

Introduction

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Every four years, citizens of the United States go to the polls to cast their votes for a new president. But the rules of electing a president in November and the rules governing how American political parties *nominate* their candidates for the presidency differ in important respects. In the general election, voters in each state choose electors, who subsequently vote for the president. The candidate who receives the majority of the electors' votes becomes president. Although there have been calls to abolish the Electoral College, Americans have largely relied on the same system since 1804—when the Twelfth Amendment altered important aspects of how the Electoral College works¹—to decide the outcome of their general presidential election. In contrast to the relatively stable rules governing the general election, the rules by which American political parties nominate their presidential candidates have changed dramatically over the past two hundred years.

The American presidential nomination process has been able to evolve over time in part because it has no constitutional basis. The operation of the presidency and of Congress is controlled in many important respects by the Constitution, which regulates several aspects of how the occupants of each of these institutions are chosen and what qualifications they must have. By contrast, the basic structures of the presidential nomination process have developed largely outside of the confines of the Constitution's original design.² This is true of most features of the American presidential nomination process, including its system of primaries and caucuses, the role that political parties play in them, and the national party conventions that follow them. It is also true of the primary

¹ U.S. CONST, amend. XII; *see also* EDWARD B. FOLEY, *PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE* 27–42 (2020).

² *See* JAMES W. CEASER, *PRESIDENTIAL SELECTION: THEORY AND PRACTICE*, at ix (1979).

debates that Americans watch, and of the campaigns that the country's presidential candidates wage.³

There are many worthy questions about the American presidential nomination process to which scholars do not have very good answers. Does the nomination process strengthen or weaken the country's political parties? Does it foster or impede the selection of presidents who are suitably skilled for the office? Is the presidential nomination process regarded as legitimate by the public? Is it sufficiently democratic? To what extent have the sequenced choices imposed by the presidential primary calendar been influential in determining the contest's final outcome? Would a redesign of the primary system lead to a different result? In the social sciences, institutional theories of politics often predict that political outcomes will result from the institutional settings in which they take place. For institutionally minded scholars, a primary system designed differently would result in a different outcome. There is no question that the institutional structure of the primaries and caucuses determines the outcome of the presidential nomination process in the United States, even if it does so in often unpredictable ways.

Part of the unpredictability comes from the fact that the United States maintains a unique presidential nomination system. It is the only democracy in the world that selects its nominees for the country's highest office by popular vote. Major parties in parliamentary democracies, including in the British Commonwealth, Western Europe, and Japan, choose their candidates for prime minister by a secret vote of party members. Though parties in these countries do hold annual conventions composed of delegates chosen by local or affiliated organizations, these conventions typically do not elect the parties' leaders. In other presidential democracies, such as those in Latin America, the presidential candidates of various political parties are also chosen in national delegate conventions, and these conventions resemble their American counterparts, but there is an important difference in that their delegates are elected by the dues-paying members of the parties' local and regional organizations or else given their seats by virtue of the executive or legislative offices they hold. No delegates are chosen through a presidential state primary or caucus in which ordinary voters actually participate.

The system used to work that way in the United States, too. For most of the country's history, a party's presidential nominee was chosen in a process that

³ *Id.*

was entirely closed to the public. Ordinary citizens had no say over who became their party's presidential candidate. Instead, this choice was left to party elites. People who had experience in government evaluated a nominee's credentials long before voters did— through a process that resembled a form of peer review. Then, in 1968, the American presidential nomination system was utterly transformed. The Democratic Party instituted new rules, put in place for the Democratic National Convention of 1972, that eliminated many of the backroom deals that had characterized the previous system. By 1976, the Republican Party followed suit and adopted similar rules. These new rules made the views of primary and caucus voters paramount. Over the next four decades, these new rules evolved, until they eventually yielded a presidential candidate— Donald Trump— who did not resemble any previous president in American history. Trump had no previous experience in government or the military and would never have been chosen under the prior system.

