

Disenfranchisement in the US Presidential Nomination Process Through Caucuses and the Gatekeeping Role of Iowa and New Hampshire

Thomas C. Dec*

This Note examines inequities in the presidential nomination process. The nomination process has developed such that African American and women voters, compared to white male voters, wield less influence over which candidates parties nominate. By examining data from recent elections and scholarship from the fields of law, political science, and economics, this Note illuminates the extent of voter disenfranchisement and argues that parties must eliminate the use of caucuses and demote Iowa and New Hampshire from their role as gatekeepers of the nomination process.

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* J.D. 2018, University of California, Berkeley, School of Law; B.A. 2013, Yale University.

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INTRODUCTION

The United States was founded on the republican values of liberty, equality, and justice.¹ To safeguard these core values, the nation's leaders are accountable to the people through periodic popular elections.² Although the Constitution at its inception did not provide a right to vote, the country slowly expanded the franchise from white male property owners to African Americans, women, and citizens over eighteen years old.³ The Supreme Court in 1964 famously recognized the principle of "one person, one vote," a concept that helped eradicate inequalities between voters in the apportionment of congressional seats and led courts to be more searching in their review of state election laws.⁴ The

1. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. pmb1.
2. See U.S. CONST. art. I, § 2; U.S. CONST. art. II, § 1.
3. See U.S. CONST. amends. XIV, XV, XIX, XXVI.
4. Reynolds v. Sims, 377 U.S. 533, 558 (1964).

idea that each citizen's vote should count equally has led citizens and scholars to question inequities in our election system and seek reform.⁵

The presidential nomination process reinforces these inequities, as each citizen's vote is far from equal. The current process violates democratic principles by giving a small group of voters disproportionate influence over the process, which allows them to effectively limit which candidates the rest of the electorate may consider. This power imbalance is particularly harmful to groups that have been historically disenfranchised from the voting process.

In this Note, I argue that the presidential nomination process systematically disenfranchises African American and women voters and that this disparate impact should lead to reform. This Note will proceed in three parts. Part I will discuss the development of the presidential nomination process and its treatment by courts. Part II will discuss how caucuses and the gatekeeping function of Iowa and New Hampshire disenfranchise African Americans and women, among other groups. Part III will discuss potential solutions and will suggest that parties abolish the use of caucuses and reduce the influence of Iowa and New Hampshire in the nomination process. I will then briefly conclude.

I.

DEVELOPMENT OF THE PRESIDENTIAL NOMINATION PROCESS

This Part will discuss the development of the nomination process, which is important to our analysis of current debates and reform proposals. It will proceed in two Sections. First, it will discuss the political history of the process and how parties created the current system. Second, it will discuss the current state of the law and how courts have addressed challenges to the process.

A. *Political History*

The presidential nomination process has a unique history in American political development and, for most of US history, looked very different than today's process. This Section is divided into two Subsections. The first will describe the nomination process prior to 1972. The second will describe the current nomination process, which has been substantially the same since 1972.

5. See, e.g., *Abolish the Senate!*, SLATE (Nov. 2, 2000), http://www.slate.com/articles/news_and_politics/chatterbox/2000/11/abolish_the_senate.html [<https://perma.cc/4PA6-72CU>] (arguing that the Senate violates the important principle of "one man, one vote" because senators are not distributed based on state population); Akhil Reed Amar & Charles Fried, *Should the Electoral College Be Abolished?*, N.Y. TIMES (Nov. 16, 2016), <https://www.nytimes.com/roomfordebate/2016/11/16/should-the-electoral-college-be-abolished?mcubz=1> [<https://perma.cc/A7QA-8RH2>] (arguing the benefits and drawbacks of eliminating the Electoral College).

1. *Presidential Nomination Process Before 1972*

There is no evidence from the Constitutional Convention that the Framers entertained proposals to regulate the presidential nomination process.⁶ They anticipated the possibility of regional factions preventing one candidate from securing a majority of electoral votes,⁷ but did not anticipate the role political parties would play in selecting candidates. They engaged in debates over more fundamental questions about how the chief executive should be elected, what powers he should have, and how the other branches of government could check his executive power.⁸

The Framers were eminently concerned about giving the people too much power in the electoral process. The Electoral College and the selection of US Senators by the states, which limited the role of voters, demonstrate this concern. Professor Bruce Ackerman states that the Framers wanted to protect against “the danger that a demagogic President might destabilize the Republic and attempt to become King . . . the [Electoral] College was a clever device to avoid the plebiscitarian Presidency.”⁹ This same tension would come to influence the development of the presidential nomination process as well.

