Rules do matter . . . .*<sup>1</sup>

## INTRODUCTION

Few could have predicted that the 2008 Democratic primaries would be as successful as they were. Popular participation was at an all time high.<sup>2</sup> People were paying attention to the candidates and evaluating them, rather than tuning out. By nearly any measure, democracy seemed to be working.<sup>3</sup> Early predictions by pundits that the Democrats would choose a candidate early and that we were in for a long general election season were spectacularly wrong.<sup>4</sup> To many people’s surprise, the Democratic primaries almost dragged on *too* long.<sup>5</sup>

1. Interview by Tom Shaller with Jeff Berman, Member, Democratic Change Commission (Jan. 13, 2010), <http://www.fivethirtyeight.com/2010/01/dcc-trying-to-encourage-regional.html>.

2. JOHN HEILEMANN & MARK HALPERIN, *GAME CHANGE* 262 (2010) (“The battle between Barack and Hillary had been historic across every dimension, from the amount of money spent and the numbers of voters who had participated to its sheer closeness . . . .”); Thomas E. Patterson, *Voter Participation: Records Galore This Time, but What About Next Time?*, in *REFORMING THE PRESIDENTIAL NOMINATION PROCESS* 44 (Steven S. Smith & Melanic J. Springer, eds., 2009) [hereinafter *REFORMING*] (“More than a score of state primary and caucus turnout records were set in 2008. Overall, about 57 million Americans voted in the 2008 nominating elections, which easily eclipsed the 31 million who voted in 2000, the last time both major parties had contested presidential races.”).

3. Michael Neblo & Chad Flanders, *The Political Process Worked—This Time, Anyway*, *MILWAUKEE J. SENT.*, Apr. 27, 2008, <http://www.jsonline.com/news/opinion/29594264.html> (“In terms of voter turnout, media attention and almost every other measure, the front-loading of the primaries seems to have caused little trouble, and the pundits’ worrying and hand-wringing seem to have been premature.”).

4. See, e.g., Chad Flanders, *Defusing Primary Primacy*, *HARTFORD COURANT*, Apr. 13, 2007, at A9 (“With Connecticut preparing to join California, New Jersey and roughly 20 other states in what is now being called the ‘super-duper Tuesday’ presidential primary, America seems inexorably headed toward a national primary—not because anyone necessarily wants one, but because states are rushing madly to be the ‘first’ to select the next presidential nominee.”); John Nichols, *Primaries Gone Wild! And How to Fix Them*, *THE NATION*, Jan. 21, 2008, at 11, available at <http://www.thenation.com/article/mad-money-primary-race> (“That front-loading means that the decisions made before the Twelve Days of Christmas were finished began a frenzy of caucuses and primaries that, in barely a month, is all but certain to identify the presidential nominees.”).

5. DEMOCRATIC CHANGE COMM’N, *DEMOCRATIC NAT’L COMM., REPORT OF THE DEMOCRATIC CHANGE COMMISSION 17* (2009) [hereinafter *REPORT*] (describing the process as “too long” (quoting Don Fowler, Former Chairman, Democratic Nat’l Comm., Testimony at Democratic Change Commission Meeting (Oct. 24, 2009))); JAMES W. CEASER ET AL., *EPIC*

But the fact that the predictions of disaster were mistaken for 2008 does not mean that they did not contain a great deal of truth. In fact, America dodged a bullet. The presence of two celebrity candidates, equally tenacious and well-funded, masked fundamental flaws in the way we nominate our presidents.<sup>6</sup> It would be a critical error to take the fluke success of the 2008 primaries as evidence that our primary system works fine and is in no need of reform, that our primary process is headed in the right direction.<sup>7</sup>

We need to think seriously about the way we choose our presidential candidates.<sup>8</sup> Should we keep what we have now, a de facto national primary, which in most years would favor the most well-known and well-funded candidate against the newcomer or the one who has ideas, but not money? And should New Hampshire and Iowa, states that are unrepresentative of the national interest, still be allowed to wield a disproportionate weight in picking our candidates simply because they refuse to take turns? Do we want an early end to the primaries followed by a general election season that lasts eleven months?<sup>9</sup>

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JOURNEY: THE 2008 ELECTIONS AND AMERICAN POLITICS, at ix–x (2008) (“[T]he Democratic contest turned into a marathon. Having eliminated the broader field of contenders, Hillary Clinton and Barack Obama went head-to-head until the full schedule of contests had ended. After threats to take the struggle to the convention, Mrs. Clinton finally conceded in the first week of June. It was the longest active contest in modern times.”); Steven S. Smith & Melanie J. Springer, *Choosing Presidential Candidates*, in REFORMING, *supra* note 2, at 13 (“The front-loaded process did not turn out as predicted for the Democrats, for whom the contest between Senators Clinton and Obama extended until June.”); David Greenberg, *Primary Obligations*, DISSENT, Summer 2008, at 35, 37 (“Particularly when his chances of winning seemed strong, Obama seemed resentful about having to run all the way to the finish line.”); *see also* CEASER ET AL., *supra* note 5, at ix (“This [front-loading] arrangement led everyone to predict that the nominations would be decided earlier and more quickly than ever before, most likely by the first week in February. But fate had something else in mind.”); Gerald D. Skoning, *We Could Learn a Lot from the U.K. Election*, CHI. TRIB., May 14, 2010, at 23 (lamenting the length of the U.S. nomination process, as compared to the U.K.’s).

6. *See* HEILEMANN & HALPERIN, *supra* note 2, at 254 (“Quitting . . . simply wasn’t in the Clintons’ bloodstream.”); EVAN THOMAS, *A LONG TIME COMING* 53 (2009) (referring to the extended battle between Obama and Clinton as “the long siege”); Neblo & Flanders, *supra* note 3 (“The fact is that this year’s primaries were saved by celebrity: Obama’s remarkable story and the possibility of a Clinton restoration. With two Democratic superstars running for president, what could have been a very short and early primary season was turned into captivating drama. We should consider ourselves lucky. But we shouldn’t let this deter us from serious thinking about the way we choose our presidential candidates.”).

7. *See* Editorial, *Primary Reforms*, N.Y. TIMES, June 8, 2008, at 11 (“It takes nothing away from the achievements of Barack Obama and John McCain to take note that the system for choosing the parties’ nominees is seriously flawed.”).

8. *See generally* James W. Ceaser, *The Presidential Nomination Mess*, CLAREMONT REV. BOOKS, Fall 2008, at 21.

9. Flanders, *supra* note 4 (“Unless we think seriously about how we want our primaries to be run, we will end up with a system that nobody wants—a system that, as Connecticut Secretary of the State Susan Bysiewicz said, benefits the rock stars and the well-funded, who would dominate a de facto national primary.”); Neblo & Flanders, *supra* note 3.

Fortunately, reform is in the air, as the Democratic Party announced proposed changes to the way it nominates its presidential candidates.<sup>10</sup> The Republican Party is sure to follow.<sup>11</sup> Pundits and academics have also chimed in, claiming the system is broken and in need of reform.<sup>12</sup> But how are we to evaluate such proposals for reform? Changes in the primary system are often generated by short-term political needs, not long-term thinking about what will produce the best candidates. There is also the tendency for well-meaning reformers to, in David Greenberg's words, "act like generals fighting the last war."<sup>13</sup> Candidates who have won under one set of primary rules will be reluctant to change them.<sup>14</sup> And most voters, if they think about the primaries at all, will tend to judge them solely in terms of the candidates they have produced. This will not always be a reliable indicator of whether the primary system is fundamentally sound; a good candidate might emerge from a defective process. So it should be helpful to stop and think about what we want in a primary system. What are the interests involved? What values do we want to embody in the way we nominate presidential candidates?

In answering these questions, a particularly legal perspective on the problem of primary reform may seem to offer little in the way

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10. See REPORT, *supra* note 5, at 18–19, 21; see also Editorial, *Our Opinion: Presidential Primary System Needs Revision*, STATE-JOURNAL REGISTER (Springfield, Ill.), Jan. 29, 2010 (noting that the Illinois Reform Commission has recommended that the Illinois primary "be held no earlier than June"); Jeff Zeleny, *It's Never Too Soon to Think About 2010*, CAUCUS BLOG, (Mar. 23, 2009, 9:20 PM), <http://thecaucus.blogs.nytimes.com/2009/03/23/its-never-to-soon-to-think-about-2012/>.

11. The Republican National Committee had discussions about the timing of various state presidential primaries. They are still, as of this writing, wrestling with the problem of front-loaded primaries. Florida's early scheduling of its primaries has emerged as a problem. See, e.g., Serafin Gomez, *Florida GOP Reining Back on Primary Push*, AMERICA'S ELECTION HQ (Mar. 15, 2011), <http://politics.blogs.foxnews.com/2011/03/15/florida-gop-reining-back-primary-push>. The Republican National Committee has, however, approved measures that will push back the date on which any nominee can win enough delegates to get the party's nomination. See Paul Bedard, *New RNC Rules Mean a Longer GOP 2012 Presidential Race*, WASHINGTON WHISPERS (Feb. 23, 2011), <http://www.usnews.com/news/blogs/washington-whispers/2011/02/23/new-rnc-rules-mean-a-longer-gop-2012-presidential-race>. This Article will focus mostly on the Democratic Party's primary process, both because that was where the most dramatic changes occurred in 2008, and because the Democratic National Committee seems to be taking efforts to reform the process very seriously (and in a less ad hoc manner).

12. See, e.g., Thomas E. Mann, *Is This Any Way to Pick a President?*, in REFORMING, *supra* note 2, at 151; Larry J. Sabato, *Picking Presidential Nominees: Time for a New Regime*, in REFORMING, *supra* note 2, at 136; Editorial, *Primary Reforms*, *supra* note 7, at 11; Greenberg, *supra* note 5, at 35.

13. Greenberg, *supra* note 5, at 35.

14. See Nichols, *supra* note 4, at 13 ("[A]s FairVote's Ryan O'Donnell says, . . . 'once an incumbent is nominated and elected, he or she has no interest in changing the schedule.'").

of insight. The most valuable contribution election law has made so far, one might think, is the contribution of several cogent analyses of whether and to what extent Congress has the power to reform the presidential primary system. No doubt this is useful information, and the work of Richard Hasen and Daniel Lowenstein is especially helpful in this regard.<sup>15</sup> But election law can also highlight the values that are implicated in the primary system.<sup>16</sup> Clarifying what these values are can help us think more critically about what we want in a system for nominating our presidents, and why our current system does not serve those values particularly well.<sup>17</sup>

This Article unfolds in three parts. In Part I, I diagnose what went wrong in the 2008 primaries according to the conventional wisdom. I focus specifically on four problems that were present in the Democratic primaries<sup>18</sup>: the front-loading of the state primary races; the problem of party-raiding (as exemplified by Rush Limbaugh's "Operation Chaos"); the question of the role of so-called superdelegates; and the routine, boring, and scripted nature of the party conventions. Part II is organized around analyzing the three major sets of "constitutional values" that I see as implicated in the presidential primary system: the rights of voters to an effective and meaningful vote; the interests of the political parties in

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15. See Richard L. Hasen, "Too Plain for Argument?" *The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees Through Direct and Equal Primaries*, 102 Nw. U. L. REV. 2009 (2008); Daniel H. Lowenstein, *Presidential Nomination Reform: Legal Restraints and Procedural Possibilities*, in REFORMING, *supra* note 2, at 173. For an important earlier essay on the same topic, see William G. Mayer & Andre E. Busch, *Can the Federal Government Reform the Presidential Nomination Process?*, 3 ELEC. LAW J. 613 (2004).

16. In articulating these values, I rely heavily on the seminal casebook by Issacharoff, Karlan, and Pildes. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* (3d ed. 2007). Interestingly, however, the casebook does not have any extended discussion of the presidential primary process. In my previous work, I have developed, in particular, the values of voter participation and deliberation. See Chad Flanders, *Deliberative Dilemmas: A Critique of Deliberation Day from the Perspective of Election Law*, 23 J.L. & POL. 147, 150 (2007) [hereinafter Flanders, *Deliberative Dilemmas*] (noting various places in election law where deliberation can either be encouraged or discouraged); Chad Flanders, *How to Think About Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 145-49 (2007) [hereinafter Flanders, *Voter Fraud*] (citing voter participation as an important value in election law).

17. In their important collection on the 2008 primaries, Steven Smith and Melanie Springer observe that "there is no strong consensus about the key values to be reflected in the nomination process." Smith & Springer, *supra* note 5, at 18. One aim of this Article is to help to build that consensus, by first clarifying what the values at stake are.