Nonetheless, during the 2016 primaries, Trump managed to beat out sixteen rivals on his way to winning the Republican Party's presidential nomination. At the Republican National Convention in Cleveland that year, a majority of the Republican Party's 2,472 delegates rallied around Mr. Trump to nominate him as their standard bearer. On the other side of the aisle, six candidates vied for the Democratic Party's nomination, although only two lasted until the Democratic National Convention in Philadelphia. Hillary Clinton won 34 primaries and caucuses while Bernie Sanders won 23 before a majority of the Democratic Party's 4,763 convention delegates nominated Clinton as their presidential candidate. While voters disagreed sharply on the preference for Trump or Clinton, most agreed that they did not like either candidate very much. Most voters told pollsters that they held unfavorable views of both candidates ahead of the 2016 election, leaving many to wonder how these two people managed to receive their party's nominations in the first place.

As election law scholars, we followed the 2016 election, including the nominations of Hillary Clinton and Donald Trump, very closely. Like the rest of the country, we also followed the field of two dozen candidates who announced in 2019 that they would vie for the Democratic Party's nomination and the chance to challenge Trump in November 2020.⁴ While so doing, we came to realize that most American voters understand little about their country's presidential nomination process. For most people, the system used

⁴ These candidates included Michael Bennet, Joe Biden, Michael Bloomberg, Cory Booker, Steve Bullock, Pete Buttigieg, Julián Castro, John Delaney, Tulsi Gabbard, Kirsten Gillibrand, Kamala Harris, John Hickenlooper, Jay Inslee, Amy Klobuchar, Beto O'Rourke, Bernie Sanders, Deval Patrick, Tom Steyer, Elizabeth Warren, Marianne Williamson, and Andrew Yang, among others.

in the United States to nominate presidential candidates remains rather opaque. Americans know, of course, that their fellow citizens vote in primaries and caucuses, and they also know that Iowa and New Hampshire proceed first in holding these contests. But few citizens can explain why these contests are staggered rather than held on a single day, how these contests result in the selection of convention delegates, or how many delegates are allocated to each state. Few citizens appreciate the patchwork of state laws and party rules that govern this byzantine process. Indeed, because the rules governing this process are so difficult to discern and understand, most Americans also fail to appreciate how significantly these rules have evolved since the country's founding.

Though the two major parties have used primaries and caucuses to nominate delegates to their national conventions since 1972, few people have a good grasp of the details concerning how this system works in practice. In 1974, the scholar Austin Ranney, who played a role in designing the modern presidential nomination system, wrote about how “in America, the presidential nominating game is played under by far the most elaborate, variegated, and complex set of rules in the world. They include national party rules, state statutes . . . and a wide variety of rulings by national and state courts.”⁵ Contemporary scholars have also commented on how little is known about these rules. “Every four years, the Democratic and Republican national parties each promulgate a long and detailed set of rules governing the composition and selection of national convention delegates,” explains William G. Mayer, a scholar who has long observed the presidential nomination process. “In general, these rules are carefully studied by a very narrow slice of campaign managers, consultants, political activists, and reporters, while the vast majority of Americans—even those who follow politics rather closely—remain entirely unaware of them.”⁶

Interest peaks in the Democratic and Republican nomination contests every four years, especially when the media begins covering these events. This interest increases during the primaries and national conventions and subsides once the national conventions end. Despite this periodic interest, there is little sustained discussion of the mechanics of the process by

⁵ Austin Ranney, *Changing the Rules of the Nomination Game*, in *CHOOSING THE PRESIDENT* 72 (James David Barber ed., 1974).

⁶ William G. Mayer, *Superdelegates: Reforming the Reforms Revisited*, in *REFORMING THE PRESIDENTIAL NOMINATION PROCESS* 85 (Steven S. Smith & Melanie J. Springer eds., 2009).

which the Democrats and Republicans—or, indeed, the country’s minor political parties—nominate their presidential candidates. As the journalist Walter Shapiro perceptively explains, “The issue here is not *whom* the parties select, but rather *how* candidates should be chosen.”⁷ Is there a better, or perhaps fairer, way to nominate presidential candidates? Are there sensible ways to improve this system to make it more transparent and ultimately more democratic as a whole? If so, what are they?