With the Constitution silent on the presidential nomination process, political parties stepped in to fill the void. The development of the presidential nomination process is typically divided into four periods: (1) the Congressional Caucus (1792–1828); (2) Pure Convention System (1832–1908); (3) Mixed System (1912–1968); and (4) Dominant Primary System (1972–present).¹⁰

The nascent nomination process began with the Congressional Caucus, whereby the congressmen affiliated with the Federalists and Democratic-Republicans met to choose who would run under their respective party’s banner.¹¹ This system of nominating candidates broke down because of

6. Article II of the US Constitution enumerates the qualifications US presidents must hold to serve and the manner in which the president is elected. For example, Article II states that the president shall be elected by a body of electors and that the president must secure a majority of electors to take office. The Constitution gives states the power to determine the process by which their state electors are selected. Article II, however, is silent on the question of *how* those electors nominate presidential candidates. U.S. CONST. art. II, § 1.

7. *Id.* (“[A]nd if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote.”).

8. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 67–68 (1991); *see generally* *Notes on the Debates in the Federal Convention*, THE AVALON PROJECT (including James Madison’s notes from the Constitutional Convention of 1787), http://avalon.law.yale.edu/subject_menus/debcont.asp [<https://perma.cc/HWE4-N5JX>].

9. ACKERMAN, *supra* note 8, at 67–68.

10. *See* GEOFFREY COWAN, *LET THE PEOPLE RULE: THEODORE ROOSEVELT AND THE BIRTH OF THE PRESIDENTIAL PRIMARY* 4 (2016); Emmett H. Buell Jr., *Evolution of the Presidential Selection Process During the Constitutional Convention*, in *ENDURING CONTROVERSIES IN PRESIDENTIAL NOMINATING POLITICS* 36 (Emmett H. Buell Jr. & William G. Mayer eds., 2004). The fourth period will be discussed in the next Subsection.

11. *See* Buell, *supra* note 10, at 36.

poor attendance and concerns over the constitutionality of congressmen effectively selecting presidential candidates.¹²

Subsequently, there was a brief period when state legislatures nominated candidates to supplement the largely discredited Congressional Caucus.¹³ By 1832, the first national party conventions took place.¹⁴ This period is known as the Convention System. These conventions operated in a manner similar to the modern system, but exercised all of the power to pick presidential nominees.¹⁵ Delegates from across the country came to one location to select the party's presidential nominee and conduct other party business. Throughout the nineteenth century, most state parties selected delegates through caucuses¹⁶ of party members in that state, leaving control in the hands of party machines.¹⁷

The progressive movement of the early twentieth century ushered in the use of direct primaries, where voters—as opposed to party insiders—had say over who their state delegation would support. Known as the Mixed Era, this period is characterized by some states choosing delegates via direct primaries and others leaving party insiders the power to select delegates. President Theodore Roosevelt became a major advocate of direct primaries and used them to great effect in his bid for the Republican nomination in 1912.¹⁸ Although Roosevelt lost the nomination, his advocacy for direct primaries had a lasting impact. The Progressive Party platform included a call for direct primaries and a few months later President Woodrow Wilson declared support for direct primaries in his first national address.¹⁹ Primaries would be a force in presidential nominations for the next few decades by demonstrating a candidate's viability and conferring on the candidate a sense of legitimacy. However, primaries were by no means outcome determinative. In fact, one scholar noted that primaries did not “seriously impinge upon the power of conventions to reject candidates leading in the primary preference vote.”²⁰ During this period both major parties nominated

12. See *id.* at 36–37 (noting that critics at the time expressed discomfort with the idea of congressmen effectively selecting the President and the anti-democratic thrust of the nomination process).

13. See *id.* at 38–39.

14. See *id.* at 39.

15. *Id.* at 79.