18. The Republican contest did not contain nearly as many surprises. As James Ceaser et al. write, "[s]ometimes presidential nominations turn out just the way everyone expected at the beginning. Sometimes there are surprises. And then, on rare occasion, the surprise is that the nomination turns out the way everyone expected at the beginning. The 2008 Republican nomination race was one of those rare occasions." CEASER ET AL., *supra* note 5, at 53. At the same time, one major problem—front-loading—was present in the Republican primaries.

their autonomy and ideological purity; and the concern of state and federal governments that the nomination process be legitimate, competitive, and produce a candidate who is capable of governing.

Finally, in Part III, I propose “deliberation” as the key term that unifies the disparate constitutional values sketched out in Part II—and evaluate various reform proposals, including the reforms proposed by the Democratic National Committee, in light of how they foster or inhibit deliberation.

## I. PROBLEMS

My burden in this Part is to sketch what went wrong in the 2008 primaries *in spite of* so much going right. Of course, I do not want to gainsay that much good happened in the primaries. But it is an open question whether those goods (increased participation, more excitement and interest) were a product of the system or not. I suspect that they were not. Accordingly, I want to highlight those flaws in the system, that in future election seasons, may present very real and very crippling problems for our democracy. That 2008 went on as well as it did despite these problems is, I surmise, our good luck and good fortune. There may be structural flaws in the way we select presidents, flaws that the success of 2008 did much to hide.

### A. Iowa and New Hampshire, and the Problem of Front-Loading

The most obvious problem—and the one problem that created the most angst in pundits—was the mad rush to be the first primary.<sup>19</sup> Traditionally, Iowa and New Hampshire have been given pride of place as the “first primaries.”<sup>20</sup> Along with this priority, of course, came a disproportionate influence on whom the eventual nominee would be.<sup>21</sup> Although a candidate could survive a stumble in Iowa,

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19. See REPORT, *supra* note 5, at 17 (noting concerns about frontloading); Mann, *supra* note 12, at 162 (describing problem of frontloading as becoming “more prominent with each election cycle”). See generally WILLIAM G. MAYER & ANDREW E. BUSCH, THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS (2004). Mayer and Busch’s book turned out to be prescient in predicting front-loading would be a major problem. See *id.* at 4–22.

20. Sabato, *supra* note 12, at 142 (“A foreign observer might assume that Iowa and New Hampshire have some constitutional mandate always to lead the primary season.”).

21. See Editorial, *Primary Reforms*, *supra* note 7, at 11 (noting that “[s]till, some voters—notably those in Iowa and New Hampshire—had an outsized influence, and had candidates dotting on them, while other states were afterthoughts.”)

he or she would have to make a decent showing in New Hampshire, or else their candidacy was basically toast.<sup>22</sup>

The 2008 primaries kept this feature of the primaries—one which had been heavily criticized in previous years.<sup>23</sup> But other states tried to take at least some of the advantage away from Iowa and New Hampshire by moving their primaries up in the calendar year. The difficulty was that not only one or two states did this, *many* states did. As a result, Super Tuesday became Super-Duper Tuesday.<sup>24</sup> Candidates were facing elections in twenty-four races (caucuses or primaries) on the same day in February.<sup>25</sup>

From a narrow perspective, Super-Duper Tuesday was the perfect example of a collective action problem.<sup>26</sup> What would have been rational for one state to do—jump out ahead and have more influence on the party's eventual nominee—became irrational when many states did it. By all jumping out ahead, the result was that no one state would have an “extra” impact. So front-loading, at least from one angle, was simply counterproductive.

But this was not the type of harm that pundits focused on. Rather, they isolated three main problems with the front-loading of the primaries. First, there was the problem that an early, national primary would favor candidates who were already well-established. Those with big names and reputations—think Hillary Clinton—would have an edge over less well-known candidates with

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22. The 2008 Edwards candidacy, although plagued by rumors of an extramarital affair, is a good example of this: after Iowa and New Hampshire, Edwards was dead as a serious presidential candidate. *See also* Thomas E. Mann, in AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, THE PRESIDENTIAL NOMINATING PROCESS: CAN IT BE IMPROVED? 21 (1980) [hereinafter AEI PANEL DISCUSSION] (“Right now if candidates don’t do well early on in the process, they drop in the polls, their money dries up, they lose media attention, and they’re dead.”); Alan Martinson, Note, *La Follette’s Folly: A Critique of Party Associational Rights in Presidential Nomination Politics*, 42 U. MICH. J.L. REFORM 185, 195 (2008) (“Indeed, the influence of the early states is emphasized by the number of candidates who drop out of the presidential nominating context after losing an early state. By the time the later states vote, only one viable candidate may remain.”) (citation omitted).

23. *See, e.g.*, Cullen Murphy, *Innocent Bystander: Primary Considerations*, ATLANTIC MONTHLY, Apr. 2004, at 148 (noting “hand-wringing” about “prominent roles played by Iowa caucuses and the New Hampshire primary”).

24. Flanders, *Defusing Primary Primacy*, *supra* note 4 (noting that Connecticut was preparing to join roughly twenty other states in “super-duper” Tuesday for 2008 elections); *Primary Calendar: Democratic Nominating Process*, N.Y. TIMES,

<http://politics.nytimes.com/election-guide/2008/primaries/democraticprimaries/index.html> (last visited Mar. 30, 2011) (noting that more than 20 states had scheduled their contests for the earliest date allowed by the party without special exception).

25. *Race for the White House Remains Wide Open*, CNN, <http://www.cnn.com/2008/POLITICS/02/06/intl.supertuesdayvote/index.html> (last visited Mar. 30, 2011).

26. *See, e.g.*, KEITH DOWDING, POWER 31 (1996) (stating that a collective action problem occurs when individually rational self-interested decisions fail because they are not coordinated with other actors).

little name recognition and even smaller campaign coffers. Smaller candidates who would need time to introduce themselves to the American electorate would fare poorly in a one shot “national” primary.

Second, there was the risk that an early win in the Super-Duper primary would decisively tip the nomination in favor of one candidate, making him or her the nominee. As a result, the winner on Super-Duper Tuesday might still be relatively unknown and unvetted before the general election campaign—think Barack Obama.<sup>27</sup> Indeed, this was one of Hillary Clinton’s major arguments for remaining in the primaries: she would be the one to see if Barack Obama had the mettle to survive the Republican attack machine.<sup>28</sup> An artificially shortened primary season would give way to an artificially long general election campaign dominated by relatively “untested” candidates. A longer primary season gives voters a greater opportunity to inform themselves about the candidates and to assess them in detail.<sup>29</sup>

A third worry partly relates to the primacy of Iowa and New Hampshire, but goes beyond this. Although the place of Iowa and New Hampshire at the front of the primary season has been attacked, it has also been thought to have the benefit of making the candidates engage in “retail” politics before they hit the national stage.<sup>30</sup> Even bracketing the roles of Iowa and New Hampshire, the more states that have their primary on one day, the less likely that a candidate will focus his or her campaign on any one state for a prolonged period. A de facto national primary would remove this worry by shifting the focus of the candidates from a one-state-at-a-time campaign to a national campaign. Candidates would play to their national profile without trying to gain a reputation in any one

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27. See MAYER & BUSCH, *supra* note 19, at 79 (exploring the possibility that front-loading might propel a little-known candidate to the nomination “before the public or the press has any real opportunity to learn much about the candidate or to conduct a thorough assessment of his or her strengths and weaknesses”).

28. See HEILEMANN & HALPERIN, *supra* note 2, at 180 (“Out on the trail, Hillary was . . . almost pleading with people not to be stampeded into voting for Obama. ‘Everybody needs to be tested and vetted,’ she said. ‘The last thing Democrats need is to just move quickly through this process.’”).

29. See MAYER & BUSCH, *supra* note 19, at 56 (“[F]ront-loading . . . greatly accelerates the voters’ decision process and thus makes the whole system less deliberative, less rational, less flexible, and more chaotic.”).

30. AUSTIN RANNEY, *THE FEDERALIZATION OF PRESIDENTIAL PRIMARIES* 14 (1978) (rehearsing the argument that the quality of campaigns in Iowa and New Hampshire are superior because they emphasize “commitment, organization and personal contact” (quoting Wilson Carey McWilliams, *Down with Primaries*, COMMONWEAL, July 1, 1976, at 429)). Even granting this point, there seems no *a priori* reason why it should *always* be Iowa and New Hampshire that get to go first.

state. We would, in essence, have a national primary at the front end, and then a national general election at the back end.

### B. “Operation Chaos” and Party Raiding

Of course, some of the problems associated with front-loading the primaries never materialized. The Democratic primaries did not end with an early knockout blow. The Super-Duper primary day, although it helped Barack Obama’s chances, did not decisively settle the primary nomination. Hillary Clinton survived, and things dragged on. And on. This led to its own set of problems, exclusive to the uniquely competitive—and acrimonious—nature of the fight.

One problem was caused not so much by Hillary Clinton as by Rush Limbaugh, who became Clinton’s unlikely ally (at least according to him). Fearing that Obama might cruise to the Democratic nomination relatively unbloodied, Limbaugh counseled his legion of followers to cross over and vote in the Democratic primary for Hillary Clinton.<sup>31</sup> By doing so, they would mark up wins for Clinton, or at the very least delegates. Obama would take even longer to win the nomination, which would cost him money. In one scenario, Clinton’s continued success (aided by Limbaugh’s “dittoheads”) would even mean that Obama would have to pick her as vice president.<sup>32</sup> The net result would be a weaker Democratic slate come November.

What enabled Republicans to cross over and vote in Democratic primaries were the phenomena of “open primaries,” set up by the state parties or legislatures in order to encourage voter participation.<sup>33</sup> Republicans could decide not to vote in their own primary, which was all but over by the time Operation Chaos was inaugurated, and instead register as a Democrat for a day. Doing so

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31. See Alec MacGillis & Peter Slevin, *Did Rush Limbaugh Tilt the Vote in Indiana?*, WASH. POST, May 8, 2008, at A1 (reporting that, according to Obama campaign manager David Plouffe, Limbaugh “had a clear factor in the outcome”); Carla Marinucci, *Limbaugh Sows Seeds of “Chaos” in Dems’ Race*, S.F. CHRON., Apr. 27, 2008, at A1.

32. Rush Limbaugh, Transcript, *Rush the Vote: Operation Chaos* (Mar. 12, 2008), available at [http://www.rushlimbaugh.com/home/daily/site\\_031208/content/01125108.guest.html](http://www.rushlimbaugh.com/home/daily/site_031208/content/01125108.guest.html).

33. See *About the Primary—Caucus—Convention System*, ABOUT.COM, <http://usgovinfo.about.com/cs/politicalsystem/a/delgateprocess.htm> (last visited Mar. 3, 2011) (“There are two types of primaries, closed and open. In a closed primary, voters may vote only in the primary of the political party in which they registered. For example, a voter who registered as a Republican can only vote in the Republican primary. In an open primary, registered voters can vote in the primary of either party, but are allowed to vote in only one primary.”).

entailed no commitment to vote Democratic in the national election.<sup>34</sup>

Despite some breathless reporting by some media outlets as well as Limbaugh himself, there is little evidence that the Limbaugh effect was all that significant, or that it swung any states away from Obama.<sup>35</sup> In an election year when there were many *genuine* crossover voters (that is, voters who had voted Republican in previous years, but who voted in the Democratic primary this year), the effects of Operation Chaos would have been hard to measure anyway. Some Republican voters might have really wanted Clinton to win the primary over Obama, and might have voted for her over McCain in the general election.

Still, there was probably some effect, and we might view this as one of the problems with our nominating system, even apart from the exaggerations of Rush Limbaugh. Party nominations, we might think, belong to the party. But when cross-over voters who have no short or long term interest in the well-being of the party have a role in tipping the balance in favor of one candidate or the other, the party is harmed. We might think that this makes the process less “pure.”

### C. The Power of Superdelegates

Much of the controversy in the Democratic nomination arose from the role of so-called “superdelegates” in picking the eventual nominee. This was also a consequence of the drawn-out nomination fight. At the micro level, there were some hard feelings as superdelegates switched away from early endorsements of Clinton and decided to back Obama as he emerged as the favorite.<sup>36</sup> At the macro level, there were questions of why the Democratic nomination process had superdelegates at all. Certainly they were an

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34. In some cases, however, voters would have to attest that they supported the principles of the party in whose primary they were voting. See Mark Niquette, *Limbaugh Safe From Voter-Fraud Charges*, COLUMBUS DISPATCH, Mar. 28, 2008, at 8A (“In Ohio, party-switchers are supposed to sign a form attesting, under penalty of election falsification—a felony—that they support the principles of the party whose ballot they are obtaining.”).