Since the creation of the modern, primary-dominated nomination process, there has been little scholarly or public commentary devoted to large-scale reassessments of this system or consideration of major structural changes that might be made to it. Discrete issues within the nomination system have, of course, received a great deal of attention—such as what the appropriate sequencing of primaries in the states ought to be, or whether open rather than closed primaries ought to be used. But this attention has come mostly from political scientists, and it has focused mostly on issues surrounding party building, campaigning, voting, and the media. By comparison, almost no work on the presidential nomination process has been done by lawyers and legal scholars, who naturally approach this topic with a different set of lenses. There is no book, as far as we know, that explains the law—or the patchwork of laws—that drives presidential nomination in the United States. There is thus a gap in our collective knowledge that needs to be filled.

That’s where we come in. We are two scholars of election law from opposite sides of the political spectrum. One of us is a Democrat, while the other is a Republican. Despite this, we happen to be good friends and close colleagues who have long been united in our belief that the American presidential nomination process can be designed to function in a better and simpler way. The process should be designed to function in a way that gives ordinary citizens the opportunity to nominate the candidate from their party for the presidency who is the best man or woman for the job. At the same time, we believe that our presidential nomination process should come with safeguards to ensure that only a person with the relevant qualifications, talent, integrity, and seriousness of purpose ascends to the presidency. It was with these goals in mind that we joined forces and decided to edit this book.

A few months after the historic presidential election of 2016, several of the contributors to this book gathered to participate in a discussion group called

⁷ Walter Shapiro, *The Chosen One: Thoughts on a Better, Fairer, and Smarter Way to Pick Presidential Nominees* 5 (Brennan Ctr. for Justice, 2017) (emphasis in original).

“Reforming the Presidential Nomination Process.” Our discussion initially focused on the following two questions: First, how did Hillary Clinton and Donald Trump, two candidates who were received negatively by most voters, manage to win their parties’ respective nominations? Second, if we altered state voting rules, the primary calendar, the rules of the national conventions, the campaign finance rules, or the format of the presidential primary debates, might we have had a different outcome? Relatedly, our discussion group also sought to understand how well or poorly most Americans grasped the process by which our political parties select their presidential nominees. For example, do voters know who sets the rules of the presidential primary debates? Do they understand the mechanics of how the caucuses work? And do they know why our primaries are staggered over the course of many months rather than held on a single day? After probing these issues in depth, we turned to discussing two final issues: First, as election law scholars, do we have anything novel or unique to say about the American presidential nomination process? Second, if so, then how would we design this process to ensure that only the very best candidates get nominated for the presidency? Our discussion group met in Boca Raton, Florida, as part of the 2017 annual meeting of the Southeastern Association of Law Schools (SEALS). By the end of the day, we decided that a book should result from the fruits of our long discussion.

Each of our conference participants was asked to write about a different legal aspect of the nomination process and to suggest avenues for how it might be improved. From our discussion, which the two editors of this book organized, a set of long scholarly papers emerged. These papers discussed various aspects of the presidential nomination process that are not often covered by the news media and of which most citizens may not be aware.

Here are some examples of what our contributors submitted:

- **A WOMAN AS PRESIDENT.** Hillary Clinton wasn’t the first woman to run for president. Since 1940, a full 40 women have been nominated by their parties for the highest office in the land. Ten of these women attracted more than 40,000 votes in the general presidential election. Female contenders have been similarly active in presidential primaries. Since 1964, ten women have campaigned in a major party primary or caucus. Despite this long history of women aspiring to the presidency, 2016 marked the first time that a woman participated in a general election presidential debate. What are the obstacles facing women candidates? How can we encourage more women to run?
- **PRESIDENTIAL PUBLIC FUNDING.** In 2020, Joe Biden ran for president for the third time. During his previous runs, in 1998 and 2008, he collected

public funding. In 2020, however, Biden was not using public funds. And he was not alone. Every single one of the two dozen Democratic candidates in 2020 was financed entirely by private contributions. How does a candidate running in the primaries qualify to receive public funding, and why do candidates today forgo this money in favor of private funds? What are Biden and the others thinking, and how can public funding be made attractive to candidates once more? Indeed, would it be a good idea to make it so?