16. Merriam-Webster defines a caucus as “a closed meeting of a group of persons belonging to the same political party or faction usually to select candidates or to decide on policy.” *Caucus*, MERRIAM-WEBSTER (2017).

17. See Leonard P. Stark, Note, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 YALE L. & POL'Y REV. 333 (1996).

18. Although Roosevelt would go on to lose the Republican nomination to incumbent President Howard Taft, he won two-thirds of the delegates in the thirteen states that held primaries and a majority of the popular vote. See COWAN, *supra* note 10, at 1.

19. See *Progressive Party Platform of 1912*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29617> [https://perma.cc/DC88-D9AK]; *First Annual Message*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29554> [https://perma.cc/7XY2-HWE4].

20. Buell, *supra* note 10, at 80.

candidates who did not enjoy wide support in primaries.²¹ But this trend changed after 1968.

2. Presidential Nomination Process After 1972

The 1968 Democratic presidential nomination led to the system used today, the Dominant Primary System. The Democratic Party was deeply divided over the Vietnam War, with anti-war Senators Robert F. Kennedy and Eugene McCarthy on one side and hawkish incumbent Vice President Hubert Humphrey on the other. Both Kennedy and McCarthy used presidential primaries to harness support for their candidacies and anti-war positions.²² Humphrey did not. Instead, he relied on his long-time relationships with party leaders and labor activists and decided not to compete in primary elections.²³ This did not go over well with a substantial portion of the Democratic Party, which saw Humphrey's nomination as illegitimate and undemocratic.²⁴ After a violent convention,²⁵ the party established the Commission of Party Structure and Delegate Selection (also known as the "McGovern-Fraser Commission") to examine the nomination process and propose reforms.²⁶

The Commission dramatically altered the nomination process by banning two popular selection systems that were each used for over a generation and encouraging the use of direct primaries and caucuses.²⁷ These innovations are still in use today. The reforms have been described as "the largest coordinated change in the mechanics of presidential selection since the development of the national party convention."²⁸ The actions of the Commission eroded the power of party insiders by requiring nominating events to be open to all party members. Although the Commission technically issued the reforms as guidelines, they were effectively requirements, since non-compliance could lead to a state's delegation not being seated at the subsequent national convention in 1972.²⁹ The reforms implemented by the Democratic Party during this period are important,

21. *See id.*

22. NELSON W. POLSBY, CONSEQUENCES OF PARTY REFORM 22 (1983).

23. *Id.*

24. *Id.* at 26.

25. Anti-war demonstrations led to riots and violent interactions with law enforcement. "Violence became a daily event, with marches and rallies broken up by police with nightsticks and tear gas. It was the same most nights in the parks. Protesters would gather, and after the 11 p.m. curfew, the police would move in with clubs and gas, chasing them into the streets." *See 1968 Chicago Riot Left Mark on Political Protests*, NPR (Aug. 23, 2008), <https://www.npr.org/templates/story/story.php?storyId=93898277> [<https://perma.cc/6MZ3-WWRL>].

26. POLSBY, *supra* note 22, at 34.

27. The Commission banned the Party Caucus and the Delegate Primary as a means of selecting delegates. The Party Caucus was a process by which local party leaders (not party voters) would effectively select delegates at local and state conventions, and the Delegate Primary (used by New York and Pennsylvania) was a process by which all candidates for national convention delegate would appear on a ballot for election by the voters. *See id.*

28. BYRON E. SHAFER, QUIET REVOLUTION 522 (1983).

29. *See* POLSBY, *supra* note 22, at 34.

as they represent one mechanism through which future reform could be achieved. Finally, while the Democratic Party took the lead on implementing reforms, the Republican Party has largely followed suit and uses a process that is substantially similar.

Today, the system created for the 1972 election remains largely intact. In the 2016 presidential election, the vast majority of delegates in both major parties were selected through primaries and caucuses.³⁰ The Democratic and Republican Parties also permit “superdelegates,” typically party leaders and elected officials, a vote³¹ at the convention. In 2016, fifteen percent of Democratic delegates and seven percent of Republican delegates were superdelegates.³² The calendar of nomination events lasted over nineteen weeks, beginning with the Iowa Caucuses on February 1, 2016, and ending with the District of Columbia Democratic Primary on June 14, 2016.³³ Individual states are given discretion over many aspects of their nomination event, including the following: the date;³⁴ whether to hold a primary or a caucus;³⁵ whether primaries and caucuses should

30. See *Who's Winning the Presidential Delegate Count*, BLOOMBERG POLITICS, <https://www.bloomberg.com/politics/graphics/2016-delegate-tracker> (July 25, 2016) (last visited Oct. 25, 2018).