35. See Todd Donovan, *The Limbaugh Effect: A Rush to Judging Cross-Party Raiding in the 2008 Democratic Nomination Contests*, 6 THE FORUM, No. 2, 2008, at 1, 5 (finding little evidence that Limbaugh influenced primaries).

36. Georgia Congressman John Lewis was a particularly high-profile superdelegate who switched from Clinton to Obama, although there were others. See HEILEMANN & HALPERIN, *supra* note 2, at 231.

anomaly in an age of increasing popular control of the nomination process.<sup>37</sup> Why were they still around?

Superdelegates in fact, were instituted as sort of a fail-safe mechanism, a peer review check on a nominee who might not fare well in the general election or do a poor job governing<sup>38</sup> (In the late 1970s Jimmy Carter was perceived as just such a “weak” candidate<sup>39</sup>). Superdelegates were supposed to look at the party’s long-term interests and not merely at the short-term “likeability” of a candidate.<sup>40</sup> By giving the party elders (such as members of Congress, Governors, and members of the Democratic National Committee<sup>41</sup>) a greater say in the process, they could ensure that a competent and electable candidate emerged.<sup>42</sup> Therefore, they were to exercise their “independent judgment” in voting for a candidate.<sup>43</sup> Superdelegates would get their votes just by virtue of the leadership positions they held, and not be bound directly to the popular vote in the primaries.<sup>44</sup>

Hillary Clinton, the presumptive Democratic nominee prior to Barack Obama’s entrance, had early on received commitments from many superdelegates.<sup>45</sup> But as the race wore on and Obama started winning more popular votes, critics questioned the role of the superdelegates.<sup>46</sup> Could Clinton possibly steal the election

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37. See, e.g., Paul Rockwell, *Superdelegate System is Pure Elitism*, SAN JOSE MERCURY NEWS, Apr. 3, 2008.

38. *Id.* (stating that the original purpose of superdelegates was to boost influence of party leaders so that they could screen candidates).

39. Jeane J. Kirkpatrick, in AEI PANEL DISCUSSION, *supra* note 22, at 12 (“President Carter’s inability to consult and build consensus would have made it impossible for him to become his party’s leader and presidential nominee under the old nominating system [which emphasized meeting and consulting with party regulars].”).

40. See Ari Berman, *Not So Superdelegates*, THE NATION, Feb. 18, 2008, at 4 (superdelegates designed to represent “establishment” interests and to discourage party outsiders from running).

41. See ELAINE C. KAMARCK, PRIMARY POLITICS 158 (2009) (“The category of superdelegates was expanded in subsequent years to nearly 800 elected officials including all members of the Democratic National Committee.”).

42. CEASER ET AL., *supra* note 5, at 93 (“These ‘superdelegates’ would consist mainly of party leaders and elected officials. Though voters would continue to choose most delegates, the superdelegates would make the nominee more accountable to party organizations and the party in government.”)

43. See Adam Nagourney & Carl Hulse, *Neck and Neck, Democrats Woo Superdelegates*, N.Y. TIMES, Feb. 10, 2008, at A1 (observing that it is a function of superdelegates to exercise “independent judgment”).

44. As Elaine C. Kamarck explains, superdelegates were supposed to “counter the effect of binding public primaries” and “save the party from a disastrous general election choice.” KAMARCK, *supra* note 41, at 155–56.

45. Berman, *supra* note 40, at 6 (“The obvious beneficiary of the superdelegates this time around is another establishment favorite, Hillary Clinton.”).

46. See, e.g., *Superdelegate System Ripe for Reform*, STAR TRIB. (Minneapolis), Mar. 11, 2008, at 8A.

based on the number of (super)delegates she had, even though she was losing many of the popular primary contests?<sup>47</sup> Fears of a brokered convention loomed.

Eventually, the issue was resolved. Obama earned enough delegates to make a Clinton victory virtually impossible, plus superdelegates drifted to Obama on their own.<sup>48</sup> Obama also counseled superdelegates to vote according to the popular vote total in their district or state, if delegates were elected officials.<sup>49</sup> Still, the very idea of superdelegates cut against the notion that the presidential primaries should be small-d democratic affairs and so emerged as a problem. Why, voters asked, do we need peer review, or wise elders to choose our presidential nominee? And if superdelegates only ratify the popular vote choice, aren't they redundant?<sup>50</sup>

#### D. Meaningless Conventions

Finally, there is a problem that has been noticeable for several presidential campaigns, with the 2008 primaries being no exception. The nomination for each party concluded with a convention that was scripted and entirely predictable, without any drama about whom the party's nominee would be. Of course, there was still some controversy surrounding the selection of the vice presidential candidate, at least on the Republican side. The announcement of Alaska Governor Sarah Palin was a shock, and almost completely unexpected by pundits.<sup>51</sup> Her selection in turn meant that more people tuned in to the Republican Convention to see how she would perform.<sup>52</sup>

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47. See Jessica Van Sack, *Superdelegates May Exert Superpower*, BOSTON HERALD, Feb. 9, 2008, at 4 (demonstrating concerns that superdelegates could end up determining the nominee).

48. HEILEMANN & HALPERIN, *supra* note 2, at 231.

49. Greenberg, *supra* note 5, at 38 (noting that Obama urged superdelegates to vote according to popular results in district, state, or nation, insofar as these favored Obama); see Nagourney & Hulse, *supra* note 43, at A24 (quoting Obama on problematic role of superdelegates, and urging them to consider the judgment of the voters).

50. See Editorial, *Primary Reforms*, *supra* note 7, at 11 ("If superdelegates ratify the choice made by the elected delegates, they are unnecessary. If they overrule that choice, their influence is undemocratic."); Greenberg, *supra* note 5, at 38 (noting that if superdelegates mimic the majority vote, they become "superfluous"); Berman, *supra* note 40, at 4 ("How could the Democratic Party be so, well, undemocratic?").

51. See HEILEMANN & HALPERIN, *supra* note 2, at 364 ("When Palin took the stage with McCain, jaws dropped and eyes popped across the country and around the world.").

52. See, e.g., DAVID PLOUFE, *THE AUDACITY TO WIN 308* (2009) ("[G]iven [Palin's] life story, coupled with the surprise nature of her selection, her entrance to the race would be nothing short of a phenomenon. I felt certain that all the oxygen in the campaign would

But this does not take away from the main point. The conventions *themselves*, on the Republican side, and perhaps more so on the Democratic side, were boring.<sup>53</sup> Clinton did not, as she seemed at one point capable of doing, decide to force a vote for the nomination. As a result, there was no risk of a brokered convention as some feared (or hoped).<sup>54</sup> This would have created some uncertainty and excitement.

Why does it matter that conventions are boring? Conventions used to be tension-filled events, full of high-stakes bargaining, some of it healthy and democratic, some of it made in smoky backrooms. Forty years ago, the Democratic convention in Chicago was the site of fervent protest, protest that could not be contained behind fences or in carefully monitored “free speech” areas.<sup>55</sup> Conventions, in short, used to be important. They used to matter in selecting the candidates, and as sites of party dissent—and even turmoil. At worst, of course, they were party bosses making backroom deals to pick the nominee or his running mate. At best, they were places for democratic participation and contestation.

So the rise of boring conventions might be seen as problematic relative to how conventions used to be run, or perhaps could be run. Conventions at one point used to be points of deliberation and decision. Now they are carefully scripted media events, “rubber stamps for registering the decisions made in primaries and caucuses well before the conventions meet.”<sup>56</sup> They seem to be the very opposite of what democracy is supposed to look like.

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immediately go to the newly minted McCain-Palin ticket.”); *id.* at 312 (calling Palin’s convention speech “much anticipated”).

53. The boringness of the conventions may have something to do with the fact that conventions are now mostly fund-raising affairs, and not matters of selecting candidates or making substantive changes to the party platforms. Regular fund-raising rules do not apply to convention donations. See Fredreka Schouten, *Lobbyists’ Dollars Can Fund Political Conventions*, USA TODAY, Jan. 29, 2007, at 6A (“Federal rules do not limit the source or amount of convention donations.”).

54. See Eleanor Clift, *A Ticking Clock*, NEWSWEEK (Feb. 6, 2008), <http://www.newsweek.com/2008/02/05/a-ticking-clock.html> (“If Hillary Clinton and Barack Obama can’t win the requisite 2,025 delegates on their own in the upcoming primaries and caucuses, we could be looking at a brokered convention.”).

55. Kirkpatrick, in AEI PANEL DISCUSSION, *supra* note 22, at 5 (“The 1968 convention did deliberate and debate a wide range of questions concerning party rules and party procedures and party positions; but that kind of convention could not happen under present-day rules.”); NORMAN MAILER, *MIAMI AND THE SIEGE OF CHICAGO* (rev. ed. 2008) (providing a narrative description of the 1968 conventions).

56. Austin Ranney, in AEI PANEL DISCUSSION, *supra* note 22, at 14.

## II. VALUES

Are the problems listed in Part I *really* problems? And are they the only problems, or even the most important? In order to explain why front-loading, party-raiding, the role of superdelegates, and boring conventions are bad (if they are bad), we need a theory that explains what values should properly be promoted by a presidential primary. And if there are other respects in which our primary system is less than ideal, knowing what values matter in the process should help us identify those problems as well.

To articulate these values, I turn to the field of election law, which for many years has been detailing and debating the role of the Constitution in regulating the political process.<sup>57</sup> In doing so, it has brought to light several important values involving the interests of voters, parties, and the state. I will call these values “constitutional values” for reasons that will I hope become clear.

### A. Voters

The basic, indeed “fundamental,” value in election law is the right to vote. It has been labeled as such in several Supreme Court decisions.<sup>58</sup> But as it has been developed in our constitutional caselaw and in scholarship, it is a vote with many different aspects, so it is important to make some distinctions. Nearly all of the various facets of the vote outlined below are implicated in the primary process.

#### 1. The Formal Right to Vote

The right to vote should be first considered in its formal aspect.<sup>59</sup> The formal right to vote is the ability to cast a ballot, and to not be prevented from voting by, e.g., intimidating tactics or by a poll tax

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57. See generally Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004).

58. See *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (noting the “fundamental political right” to vote); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966) (citing voting as fundamental political right because it is “preservative of all rights”); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“[The] right of suffrage is a fundamental matter in a free and democratic society.”).

59. For an especially perceptive look at the meaning of the formal right to vote to which I am indebted, see Joey Fishkin, *Equal Citizenship and the Right to Vote*, 86 IND. L.J. 1289 (2011).

or a literacy test.<sup>60</sup> It is perhaps best described as a negative right, as it is in most constitutional amendments regarding the right to vote.<sup>61</sup> It is the right not to have one's ability to vote interfered with or denied for arbitrary or unjustified reasons, such as wealth, race, or creed.<sup>62</sup>

This formal right to vote has historically been implicated in debates over the primaries. The famous (or infamous) "White Primary" cases dealt with Texas primaries that excluded African-Americans from participation in the primaries.<sup>63</sup> At one stage in the succession of cases, the Supreme Court upheld the right of the Texas Democratic Party to exclude blacks: the party was, they reasoned, a private group, and the Constitution could not reach the actions of private non-state actors.<sup>64</sup> But this changed after the Court's decision in *Classic v. Louisiana*, which found that the primary was an integral part of the overall election process.<sup>65</sup> In other words, the primary now *was* state action and that made the parties in charge of running and organizing the primaries *de facto* state actors as well.<sup>66</sup> As a result, the parties could no longer exclude voters from voting in the primaries—and not just the general election—based on race.

The White Primary cases had special force in situations where the primaries basically were the election: where one party so dominated the general election that the primary election was the only contest that really mattered.<sup>67</sup> To deny a right to vote in the primary would be effectively to deny a person's ability to have any say in who would eventually be elected for office (that is, who would win the general election).

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60. Some of the greatest judicial and statutory accomplishments of the twentieth century were in service of protecting the formal right to vote. *See, e.g.*, Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973aa-6 (2000) (prohibiting literacy tests); *Harper*, 383 U.S. at 670 (finding poll taxes unconstitutional).

61. *See, e.g.*, U.S. CONST. amend. XV, XIX (stating that the right to vote can't be abridged on basis of race or sex).

62. *See Harper*, 383 U.S. at 668 ("Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored. To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." (citation omitted)).

63. *See generally* *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herdon*, 273 U.S. 536 (1927).

64. *See Grovey v. Townsend*, 295 U.S. 45, 53–55 (1935).

65. *United States v. Classic*, 313 U.S. 299, 314 (1941).

66. *See Smith*, 321 U.S. at 663–64.

67. *See Terry*, 345 U.S. at 469 ("The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded. The Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections . . .").