- **SUPER PACS.** The non-use of public funding is not the only thing that has changed about the presidential nomination process. The deregulation of campaign finance law has upended the nature of private funding as well. Whereas candidates once relied on contributions from individuals and corporate and union PACs, today new kinds of political actors have entered the playing field whose spending cannot be capped. They include Super PACs, 501(c)(4), and 527 organizations. How has the deregulation of campaign funding changed the presidential nomination process? What can the law do about it?
- **THE PRESIDENTIAL DEBATES.** The Commission on Presidential Debates, a private, non-profit organization, sets the rules of the presidential debates and decides which candidates to invite, all on its own. Research shows that the exclusion of certain candidates has the effect of limiting the range of policy issues offered to American voters. Recently, the Federal Election Commission passed regulations to ensure that the debates are run more fairly, even though government oversight of the debates has traditionally been minimal. How are the debates regulated, and by whom? How should they be regulated?
- **BINDING DELEGATES AT THE NATIONAL CONVENTIONS.** Delegates elected to vote for one party candidate at the national conventions sometimes wind up casting a vote for another. This happens with presidential electors, too. In 2016, four Democratic electors from the state of Washington cast votes for president for Colin Powell and for Faith Spotted Eagle, rather than for Hillary Clinton. And rather than vote for Tim Kaine for vice president, they voted for Elizabeth Warren, Maria Cantwell, Susan Collins, and Winona LaDuke. The national media rarely reports on these faithless delegates and faithless electors, but scholars certainly study them. What should the law do about this?
- **FRONT-LOADING.** Iowa and New Hampshire have state statutes that grant their state officials discretion to move up the date of their caucus and primary contests if any other state tries to hold an earlier contest. As a result, Iowa always holds the nation's first caucus, and New

Hampshire usually holds the nation's first primary. The national parties have tried to penalize these two states by refusing to seat their national convention delegates, a punishment Iowa and New Hampshire readily accept because the media attention showered on these states is more important to them than the small number of delegates they send to each party's national convention. Constitutionally, is there anything Congress can do to bring Iowa and New Hampshire in line?

Other contributors wrote chapters on how ranked-choice voting can be used for presidential primaries, what the impact of technology has been on the primary process, and related topics. In many cases, these chapters are written from a legal standpoint, and most of them uniquely try to engage with the law—state and federal, statutory and case law—that influences the presidential nomination process. Ultimately, each chapter provides recommendations for how that law might be changed or improved.

This book's importance springs from its historical moment. Presidential nomination reform is currently on the national agenda, and scholars and citizens alike are voicing their opinions about the process. Opinion polls show that most Americans overwhelmingly support efforts to reform their presidential nomination process, even though many of them do not know how to bring such reforms about.⁸ The mechanics of the process are so complex that even most candidates do not fully understand them, and thus they resort to hiring expensive lawyers to help them navigate this labyrinth. Our goal for this book was to gather leading election law scholars from across the political spectrum to explain the myriad laws and rules that comprise this process.

We wish to thank all those who came to Florida to participate in our discussion, including several election law scholars who helped frame our thoughts but who did not contribute a chapter to our book: Joshua Douglas, Jacob Eisler, Atiba Ellis, and Ciara Torres-Spelliscy. We also thank those scholars who did not attend our gathering in Florida but nonetheless agreed to contribute a chapter after learning of our project. We thank our respective deans and associate deans for their support: Ronald Chen, Reid Weisbord,

⁸ In 2016, there was profound disaffection with America's nomination system. Widespread accusations of unfairness accompanied the nomination fights of both major parties. The problems touched many aspects of the nomination process, including the sequencing of primaries, the oversight of the candidate debates, and, of course, the lackluster popular support that voters exhibited for Trump and Clinton, the two candidates who ultimately wound up winning each party's nomination.

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