This does not seem to accurately describe the present-day presidential primaries. It is simply not the case that one party or another has a “lock” on the general election, so that to deny a person the right to vote in the Democratic or Republican primary would be effectively to deny that person a role in the general election. Nonetheless, the formal right to vote could be relevant in some present-day circumstances.

Some states run their primaries via a caucus system, and this may present problems even with the formal right to vote, because people may have trouble attending the caucuses.<sup>68</sup> They may be held at odd times, or they may be held in houses that are not accessible to the handicapped or the elderly.<sup>69</sup> They may also involve a large time investment. Furthermore, you cannot vote absentee; those overseas and away will not have the right to vote.<sup>70</sup> In short, the caucus system may in fact end up preventing a large number of people from even attending or participating in the caucus itself.<sup>71</sup> This, we might think, amounts to a denial of the formal right to vote as well. Barriers are being set up which stop some people from participating.<sup>72</sup> To be sure, these barriers may not be as severe as a poll tax or a literacy test, but they are obstacles—obstacles that may mean that people do not get to exercise their formal right to vote at all.

Also, we might consider that in the 2008 contest, Democratic voters in Michigan and Florida almost were refused representation in the convention, because they moved up their primaries in violation of national party rules. The Democratic leadership threatened

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68. CAESER ET AL., *supra* note 5, at 97 (“In theory, caucuses fostered community and civic deliberation. In practice they prevented participation by those who had little time to spare.”).

69. See TOVA ANDREA WANG, THE CENTURY FOUNDATION, ISSUE BRIEF: HAS AMERICA OUTGROWN THE CAUCUS? SOME THOUGHTS ON RESHAPING THE NOMINATION CONTEST 5 (2007), available at <http://tcf.org/publications/pdfs/pb629/caucusbrief.pdf> (indicating that caucus sites may not be accessible to the handicapped and the elderly); see also Greenberg, *supra* note 5, at 37 (“The events’ sheer length deters the time-pressed wage earner, the single mother, the ailing grandfather.”); Richard L. Hasen, *Whatever Happened to “One Person, One Vote”?* SLATE (Feb. 5, 2008, 5:33 PM), <http://www.slate.com/id/2183751/> (“Orthodox Jews complained that they couldn’t vote in the Saturday morning Nevada caucuses.”).

70. See WANG, *supra* note 69, at 4 (“There is one group of voters that is absolutely and completely barred from participating in presidential caucuses: military and overseas voters.”); Editorial, *Primary Reforms*, *supra* note 7, at 11 (“[P]articipants generally have to commit themselves for hours, a sizable burden on the right to vote, especially for people who care for children or sick relatives. There is no absentee voting, so caucuses disenfranchise voters who have conflicting work schedules; who are out of town, including in the military; or who are too sick to travel to the caucus site.”).

71. See *id.* at 2 (noting lower turnout in caucuses than in primaries).

72. *Id.* at 3 (describing the many barriers voters may face in trying to participate in caucuses).

to throw out their primary votes, or alternatively, only seat half the delegates elected from those states. Neither of these things happened, but they almost did,<sup>73</sup> and we might think that if they did, voters in those states would have been deprived of their right to vote. They would have cast ballots, but those ballots would not have counted, or not counted for as much. It would be as if they had gone through the motions of casting a ballot, but then all, or nearly all, of their votes had been thrown out.

## 2. The Right to an Effective Vote

Much election law scholarship has not been especially concerned with the understanding and articulation of the formal aspect of the right to vote. After all, such an understanding of the right to vote is rather easy to come by. This is not to deny, of course, that achieving the formal right for everybody to vote has been the subject of many and important historical struggles.<sup>74</sup> But an increasing amount of attention in election law has been paid to the right to an effective vote: the ability not just to cast a ballot but also to be able to exert the same *influence* on an election as other voters. The meaning of such a right has proved elusive, so that we might be tempted to deny that the right to vote has such an aspect. Surely everyone wants their vote to make a difference in an election, but is there a right to make a difference?

Although the idea of the right to an effective vote emerged in the “one person, one vote” context,<sup>75</sup> it gained a special salience in the context of racial gerrymandering. On the one hand, African-Americans that were in a majority-white district had the formal right to vote. On the other hand, it seemed obvious that the point of the majority-white district was to make sure that black voters had no influence on the outcome. So long as the district was majority white, there would never be an African-American candidate of choice.

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73. In the Democratic primaries, Michigan and Florida were initially stripped of half their delegates for front-loading their primary contests. See Martinson, *supra* note 22, at 199. But these were restored at the Democratic National Convention. See CEASER ET AL., *supra* note 5, at 60; see also Richard L. Hasen, *Taking the Democratic Party to Court*, SLATE (March 7, 2008, 11:05 AM), <http://www.slate.com/id/2186011/> (describing suit brought by Floridians complaining of disenfranchisement if their delegates were not seated).

74. Flanders, *Voter Fraud*, *supra* note 16, at 110–11 (discussing formal right to vote or the “right to participate”).

75. See *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (“Full and effective participation by all citizens in state government requires . . . that each citizen have an *equally effective voice* in the election of members of his state legislature.” (emphasis added)).

Whatever we think the correct remedy to this problem is, there does appear to be a problem, and it is a problem relating to the effectiveness of the right to vote. In the abstract, there might not be any unfairness if your favored candidate does not win. However, if the district has been “stacked” in such a way that your favorite candidate never had a chance to win—and this has been deliberately orchestrated by the way district lines have been drawn—then we might wonder if your right to vote has not, in some way, been denied. You have not been denied the right to formally cast a vote, perhaps. You can put your ballot in the box. But you have been denied your right to have a role in influencing the election; the vote you cast will not be an effective vote.

An analogous problem to the problem with majority-white districts appears in the context of the presidential primaries. If the presidential nominee is all but determined by the Iowa caucus and the New Hampshire primary, then those later on in the process may feel deprived of their ability to influence the selection of the nominee. They will have the formal right to cast a ballot, but their vote will not matter.<sup>76</sup> Indeed, the later a state holds its primary, the less likely a voter in that state will have *any* influence on the outcome of the competition. Some have even raised the prospect that this lack of influence, if it results in African Americans being denied an effective voice, may violate the Voting Rights Act.<sup>77</sup> Iowa and New Hampshire, states that do have a disproportionate influence in selecting the nominee, tend to be racially unrepresentative of America.<sup>78</sup>

Second, the role of superdelegates may be seen as reducing the effectiveness of one’s vote. Superdelegates *qua* individuals have a much greater power to influence the selection of the eventual nominee. Whereas a person voting in a primary will only contribute to her favored candidate’s winning some delegates, a superdelegate on his or her own has the power to be a delegate for a candidate. This results in a disproportionate influence on the part of the superdelegate. This may be thought of as unfair, and a

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76. See Rob Ritchie & Paul Fidalgo, *Primary Power to the People*, FAIRVOTE (July 17, 2009), <http://www.fairvote.org/primary-power-to-the-people> (“[W]ith contests spread apart, we always run the risk of nominations being wrapped up well before the majority of Americans have even tuned in, essentially disenfranchising them.”).

77. See Justin Driver, *Underenfranchisement: Black Voters and the Presidential Nomination Process*, 117 HARV. L. REV. 2318, 2331–32, 2339 (2004) (claiming that the primacy of Iowa and New Hampshire could be challenged under Section 2 of the Voting Rights Act).

78. See *id.* at 2322–23 (“The racial homogeneity of the early-voting states, along with their lack of a major metropolitan area, establishes a domestic agenda that often overlooks issues that strongly affect African Americans.”). With the election of Obama, this worry may have less force.

denial of the ability to have an equal influence in selecting the party's nominee.

The parties are aware of this problem. Indeed, many states in the Democratic primaries allot delegates on a proportional basis, that is, the person who gets the highest vote total in the state does not win all the delegates. This way, the person who votes for the losing candidate may still have his voice "heard" because his vote will potentially add to the count of delegates for his or her candidate. This can be contrasted with the winner-take-all nature of the Republican primaries, where if you are in the minority in a state, your influence is essentially lost.<sup>79</sup> Then again, in some Democratic primaries, heavily Democratic districts are sometimes given more delegates, giving voters in those districts a disproportionate influence, so a version of the unequal influence problem reemerges.<sup>80</sup>

In short, we can give the right to an effective vote some meaning, so long as we are clear about specifying the context in which such a "right" can be asserted. Those who vote in primaries where the nominee has already been, for all intents and purposes, chosen, may feel that their vote does not matter, because it cannot influence the selection of the nominee. So too might voters feel they have less influence if their state awards only a few delegates, or if superdelegates have a greater power to choose the nominee than they do. In all of these cases, we can give some credence to the idea that people may unfairly lack the power to have effective influence over their party's nominee.

### 3. The Right to a Meaningful Vote

Related to the right to vote is the idea of a meaningful vote. This notion is perhaps even more obscure than the right to an effective vote. Surely it might be thought that the two concepts overlap, at least because a meaningful vote would seem to have to be, at least in part, an effective one. But here I will be using "meaningful" vote in a sense different from having the ability to exert an influence on the process of choosing a nominee. I will be using it to refer to the right of voters to vote for a candidate he or she *prefers*.

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79. Editorial, *Primary Reforms*, *supra* note 7, at 11.

80. Hasen, *supra* note 15, at 2009–10, 2010 n. 3 ("In Texas, for example, heavily Democratic districts are weighted more heavily in delegate selection than districts with more Republicans, and about a third of the delegates are awarded through caucuses rather than primaries. In 1988, for example, Michael Dukakis won the state with 33% of the vote in the Texas primary compared to Jesse Jackson's 25%, but they split Texas delegates almost evenly.").

We might have a hard time, initially, seeing this as a right a voter has. If a voter does not feel that there are any candidates who adequately represent her interests, she may feel that she lacks a meaningful choice in the primary process. But does this rise to the status of a right? In some contexts, it may. Consider if the state puts onerous restrictions on the rights of third party candidates, so that few are able to run,<sup>81</sup> or prevents a voter from writing in her favored candidate, so that she is “forced” to vote for the major two party candidates. Justice Kennedy, for one, has said that a voter in this situation may be deprived of a “meaningful” vote in the election.<sup>82</sup> This is because the voter may feel that she is “substantially limited in [her] choice of candidates.”<sup>83</sup> She might feel that her right to vote has been diminished insofar as she has been prevented from voting for the candidate that she would prefer to vote for.

We might also look at the right to a meaningful vote as in part a right for candidates to run for office. The individual’s right to vote has always been bound up with the right of candidates to run for an office; the Supreme Court has said that the two sets of rights cannot be neatly separated.<sup>84</sup> Individuals can have standing if their favored candidate is excluded,<sup>85</sup> because part of *their* right to vote is bound up with having a certain candidate run. So just as a voter may have a right to a meaningful choice of candidates, a candidate may assert—if only through the voters—his right to be part of a slate of candidates on the ballot.

The presidential primary will tend to limit the choice voters have among candidates in a variety of ways. Suppose that the early primaries favor a certain type of candidate, or that a national primary means that the field is narrowed down early on in the process. Some who vote in later primaries may feel that they no longer have a meaningful choice among candidates. Or perhaps the process as a whole favors those candidates who are effective at raising money or who already have a celebrity status. The process may make it very difficult for those who are not well-funded or who have little

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81. See Flanders, *Deliberative Dilemmas*, *supra* note 16, at 147, 155 & n.40 (discussing ways in which election law tends to entrench the two major parties).

82. *Burdick v. Takushi*, 504 U.S. 428, 442 (1992) (Kennedy, J., dissenting) (“Because [the plaintiff] could not write in the name of a candidate he preferred, he had no way to cast a meaningful vote.”).

83. *Bullock v. Carter*, 405 U.S. 134, 143–44 (1972).

84. *Id.* at 143 (“[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.”).

85. See, e.g., *Duke v. Massey*, 87 F.3d 1226, 1231, 1233 (11th Cir. 1996) (voters have standing to sue when their favored candidate was excluded from the Republican Presidential primary).

name recognition to run campaigns. Again, a person voting in the primaries may feel that there is not a meaningful choice among candidates, and so she would not have the right to cast a meaningful vote.

The caucus system also presents an example where people may be routinely denied the opportunity to cast a meaningful vote. In the typical caucus, a voter whose candidate does not receive a fixed percentage of the vote in the first round of voting—usually fifteen percent—will not be able to “vote” for that candidate in later rounds. There will be a revote, and the person must instead vote for one of the top vote-getters.<sup>86</sup> Voters may have the ability to participate in discussions regarding who will be the eventual nominee and their voice will be heard, but at a certain point they may no longer be able to cast a vote for their candidate of choice. She can side with a candidate, and may be vital in getting that candidate delegates. But she will not be able to vote for the candidate that she prefers. So while this denial may not be the denial of a formal right to vote or the right to have an influence on the process, it may be seen as the denial of her right to cast a “meaningful” vote.

But I should emphasize that though they are related, the right to a meaningful vote and the right to an effective vote are distinct concepts. The right to an effective vote refers to the *influence* your vote has in the election. A diluted vote is a less effective vote because the odds of your vote making a difference are decreased; sometimes, in the case of majority white gerrymandered districts, the influence your vote will have in electing a candidate, if it is a minority candidate, can shrink to zero.

A right to a meaningful vote, by comparison, implicates the diversity of the field of candidates running, and whether there is a candidate running who matches up with your preferences, or more generally, who you think is running on an attractive platform. Even if your favored candidate may never win the election, having a meaningful vote means that you get at least *the chance* to vote for him or her. This is another way of saying that a right to a meaningful vote may not be a right to an effective vote. A meaningful vote is one cast in favor of a candidate you *like* whether or not your vote is effective in getting that candidate elected.

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86. WANG, *supra* note 69, at 1 (explaining the caucus system).

### B. Parties

A second area of value that election law has spent some time identifying and specifying involves the rights of parties.<sup>87</sup> The rights of parties and the rights of voters are not easily separated—just as the rights of voters and the rights of candidates cannot be easily separated. Parties exist to help give voice to a group of voters, to focus their energies in support of a particular candidate.<sup>88</sup> Also, as we have seen with the White Primary cases, parties also function in a governmental capacity; they can help *run* elections. This is especially the case when it comes to primaries. The primaries are *party* primaries; they are designed to find a candidate who can represent the party, as well as to win in the general election.

But the interest of the party is not simply reducible to the interests of the voters, to the interests of the candidates, or to a mere functional role. Parties have interests, and represent values in their own right.

#### 1. The Right to Party Autonomy

The first value associated with parties is best seen as a negative one: it is the value to parties being *left alone* to experiment and do what is best for their members and the party itself.<sup>89</sup> This is sometimes a problematic value, as it was in the case of the White Primaries.<sup>90</sup> There the party could not be left alone, or else the rights of black voters would be violated.

But apart from the White Primary cases, the Supreme Court has consistently recognized value in letting the party pursue its goals as it best sees fit. In the context of primaries, that means using different methods of choosing the nominee (a primary or a caucus), experimenting with the order of states, and allowing non-members of the party to vote in the primary.<sup>91</sup> The success of each different

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87. For an overview, see Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741 (1993), and Robert Wiygul, *Private Rights or Democratic Virtues? Justice Scalia and the Associational Rights of Political Parties* (2007) (unpublished manuscript) (on file with the University of Michigan Journal of Law Reform).

88. *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 629 (1996) (describing role of parties).

89. See, e.g., *Nader v. Schaffer*, 417 F. Supp. 837, 845 (D. Conn. 1976) (“[P]arty members . . . have a ‘right to organize a party in the way that will make it the most effective political organization.’” (citation omitted)).

90. See *supra* Part II.A.1.

91. Greenberg, *supra* note 5, at 36 (“[T]he court has on the whole granted parties a wide berth of autonomy in setting their rules. It has overturned, for instance, state laws

experiment is not the point—the point is that the party should have the freedom to decide how to run its own internal affairs.

Again, this is best seen as a value involving mostly what parties should be *allowed* to do, not what they necessarily *should* be doing. The party should not be seen merely as a tool of the state, nor merely as a vehicle for individual voters to express their preferences. This “negative” freedom from external constraint enables the party to further its own goals.

The goals of parties in managing their primaries are two-fold, and sometimes conflicting. They are the goals of pursuing party representativeness, and achieving candidate electability.<sup>92</sup> By party representativeness, I mean the value of having a candidate who adequately represents the party’s values, and can be counted on as being a standard-bearer for the party in the general election. The goal of electability is rather straightforward. It is the goal of having the party’s nominee be a candidate who can actually *win* in the general election, and not merely be a symbolic effort to send a “message” to those in power.

The party needs flexibility in order to decide how to prioritize these two goals. In some cases, the party may choose to open its primaries to voters who have not registered in the party.<sup>93</sup> This may be seen as putting the goal of electability in front of the goal of party purity. The party may reason that it is better having non-members of the party participate in its primary because that way a more “electable” candidate will be chosen. Of course, this decision may also present risks: a candidate may be chosen who does not adequately represent the party faithful. Still, the value of party autonomy says that this is a decision best left to the party.<sup>94</sup>

A further distinction should be made when it comes to party autonomy. For there are at least two levels at which party autonomy might be a going concern: we could be talking of the autonomy of a *state* party, or the autonomy of the *national* party. As history has shown, the interests of the state party and the interests of the

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mandating or prohibiting ‘open’ primaries, in which nonparty members are allowed to vote.”).

92. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: TEACHER’S MANUAL* 64 (3d ed. 2008) (emphasizing “two very different models of what parties are about: ideology and winning elections”).

93. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 208 (1986) (striking down a statute that put “limits upon the group of registered voters whom the Party may invite to participate” in its primaries).

94. This is true whether the nature of the primaries is decided by the state or by the party.

national party do not always perfectly align.<sup>95</sup> And in the context of the primaries, some states have revolted against the national party by holding their primaries on dates earlier than the national party would allow. This resulted in sanctions for some states, but sanctions that were ultimately toothless.<sup>96</sup>

So when we speak of party autonomy, we should distinguish between state party autonomy and national party autonomy. The goals of state and national parties will be similar, but will be differently inflected. Whereas a national party will want a candidate who represents the national party's interests, the state party will want a candidate who best represents the demographic of the state. And whereas both state and national parties will want a winning candidate, who they feel can win may be a source of disagreement.

## 2. The Right to Party Purity

We have already briefly canvassed the second value associated with parties, and that is their "purity," roughly understood as "ideological purity."<sup>97</sup> Parties are important because they represent a set group of interests, and interests that are of the same type.<sup>98</sup> Parties do not merely exist to elect candidates, although that is certainly part of their job. Parties also exist simply to represent a certain point of view, and this point of view is not merely reducible to the aggregate interests of its members (although there must be *some* relationship between the views of the party and the views of its members). The party, to some extent, exists in its own right, beyond what its current members believe.

Why are ideologically "pure" parties a good thing? One aspect simply is that pure parties are best thought to represent the party faithful. To this extent, the party is a vehicle of its members, especially the members that are most vested in the party and furthering its message. But the party also *is* its message, and it might be thought to be a good thing that its message is as clear as possible,

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95. See, e.g., *Democratic Party of the U.S. v. LaFollette*, 450 U.S. 107, 107–12 (1981) (responding to a clash between national Democratic party and state party about whether the national party had to accept results of a primary).

96. The Republican party ended up stripping several states of half of their delegates because they held early contests, but this ended up mattering little to the outcome of the contest. For the results of the Democratic sanctions, see *supra* note 73.

97. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) (acknowledging special First Amendment protection for the "process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences'" (citation omitted)).

98. See *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 629 (1996) ("[Parties] . . . exist to advance their members' shared political beliefs.").

and that it represents an ideologically distinct way of looking at the world.<sup>99</sup> Parties at least purport to give a consistent philosophy of governing. The more parties are concerned solely with winning, the less they may be able to project this philosophy of governing. Party purity is valuable just insofar as having candidates who are able to articulate and defend a consistent philosophy are appealing. There is also a related, pragmatic interest in having parties with clear messages: it enables more informed choices by voters because they can “rel[y] on party labels as representative of certain ideologies[.]”<sup>100</sup>

The drive for ideological purity in parties may lead in some instances to the need to protect parties from themselves.<sup>101</sup> Parties may be tempted by the prospect of victory—or the frustration of continually losing—to broaden their appeal and accordingly dilute their message. But this may be thought to defeat the purpose of having the party in the first place. If the party is simply a way to get someone who would win, then why have an ideologically distinct party at all? Why have party platforms? When we start focusing more on a party’s ability to elect a candidate, and less on its ability to form and promote a distinct message, we start losing the point of having parties at all. This suggests that party purity, more than party autonomy, is the main value that should be associated with parties.

We might view the role of superdelegates as serving the interests of the party’s purity. Superdelegates, the theory goes, are less interested in the short-term interest of the party in producing a popular candidate who can win.<sup>102</sup> They are interested, instead, in the party producing a candidate who can faithfully represent the party’s interest in the general election and then—just as importantly—who can govern effectively and put the party’s platform into law and policy. The superdelegates will want, then, a candidate who is accountable to the party, and not merely to the people. Or to put this in a less tendentious way, they will want a candidate who is

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99. *See id.* at 615 (“A political party’s independent expression . . . reflects its members’ views about the philosophical and governmental matters that bind them together . . .”).

100. *Nader v. Schaffer*, 417 F. Supp. 837, 845 (D. Conn. 1976).

101. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 237 (1986) (Scalia, J., dissenting) (asserting that the State may have the right to “protect the Party against the Party itself” in the interests of retaining party purity).

102. Although this is not to say that this might also be a concern of theirs. The point is, it is not the only concern, or even the most important. Bruce Ackerman has recently emphasized the moderating function of superdelegates. *See* BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 17 (2010) (“When party chieftains did the picking, they focused on candidates who might win the support of the median voter in their state.” (citation omitted)).

faithful to the party's vision, and not merely to the transient interests of voters in the general election. Of course, they will want a candidate who will win. But, at least in principle, they should not be willing to back a candidate who wants to win at all costs—including the cost of diluting or dirtying the party's message.

### *C. The State*

Finally, we come to the interests of the state in the primary process. Much in the same way that a party's interest will overlap with the interests of the voters that make up the party, so too will the state be interested in protecting the rights of voters and parties. The state will want to enforce at least the individual voters' formal right to vote, and perhaps also take measures (such as the Voting Rights Act and amendments to it) to ensure that voters have an effective right to vote. It will want to protect the autonomy of parties and it is also the case that voters and parties will have shared interests with the state.

The state will always have a generic interest in protecting the rights of individuals and entities under its care—or at least it should have such an interest. The state, for instance, has an interest in protecting prisoners from cruel and unusual punishment or in preserving the Second Amendment rights of gun owners. But what I want to discuss here is how the state has special election-related interests in protecting the rights of citizens and parties. These interests will go beyond merely protecting the right to vote of citizens or the autonomy of parties, although it will obviously include them.

#### I. Legitimacy

The first and most important interest of the state in elections is to ensure election results that are accepted as legitimate by citizens.<sup>103</sup> If voters are prevented from voting by intimidation, or if there is widespread voter fraud, the state may be concerned that

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103. This is also sometimes phrased as protecting the overall "integrity" of the election process. *See, e.g., Nader*, 417 F. Supp. at 845 ("In addition to protecting the associational rights of party members, a state has a more general, but equally legitimate, interest in protecting the overall integrity of the historic electoral process."). *See also* Mann, *in* AEI PANEL DISCUSSION, *supra* note 22, at 2 ("The process has to be legitimate; it has to be perceived as fair, as proper, as appropriate by citizens and by leaders. If they have no confidence in the system, it becomes illegitimate, and that in turn works to undermine the system.").

the election results are not valid.<sup>104</sup> The winner of the election may not correspond to the candidate the voters actually chose.<sup>105</sup> This will make it less likely that the winner will be accepted as legitimate, creating a serious problem for the state.

Or consider another example taken from the campaign finance context. The state may have an interest in preventing the impression that votes can be bought, or that wealthy donors have a greater role in the selection process than non-wealthy voters.<sup>106</sup> If people think the election is corrupt in either of these ways, they may not accept the winning candidate as *legitimately* elected. They will think that the way the election was decided was not by the attractiveness of the candidate's message or by his skills as a campaigner, but only because he was able to outspend his opponent. In the Supreme Court caselaw, anti-corruption is a value closely linked to legitimacy, if not one that is precisely identical to it.<sup>107</sup>

Legitimacy is a hard value to define precisely. It can have a normative meaning, but it can also have a descriptive one. Here I am mostly interested in descriptive legitimacy.<sup>108</sup> The state has an interest in having an election that citizens *will* accept as producing a winner who is legitimate—even if, perhaps, they should not accept that result. This allows the state considerable leeway in tolerating some practices that might not be ideal in selecting candidates who can govern well, or who adequately represent the interests of citizens.

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104. See *Crawford v. Marion Cnty. Election Bd.*, 128 S. Ct. 1610, 1620 (2008) (noting state interests in preventing voter fraud and thereby protecting public confidence in the “integrity and legitimacy of representative government”); CENTER FOR DEMOCRACY AND ELECTION MANAGEMENT, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 18 (2005), available at [http://www1.american.edu/ia/cfer/report/full\\_report.pdf](http://www1.american.edu/ia/cfer/report/full_report.pdf) (“The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.”).

105. Flanders, *Voter Fraud*, *supra* note 16, at 122 (describing cases of “massive fraud” where candidate with most legitimate votes may not have won).

106. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring) (“[R]estrictions upon the amount any one individual can contribute to a particular candidate seek to protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action.”); Andrew N. DeLaney, Note, *Appearance Matters: Why the State has an Interest in Preventing the Appearance of Voting Fraud*, 83 N.Y.U. L. REV. 847, 860 (2008).

107. See Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1036–87 (2005) (analyzing Supreme Court campaign finance decisions and their use of the idea of corruption).

108. See, e.g., TOM TYLER, *WHY PEOPLE OBEY THE LAW* 19 (2006) (explaining legitimacy as in part whether people generally accept the decisions and policies of legal decision-makers).

My emphasis on descriptive legitimacy might make it harder to characterize the preference given to New Hampshire and Iowa as illegitimate. The priority given to those states may result in candidates who do not fairly represent the interests of most members of the Democratic Party. But it is hard to say that the primacy given to these states renders the selection of the Democratic nominee *illegitimate*. And indeed, most people do not see the preference given to New Hampshire and Iowa as rendering the system illegitimate. They may not like it,<sup>109</sup> but they do not think that it taints the eventual nominee, so that if he wins the primary based on the momentum he has coming out of Iowa and New Hampshire, he is not “legitimately” the winner. This of course could change.

By contrast, in several cases the Court has recognized a state interest in preventing party raiding, based on preserving the “integrity” of the electoral process.<sup>110</sup> This may entail limiting the right of parties to invite whomever they want to participate in their primary process. If the rules for letting non-party members vote are too lax, and so subject to abuse,<sup>111</sup> the voters may end up selecting a candidate that most members of the party would *not* accept as legitimate.

## 2. Competition

A state interest which has been recently examined with some subtlety by election law scholars is the state’s interest in competitive races.<sup>112</sup> It may be hard to see this as truly a distinct interest the state has, but a little digging shows why competition is a value in election law. On the one hand, a competitive election might be thought to be a more legitimate election. In a competitive election, candidates are tested, and voters get a good chance to evaluate the merits and failings of each of the individual candidates. Moreover, if an election is dominated by a candidate who is well-financed, voters may think he has won the election less due to his qualifica-

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109. Although this is unclear. See Melanie J. Springer & James Gibson, *Public Opinion and Presidential Nominating Systems*, in REFORMING, *supra* note 2, at 123 (indicating that less than 50% of those polled favored a system where New Hampshire is not first).

110. See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 219 (1986) (noting the state’s legitimate interest in preventing party raiding in order to protect “integrity of the electoral process”); *Munro v. Socialist Workers Party*, 479 U.S. 189, 194–95 (1986) (citing state interest in preserving stability). See generally Richard H. Pildes, *The Constitutionalization of Democratic Politics*, in A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY 155, 165, 182 (2002).

111. As perhaps happened in “Operation Chaos.” But see Niquette, *supra* note 34, at 8A.

112. Richard Pildes, *Democracy and Disorder*, in THE VOTE 140, 155 (2001) (explaining value of “robust competition” in election law).

tions than to his ability to outspend the other candidates. So this may also influence whether the candidate is perceived as “legitimate” or not.

On the other hand, and to anticipate the value we will be considering next, a competitive election may be a way of testing to see if the candidate will be effective at governing, if she is elected. Campaigns, both in the primary and in the general election, are thought to test the same virtues as governing does: building coalitions, weathering opposition, etc. A competitive election is one that gives candidates the ability to show that they have the skills necessary to govern effectively. A more wide-open race also increases the chance that a candidate who is cash-poor or lacks name recognition, but is the better candidate, may win her party’s primary.

Is there, then, an independent value to competition? Yes. Competitive elections form a valuable civic function. They engage more voter interest and participation—this increases the likelihood of a legitimate election, of course, but it is also an independent good. So too is it the case that more informed voters may choose a candidate who is better at governing. But it is also good that citizens are more aware of who the candidates are. Competitive elections increase civic participation because of the interest they generate: citizens discuss and debate the merits of the candidates in ways in which they might not if one candidate has a “lock” on the nomination, and the primary is a foregone conclusion. This is obvious from the 2008 primary.<sup>113</sup>

Competition as an independent good may not have that great of a value, however. It may not create an incentive for the state to make an election competitive *just for* the sake of making elections more competitive. Moreover, the state also has an interest in having a stable election.<sup>114</sup> This is closely related to its interest in having an election that is legitimate. An election that is *too* competitive, where there are too many candidates, and where no candidate can get the support of a majority of his party’s voters, may drag on too long and create uncertainty. The state may then have an interest in decreasing the extent to which races are “wide-open,” because in the end what the state wants is the election of a candidate who can govern, not a never-ending civics seminar.

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113. See *supra* note 2 (describing record interest and participation in 2008 primary).

114. *Bush v. Gore*, 121 S. Ct. 512, 512 (2000) (Scalia, J., concurring) (stressing value of democratic stability); *Storer v. Brown*, 415 U.S. 724, 730 (1974) (“[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.”).

Some might conclude that the 2008 Democratic primary *was* too fiercely competitive in precisely this way. The Clinton-Obama race, although it excited massive popular interest and participation, risked going on too long and becoming too divisive. The worry was that the primary would end not just with a battle-tested candidate, but also one who was bloodied and poorly prepared for the general election. This did not happen, of course. But the specter was raised, and may show the limit of the good of competitive elections.

### 3. Governance

Finally, the state has an important interest in making sure that the candidate who is selected by the party can eventually govern well.<sup>115</sup> That is, the candidate must be able to do the job she might be elected to do effectively. This is an interest arguably as great as the interest in having a legitimate candidate. If a candidate wins the acceptance of the people as legitimate, it may still be a disaster for the country if the candidate cannot govern well.

As already discussed, competitive elections can be one way of making sure that a candidate will govern well. A successful candidate in an election might be thought to have many of the traits that make for a successful office-holder.<sup>116</sup> The candidate must be able to persuade, to organize, and to rally. A president must also have these virtues—indeed; the office of the presidency has frequently been called a “permanent campaign.”<sup>117</sup>

A candidate for president must also be able to work with and—hopefully—win the endorsement of the members of the party if he is able to win the nomination.<sup>118</sup> This may also be seen as an important test of whether the candidate will govern well. Here the interests of the state and the party may converge. One reason for instituting superdelegates was the concern of Democrats to make

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115. See Howard R. Penniman, in *AEI PANEL DISCUSSION*, *supra* note 22, at 4 (“The debates in the framing of the Constitution show that every element of the electoral system was designed deliberately with an eye toward producing good presidents . . . . A good presidential selection process required a representative system involving deliberation among people who knew the candidates and could make judgments about the candidates’ abilities.”).

116. *But cf. id.* at 11 (“[T]he skills required to be successful in the nominating process are almost entirely irrelevant to, perhaps even negatively correlated with, the skills required to be successful at governing.”).

117. See generally SIDNEY BLUMENTHAL, *THE PERMANENT CAMPAIGN* (1982) (detailing the many ways the position of president represents a permanent campaign).

118. See Mann, in *AEI PANEL DISCUSSION*, *supra* note 22, at 6 (stressing importance of “bring[ing] candidates in touch with people who subsequently share in governing” in the primaries).

sure a Democratic candidate would have to meet and work with the higher-ups of the party. They could measure his ability to govern, and one aspect of testing that was whether he could negotiate and work with them in the context of a competitive election.

Finally, the act of choosing a vice president is often thought to be a measure of the candidate's ability to govern. It is typically thought to be the candidate's "first" major choice of governance: who will he or she select to govern with? What does that decision show about the candidate's ability to make difficult choices? There was widespread perception that John McCain's choice of Sarah Palin as his running mate showed that he just wanted to win, that he was not being serious about the office of the presidency.<sup>119</sup>

It is unclear what, in general, the state can do to ensure that a candidate will be able to govern well. Of course, the state can require certain things of candidates: that they be of a certain age, or be citizens. There are a few things we can say about the type of process the state would tend to resist, however, if it were interested in governance as a value. It may want to resist a system that gives the nomination to a candidate who is relatively untested and who wins mainly because of an advantage in fund-raising or celebrity status.<sup>120</sup> The state may also want to foster strong parties, as entities that can hold candidates accountable, and be held accountable themselves.<sup>121</sup> But regardless of *how* the state can secure this interest, it seems indisputable that it does indeed have this interest.

### III. TOWARD DELIBERATIVE PRIMARIES

In the previous Part, I laid out various interests that election law scholars have identified as "at play" in their field. I also took pains to show how those interests are implicated in current controversies

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119. See, e.g., Andrew Sullivan, *The Reason for All of This*, THE DAILY DISH (Nov. 17, 2009, 2:58 PM), [http://andrewsullivan.theatlantic.com/the\\_daily\\_dish/2009/11/the-institute-for-the-study-of-sarah-palin.html](http://andrewsullivan.theatlantic.com/the_daily_dish/2009/11/the-institute-for-the-study-of-sarah-palin.html) (stating that McCain's pick of Sarah Palin showed John McCain's "recklessness and cynicism").

120. James Ceaser, *The Presidential Nomination Mess*, 8 CLAREMONT REV. BOOKS, Fall 2008, at 21, 25 ("But two nominees now seem to be clear 'products' of the new system: Jimmy Carter and Barack Obama. Neither won on the basis of a substantial record of public service or high previous standing in his party. Their victories were due to their performance as popular leaders.").

121. Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 615 (1996) ("A political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure.").

about election law. It should be obvious by now that the interests are not unique to any one player in the field. Voters will of course have an interest in a legitimate election. How could they not? They will also want a candidate that will be able to govern once elected. Voters who are members of a party may have an interest in keeping that party ideologically pure, or at least in giving it the ability to regulate its internal affairs as will best suit the party. And candidates—a group I didn't specifically single out in Part II—certainly have an interest in voters being able to vote, an interest in parties that can be able to support them, and an interest in a campaign process which tests them, yet is fair. So by listing the interests separately, I did not mean, by any stretch, to say that the interests are exclusive to any one player. Indeed, the interests overlap and, because they are interests of many groups, tend to reinforce one another.

But in this Part I want to introduce another constitutional value, one that I think in some sense consolidates many of the interests and values identified in the previous section. That interest is in *deliberation*. Deliberation is not so much an outcome value as a process value: it is less about securing a good result as about making sure that result is reached in a certain way, that is, through discussion and debate. Then again, many of the values identified in the previous Part were process values: the ability to participate and have your voice heard, the interest in having a competitive election, or a legitimate one—these are all values about ensuring a good process, not necessarily a good outcome. But I want to argue that by looking at deliberation as a value, and perhaps the chief value of the primaries, we can unite many of the various values from the previous Part and give them a center.<sup>122</sup>

I begin this part by sketching the value of deliberation in elections, and contrasting it with another view of election law that sees elections mostly as devices to aggregate and measure interests. I then go on to evaluate two major proposals for reforming the primaries—a series of regional primaries and a national primary—in light of both of the various values listed in Part II, and also the value of deliberation. I contend that a series of regional primaries best fulfills both the values of Part II and the meta-value of deliberation. National primaries, though often seen as an improvement over the present system and although they seemingly aid some of the election law values of Part II, are the inferior option. I close

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122. On the rise of deliberation as a value in American campaigns, see generally JOHN GARDNER, *WHAT ARE CAMPAIGNS FOR?* ch. 1 (2009).

this Part by briefly considering the reform proposals made by the Democratic Change Commission in its recent Report.

#### *A. Deliberation vs. Aggregation*

The value of deliberation has often appeared in the Supreme Court's decisions on campaign finance,<sup>123</sup> although I think we can divorce it from that context here and consider it as an independent value on its own.<sup>124</sup> The rough idea behind it is that in a democracy, the goal is not simply a good outcome. That is, the value of a campaign is not just in electing the best candidate, although that is important. There is a value in having a robust debate about the candidates and about the issues, about having people think about the candidates and possibly change their minds. There is a value, further, in discussion between citizens, between candidates, and between citizens and candidates. All of these process values are goods in themselves, something that campaigns and elections can facilitate.

What are the characteristics of such democratic deliberation, at least ideally? For present purposes, we can highlight two. The first is that there should be a variety of points of view, so we should try to secure as much participation as we can, and hear as many different kinds of voices as we can.<sup>125</sup> In the campaign finance context, this is understandably put in terms of restricting the monopolization of debate by the wealthy.<sup>126</sup> If the rich are able to give

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123. This concern got its classic expression in the now-overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990), overruled by *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010), where Justice Marshall warned of the "corrosive and distorting effects" large contributions from corporations could have on the quality of political debate.

124. Many have found the value of deliberation to be implicit in the First Amendment. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY* 46 (2005) (understanding the First Amendment's function "as seeking to facilitate a conversation among ordinary citizens that will encourage their informed participation in the electoral process"); see also OWEN M. FISS, *THE IRONY OF FREE SPEECH* 19 (1996); OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 67–88 (1996).

125. See GARDNER, *supra* note 122, at 136 ("In most theories, processes of deliberation must be inclusive so that deliberators may consider the greatest variety of viewpoints, a practice said both to improve the quality of decision making and to ensure that all who will be bound by democratic decisions have a voice in making them." (footnote omitted)). Gardner, I should note, has significant reservations about the value of deliberation in electoral politics.

126. See, e.g., *Austin*, 494 U.S. at 660 (denouncing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978) ("According to

unlimited sums to candidates, the reasoning goes, only the candidates they favor will be heard. Those who are able only to give modest sums or no money at all, will not be able to have *their* candidates heard. In the familiar metaphor, the megaphone of the rich will drown out the voices of the poor.<sup>127</sup> And the more people who can be heard, the argument continues, the better the debate will be. Not only will it be more representative, the conclusions reached will likely be better for having considered a wide range of viewpoints.<sup>128</sup>

Second, deliberation holds out the promise that debate will not merely reinforce people's views on a particular position—that they will leave the process with the same views that they entered in with—but that it might transform them.<sup>129</sup> By hearing all sides of the debate and by engaging with them, one might leave a discussion with one's position changed. Perhaps this means that you hold your initial position with much less certainty, you modify it slightly, or you repudiate it all together. None of these options are *required* by deliberation, but deliberation *holds open the possibility* that one or all of these things could happen, and this is seen as a good thing in itself.

Deliberation as a value is usefully contrasted with a view of elections that sees them merely as aggregating pre-existing preferences.<sup>130</sup> If elections merely exist to tabulate and tally what

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appellee, corporations are wealthy and powerful and their views may drown out other points of view.”).

127. Transcript of Oral Argument at 41, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (No. 98-963), 1999 U.S. Trans. LEXIS 76 (“A big megaphone can drown out the smaller ones, and if Missouri wants the smaller ones also to have a voice, maybe it has to limit the size of the larger one, and if that's so, isn't that just as important a constitutional interest as the First Amendment interest of Ebenezer Scrooge?”).

128. *Munro v. Socialist Workers Party*, 479 U.S. 189, 200 (1986) (Marshall, J., dissenting) (“The minor party's often unconventional positions broaden political debate, expand the range of issues with which the electorate is concerned, and influence the positions of the majority, in some instances ultimately becoming majority positions.”). See generally GARDNER, *supra* note 122, at 48–49. The *locus classicus* for this point is J.S. Mill's *On Liberty*. JOHN STUART MILL, *ON LIBERTY* 42–43 (Ticknor & Fields 1863) (1859) (comparing a position with those of others is the best way of testing it).

129. DENNIS F. THOMPSON, *JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES* 195 (2002) (“As deliberators, citizens modify their views in response to the views voiced by others. When citizens vote, they simply record their own conclusions. They do not change them in response to anyone.”).

130. *Id.* at 202 n.20 (noting that deliberative theory “is often contrasted with aggregative theory, which requires only that citizens or their representatives express individual preferences. Aggregative theory typically relies on voting to turn these individual preferences into collective outcomes . . .”); see also GARDNER, *supra* note 122, at 136 (“[D]eliberative theories understand preferences to be formed endogenously, in the crucible of politics itself, through the give and take of discussion with other citizens of different views.”). See generally CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* ch. 6 (1993).

people think already, deliberation is at best useless and at worst a distraction. Why have many points of view if the goal is just to add up preferences? Why have a process that might encourage people to change their preferences? Such a process could be profoundly destabilizing and disorienting. It would make it harder for elections to unambiguously register the opinions and the preferences of the voters. On the aggregation picture there is no independent value to having people deliberate at length, or even at all. It may at best serve the secondary function of making sure that the preferences people vote are their “true” preferences, ones that are not likely to change.

Deliberation as a value captures many of the values that were articulated and laid out in Part II of this Article. It also transforms and unifies them, and helps us see how they contribute to an underlying vision of deliberative primaries. The right to vote, on the deliberative picture, is no longer a *merely* formal value. That is, it is not merely about the right to be heard, although this is important. It is the right, more fundamentally, to participate in the process along with others. It now can be seen as having a positive value, and not merely a negative one (to be free from obstacles to voting). Your formal right to vote also indicates your right to engage in the ongoing debate that is the primary election season, and to have your voice counted in the end. It is your ticket to the deliberative process.<sup>131</sup>

So too might we see the idea of having a meaningful and effective vote as necessary to ensure that diverse voices are represented in the debate. The process should not be confined just to one segment of the population, but should give all types of people the opportunity to influence and contribute to the debate. Iowa and New Hampshire should not be allowed to drown out the voices of the other states. Nor should the primary process unfairly burden or exclude the voices of those not from the two major parties.

The value of party autonomy and independence can also be viewed through this lens. Having parties that represent distinct viewpoints can add to deliberation by clarifying the options voters have, and by presenting a consistent and coherent governing philosophy. They can be the starting points for voters to think about the merits of the candidates who seek to be the party’s representative. Even party autonomy might aid deliberation—if parties feel that the party is getting too isolated or out of touch, they may seek the input of those from outside the parties. Either way, parties can

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131. At the same time, as I emphasize in the conclusion, there are many ways that one can engage in the deliberative process that *do not* end with casting a ballot.

be seen as vital to deliberation, and so deserving of extra protection.

Finally, deliberation enhances and preserves the state's interests as well. It seems plausible that a candidate who has been selected after deliberation is a more "legitimate" candidate than one who has just been selected by a popular vote with no deliberation. Deliberation implies that we not only know the candidate's views, but have also thought about them, and found them to be persuasive—or at least better than the alternative. We are not just registering our gut feelings, which we may later come to regret.

Deliberation also reveals the state's interest in competition and puts it in a clearer light. Competitive elections are more likely to involve considering and debating the differences between candidates. If one candidate has a lock on the primary, there is little incentive to do so: why bother deliberating, if such deliberation will be useless? And a candidate who has to engage with many points of view may be thought to be better at governing.

So I conclude that as a value, deliberation has much in favor of it. It is an important value in its own right, and it also helps us to understand how the values of individual voters, parties, and the state may be unified. Deliberation works, when it works, to the advantage of all concerned. But how can we get deliberation to work?

### *B. A National Primary*

For decades, a favorite proposal of reformers has been a national primary system: have all of the states hold their primaries on the same day.<sup>132</sup> This proposal has several advantages, which we can see by referring to the constitutional values of Part II. Perhaps its greatest virtue comes with the right to vote, considered in its many guises. A national primary, presumably, would eliminate the caucus system, and allow each registered voter to cast a vote on National Primary day. So too would it, presumably, eliminate the advantage that Iowa and New Hampshire currently have (although one could imagine a modified national primary that would retain the traditional early status of those two states). If all states had their primaries on the same day, every state, and every voter could in principle be the "deciding" vote of the primary election. There

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132. See, e.g., THOMAS GANGALE, FROM THE PRIMARIES TO THE POLLS: HOW TO REPAIR AMERICA'S BROKEN PRESIDENTIAL NOMINATION PROCESS 95–97 (2008) (comparing the author's favored "American Plan" with a national primary); RANNEY, *supra* note 30, at 7–8 (discussion and analysis of various proposals for a national primary day, "not only the oldest reform proposal . . . but also the most frequent").

would no longer be an advantage to states that held their primaries earlier and got to play a potentially pivotal role in selecting the nominee. Every vote, it seems, would have an equal chance of being effective. This is not something to take lightly, and indeed is the principal advantage of a national primary. Moreover, it is intuitively plausible that a national primary would increase interest and increase turnout. It terms of getting the most participation from ordinary people, the national primary scores high.<sup>133</sup>

There are other advantages. From the perspective of the political parties, they may see it as in their interest to have a candidate who—even at the primary stage—has shown definite and genuine “national” appeal and who could therefore make a strong showing in the general election. And presumably a candidate who was able to win a majority of the votes on national primary day may seem to the voters to be more legitimate. He or she would not merely be a “favorite son” or “favorite daughter” of a particular state or a particular region, but someone whom the nation saw as real presidential material.

But there are some obvious drawbacks to the proposal as well. Let me first view them through some of the values in Part II, and then consider the national primary in light of the value of deliberation.

For starters, the national primary might be thought to make it difficult for less well-known candidates to win.<sup>134</sup> They will not have the name recognition to capture many votes nationally, and they will not have the money to run a national campaign. This is bad for the value of a meaningful vote. The fewer “smaller” candidates who are able to run an effective campaign, the less choice voters will have come primary time. Moreover, a national primary may not be a very competitive race, if a well-funded and well-known candidate is able to take an early lead and sprint ahead of the field. He or she will be able to sew up the nomination rather quickly—indeed, after the national primary is held, the race will be over.

If we restricted ourselves to only these values—the values in Part II—we might think that the balance tips in favor of a national primary. After all, it does a better job at securing an equal right to vote, and ensures a “national” candidate, and participation would doubtless increase. But things look different after we consider the value of deliberation. The national primary is a perfect example of

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133. It is also popular. See Springer & Gibson, *supra* note 109, at 109, 123; Ritchie & Fidalgo, *supra* note 76 (reporting that 72% of Americans favor a single national primary).

134. RANNEY, *supra* note 30, at 19 (“[A] one-day national direct primary probably could be won only by a contender already well known and well financed.”).

a system tailored toward an aggregative model of politics: we have our fixed preferences, and we vote, and then the candidate with the most votes wins. There is no need to drag out the process.

However, if we look at things in terms of deliberation, the national primary appears as something close to a disaster. It favors mainstream candidates who *already* have wide appeal and name recognition. Crowding out third party candidates may hinder the right to a meaningful vote; but that crowding out is also salient because it means that there are fewer voices in the conversation. These voices matter, not only because someone may want to vote for the “marginal candidate,” but also because the “marginal candidate” can bring new perspectives to the table, and force the mainstream candidate to consider that perspective—and perhaps alter his or her own position in light of it.

The variety of perspectives is also relevant if we consider the states as having primaries at different times as opposed to having one day when the primary takes place. A one-day primary in all fifty states is a national primary. It is not fifty separate primaries. But when you spread out the primaries and across different states and different regions at different times, more issues become salient. In particular, *regional* issues become salient. A national primary would have to be about major national issues. Regional and state primaries, however, would be more about local issues; candidates who hope to win in a state or regional primary would have to pay attention to those issues.

Moreover, deliberation—unlike aggregation—takes time. It is a process that cannot be done in a day (even a day of deliberation<sup>135</sup>). That is why if we had only one day to vote and to decide the nominee, this would be a disaster for deliberation. Deliberation presupposes the possibility and the actuality that people will change their preferences or at least better inform their preferences if they are given information and time to think about that information.<sup>136</sup> If the primary is just a one shot affair, then the possibility of meaningful deliberation is foreclosed, or at least strongly curtailed, from the start.

This is why the 2008 primaries were not a good test of the idea of a national primary. Many pundits talked about (and feared) a

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135. See Flanders, *Deliberative Dilemmas*, *supra* note 16, at 164 (discussing the proposal by Bruce Ackerman and James Fishkin for a national “deliberation day”). Moreover, longer primaries mean different candidates will fare better at different times; the race will not quickly be between the Democratic and the Republican nominees, but between many Democratic and many Republican nominees. This can only be a boon to deliberation.

136. Cf. Kirkpatrick, *in* AEI PANEL DISCUSSION, *supra* note 22, at 24 (emphasizing the value of “prolonging the decision process”).

“de facto” national primary, when over half of the states held their primary on the same day. But it was not a true national primary. The presidential candidate for the Democratic Party was not chosen on that day, and indeed the race dragged on for several more months. It was precisely because we did not have a true national primary that the race was as successful as it was. There was competition between two high profile and extremely able candidates. There was deliberation, because there was time for people to reflect and consider the differences between the two candidates.<sup>137</sup>

### *C. Regional Primaries*

The other major reform proposal is a system of regional primaries.<sup>138</sup> The details between competing plans will differ, but the basic idea is as follows. States will be grouped along regional lines, reflecting both geography and interests. The regional primaries would then be spread apart by a couple of weeks, and held throughout the primary season. Some plans have the smaller states going first. Some would have the first region to hold a contest be chosen randomly. Still other plans favor having regions each go first on a rotating basis. And once more, as with a national primary, we can imagine a system that would leave the traditional “first state” status with Iowa and New Hampshire and then have a regional primary with the remaining states.

As opposed to the national primary, the disadvantages of the regional primary with regard to having an effective vote seem to stand out. Those states in the region that goes first will still have an advantage in choosing the nominee. Invariably, the candidate who picks up the first region will have momentum going into the next

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137. But is the problem merely with a national primary, or with having a national primary very early in the primary season? Both. An early national primary cuts shorts debate before most people are paying attention. But even a later national primary would not be ideal. By spreading the contests out, there is a greater chance to sustain voter interest and participation for several months. Having one national primary late in the primary season might make for intense debate for a few weeks before the national primary, but not much more.

138. See Martinson, *supra* note 22, at 200 (explaining how “the [‘California Plan’] randomly generates a primary calendar, while ensuring that the schedule is spread out over ten, two-week intervals, and allowing for fewer delegates to be selected in the first few weeks so as to guarantee retail politicking”); Nichols, *supra* note 4, at 14 (describing the “Delaware Plan” where “the smallest twelve states would have chosen delegates in March, the next smallest fourteen in April, the next thirteen in May and the remainder in June”); *The American Plan*, FIX THE PRIMARIES, <http://www.fixtheprimaries.com/solutions/americanplan/> (last visited Mar. 30, 2011) (describing a system which “features a schedule consisting of ten intervals, generally of two weeks, during which randomly selected states may hold their primaries”).

set of contests. Those who are in the later regions, and especially those in the last region to have its primaries, may feel that their voice is not being heard.

This is a serious worry. At the same time, it can be overstated. Some candidates will have regional advantages—they may be Senators or Governors in state with later primaries—and may be able to make a strong showing late in the primary season, even after getting off to a poor or rocky start. Moreover, there is a chance that the campaign will start in a region in which *no* candidate has a decisive advantage, so that even after the first primary day, there is still a relatively open contest. Finally, if the regions take turns going first, the unfairness of one primary season could be mitigated in the next.

But whatever unfairness lingers seems to be made up by the advantages of the regional primary system in terms of the goal of deliberation. By breaking up the contest and spreading it out over time, one reduces the risk that a celebrity candidate can simply dominate the first set of primaries and make the remaining primaries irrelevant. It also gives various regional stars a chance to shine later in the primary season, when their state or region comes to vote. They may at least have a *chance* to shine, even if they cannot translate their regional celebrity into a national candidacy. Or a lesser-known candidate can slowly build support by making a good showing in the early primaries. The fact that the primaries will be spread out over time will give voters a chance to think and assess the various candidates. The primary season will not be over in a day, at least if things go according to plan.

#### *D. The Democratic “Change Commission” Proposal*

The Democratic National Primary “Change Commission” (the “Commission”) made three major recommendations for changing the primary process.<sup>139</sup> The first involved the timing of the primaries.<sup>140</sup> The Commission proposed moving the start date of the primaries back to February (the earliest primaries would be held no sooner than February 1) and to encourage states to cluster their primaries in regions. They would do this, not by sanctioning those states that cut ahead in line (as they tried, unsuccessfully, to do in 2008), but by offering “bonus” delegates and other inducements to

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139. REPORT, *supra* note 5, at 17–21.

140. *Id.* at 17–18.

states which opt to participate in a regional cluster.<sup>141</sup> In other words, the DNC has firmly sided with the idea of a regional primary, against the related trends of frontloading and a national primary. However, the Commission did not recommend removing the priority given to New Hampshire, Iowa, Nevada, and South Carolina. They can have their primaries or caucuses in February.<sup>142</sup> All other states must wait until the first Tuesday in March.

The second reform recommended by the Commission was to remove the influence of unpledged delegates, or superdelegates.<sup>143</sup> Concerned that superdelegates nearly had a decisive role in choosing the nominee in 2008, the Commission wanted the nominee to reflect entirely the wishes of the voters in the states.<sup>144</sup> All delegates, the Commission said, should be assigned based on the result of state primaries and caucuses: the party leaders would now be able to attend the party either as “assigned delegates” or as non-voting delegates.<sup>145</sup> The effect of this reform would be to eliminate the possibility that superdelegates could act as a meaningful counterweight on the nominee as determined by the popular vote.

The Commission’s final set of recommendations, regarding the caucuses, were more tentative.<sup>146</sup> The Commission expressed a concern about people being able to attend the caucuses, and about haphazard organization on the part of many states. They did not propose abolishing the caucus system, nor did they formally recommend against it. Rather, they counseled the adopting of a set of “Best Practices” in order to guide states that use the caucus system.<sup>147</sup>

How do these reforms fare in light of the values articulated in this paper? The move towards regional primaries, which the Commission recommends (and suggests a mechanism for encouraging), gets high marks for promoting deliberation. The idea of spreading out the primaries gives more time to consider the candidates, and the regional emphasis may give the edge to less

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141. *Id.* at 18.

142. These primaries and caucuses are referred to as “pre-window” events. *Id.*

143. REPORT, *supra* note 5, at 18–19.

144. See Michael O’Brien, *DNC to Reform Primary System, Cutting Many ‘Superdelegates’*, THE HILL’S BLOG BRIEFING ROOM, (Mar. 23, 2009, 3:12 PM), <http://thehill.com/blogs/blog-briefing-room/news/campaigns/37604-dnc-to-reform-primary-system-cutting-many-superdelegates> (noting desire of the Democratic National Committee to “put voters first”); Tom Schaller, *DCC Trying to Encourage Regional Primaries*, FIVETHIRTYEIGHT (Jan. 13, 2010, 3:42 PM), <http://www.fivethirtyeight.com/2010/01/dcc-trying-to-encourage-regional.html> (“The overwhelming view was that reforms needed to be made to ensure that the preferences of the voters was not overridden by unelected delegates . . . .”)

145. REPORT, *supra* note 5, at 19.

146. *Cf. id.* at 20–21.

147. *Id.* at 21.

well-known candidates. So this should be considered to be on the right track.

What of the other reforms? The demise of superdelegates—something which now seems inevitable—should be looked at as a mixed blessing. To be sure, the Commission is right that giving superdelegates a vote risks not having the nominee be entirely a matter of the popular vote. In a superdelegate system, candidates will have to persuade both the people and the party regulars if they want to be assured of the nomination. But was this entirely a bad thing? The whole idea of superdelegates was to have them act as a check on the popular favorite—to avoid a candidate who could win, but who might not be successful at governing or in advancing the party's interests.<sup>148</sup> Moreover, we might even think of the superdelegates as adding an additional voice to the deliberative process. Candidates will have to engage not only the interests of the voters-at-large, which might be focused on the short term, but also to the party hierarchy, which has the party's long term interests at heart. The loss of superdelegates is not an unmitigated good. It is part of a trend, which now seems inevitable, towards complete popular control of the primaries.<sup>149</sup> We might have reasons to lament that trend.<sup>150</sup>

The Commission's recommendation on caucuses reflected a decided ambivalence about their existence. Caucuses present logistical problems that are absent from regular primaries.<sup>151</sup> But they nonetheless have an advantage on the deliberative front. Caucuses, at least in principle, require discussion and persuasion. Minds can be changed during the caucus—a far cry from the private voting booth, where a simple preference is recorded. So the logistical challenges may be worth it. But the battle to defend cau-

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148. As Nelson Polsby famously said, “[p]eer review is a criterion which entails the mobilization within the party of a capacity to assess the qualities of candidates for public office according to such dimensions as intelligence, sobriety of judgment, intellectual flexibility, ability to work well with others, willingness to learn from experience, detailed personal knowledge of government, and other personal characteristics which can best be revealed through personal acquaintance.” NELSON W. POLSBY, *CONSEQUENCES OF PARTY REFORM* 169–70 (1983).

149. See Mann, in *AEI PANEL DISCUSSION*, *supra* note 22, at 25–26 (stating that “the tendency toward direct democracy is a substantial theme in our politics, in our culture”); RANNEY, *supra* note 30, at 13 (“Ever since the triumph of the Progressive movement . . . one of the criteria by which Americans have most often judged their political institutions is that of participation . . .”); WANG, *supra* note 69, at 4 (“We now are in an era in which the consensus is that nominating contests should be broadly participatory, not exclusionary, and reflective of the will of the rank and file.”).

150. I discuss this point more in the conclusion.

151. See *supra* Part II.A.1 (indicating difficulties with certain groups being able to participate in caucuses).

cuses may ultimately be a losing one: in the face of the increasing pressure for more direct democracy as well as the logistical problems that beset caucuses, the day of the caucus may soon be coming to an end.

#### CONCLUSION

What do we want in a presidential primary? What *should* we want? I have not tried to give a definitive answer to these questions, although I have indicated my sympathy for certain reforms of the process in light of the meta-value of deliberation. Rather, my main aim has been to give us a framework, or more precisely a set of values, that we can use in analyzing our current primary process as well as proposals for reforming that process. These values are taken from the field of election law, which has, over the past two decades, emerged as a vital and dynamic area of legal scholarship. Election law's contribution to the debate over primaries, I have argued, is to isolate certain entities and certain values as having a constitutional significance. Individual voters have the right to vote considered along many dimensions: they have the right to participate, the right to an effective vote, and the right to a meaningful vote. Political parties have interests in maintaining both their autonomy and their ideological purity: two values which are sometimes at odds with one another. State and federal governments have interests in ensuring that elections are legitimate and corruption free, that they are competitive, and that they result in electing someone who can actually govern. If we examine these values, we can find them all in play—to greater and lesser degrees—in the presidential primaries. This is what I hope to have shown in Part II.

Election law also suggests a deeper value which might unite the various interests and players in the process. That value is deliberation. I highlighted the significance of that value in evaluating proposals for reforming the primary process in Part III.

But in addition to providing an analytical framework to use in understanding and evaluating the presidential primary system, I hope to have set the stage for a deeper questioning of what presidential primaries are for, especially as compared to the general presidential election contest. Are the same values as relevant in the presidential primary as they are in the general election for president?<sup>152</sup> I have suggested that deliberation should be given a

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152. See Greenberg, *supra* note 5, at 36 (stating that parties are not obliged to “hew to an ideal of more direct democracy that we aspire to follow in electing public officials”);

greater and more important role in the primaries than in the general election. To use the language of Part III, it may be more important to aggregate votes—to make sure everyone can have their preference recorded—in the general election. But this may leave it open for the presidential primaries to be less concerned about recording preferences than in encouraging deliberation among citizens. Perhaps we should be less worried about giving everyone an equally effective vote in the primaries (something a national primary would ensure) and more about making sure that the process does a good job of testing candidates and sparking a national conversation about their merits. From this angle, it may be less important that one's state or region be decisive in picking a candidate (i.e., that one has an "effective vote") and more important that there is a competitive campaign and a diverse group of candidates. There are many ways to participate in the political process other than simply casting a ballot. Ironically, those elements of the primary system that are most disdained—the preference to Iowa and New Hampshire, caucuses, superdelegates, and conventions—may have the greatest potential to enhance deliberation. In thinking about how to reform the primaries, we should not be so quick to overlook those things that actually *preserve* deliberation in the status quo and which we might want to keep. Thus, we might want to resist the trend of more states having their primaries on the same day, as well as the move to eliminate or reduce the power of superdelegates.

If we look at deliberation as the "master value" we should seek to promote in the primaries, then the answer we give to my title question—what do we want in a presidential primary?—may be very different than the answer to the question, what do we want in a general election? The tendency in both the law and in the study of it has been to assimilate the primary process to the general election process. Both involve the same players and the same interests, so it is only natural to assume that they should emphasize the same values. And indeed, when it comes to fundamental rights, such as the right to cast a ballot, it is unquestionable that they *should* share the same values. But beyond this, perhaps we should question whether *all* values should be considered the same in the primaries and in the general elections. In particular, we should be open to ways in which the primaries might become more deliberative, even

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Hasen, *supra* note 69 (noting different Constitutional standards for primary and general elections).

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if they are not directly “democratic.”<sup>153</sup> The trend now, at least in fact if not in law, is for the primaries to resemble the general election: to make securing the nomination a single-shot, national, and popular affair. If we care about deliberation, we should resist this trend.

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153. Cf. CEASER ET AL., *supra* note 5, at 121–22 (calling superdelegates and caucuses the “least democratic” aspects of the primary campaign).