31. In the 2016 presidential election, Republican superdelegates were required to vote for the candidate who won their state while Democratic superdelegates were unpledged and could vote for the candidate of their choice. See *What Are Superdelegates? (And, Yes, Republicans Have Them, Too)*, PBS (July 12, 2016), <http://www.pbs.org/weta/washingtonweek/blog-post/what-are-superdelegates-and-yes-republicans-have-them-too> [<https://perma.cc/2YHU-2UUQ>]. For the 2020 presidential election, Democratic superdelegates are “barred . . . from voting on the first ballot to choose the party’s presidential nominee unless a candidate has secured a majority of the convention using only pledged delegates.” Adam Levy, *DNC changes superdelegate rules in presidential nomination process*, CNN (Aug. 25, 2018), <https://www.cnn.com/2018/08/25/politics/democrats-superdelegates-voting-changes/index.html> [<https://perma.cc/L4VY-5XBU>].

32. See *What Are Superdelegates?*, *supra* note 31.

33. *Election 2016 Calendar: Primaries and Caucuses*, NPR (Feb. 17, 2016), <http://www.npr.org/2016/01/26/464430411/election-2016-calendar-primaries-and-caucuses> [<https://perma.cc/Y9K9-BPDY>].

34. Discretion is not unlimited. Both parties, for example, effectively prevent states from holding nominating events before Iowa, New Hampshire, South Carolina, and Nevada and require nominating events to be held after a certain date. See DEMOCRATIC PARTY OF THE UNITED STATES, 2016 DELEGATE SELECTION RULES FOR THE DEMOCRATIC NATIONAL CONVENTION 11 (2014) [hereinafter DEMOCRATIC PARTY DELEGATE SELECTION RULES]; THE REPUBLICAN NATIONAL COMMITTEE RULES 20–21 (2016).

35. The Republican Party also allows states to forgo participation through a primary or caucus, so a state may hold neither, as Colorado did in 2016. See *Election 2016 Calendar*, *supra* note 33; REPUBLICAN NATIONAL COMMITTEE RULES, *supra* note 34, at 21–22.

be open to unaffiliated voters;³⁶ whether delegates should be awarded based on a winner-take-all basis;³⁷ and the administration of the events themselves.

As the history of the presidential nomination process shows, both national and state political parties have wide latitude in shaping the process. However, that discretion is not limitless. The Constitution provides guardrails that parties cannot violate, and groups have challenged aspects of the system as unconstitutional. This includes challenges to restrictions on who may participate in presidential primaries and caucuses and the structure of the system itself.

B. *Legal Challenges to the Presidential Nomination Process*

The presidential nomination process has been infrequently litigated, leaving a degree of uncertainty as to how courts might approach potential challenges to the system. In general, parties have a right to “choose a candidate-selection process that will in its view produce the nominee who best represents its political platform.”³⁸ However, parties must exercise this right within the confines of the Constitution. The First, Fourteenth, and Fifteenth Amendments have all been implicated in challenges to party activities over the years. In this Section, I discuss the case law that involved changes or challenges to the use of caucuses as part of the presidential nomination process and the parties’ scheduling of presidential nomination events.

1. *The White Primary Cases*

Where a political party’s action is tantamount to state action, states and the courts have more power to regulate a party’s activities. A series of cases, known as the White Primary Cases, provides the foundation for intervention on this basis.³⁹

In 1927, the Supreme Court in *Nixon v. Herndon* struck down on Fourteenth Amendment grounds a Texas law that banned black voters from participating in the Texas Democratic primary elections.⁴⁰ Shortly after *Herndon*, Texas reformulated its statute to allow parties to set their own qualifications for participation. The Texas Democratic Party passed a rule that limited primaries

36. See REPUBLICAN NATIONAL COMMITTEE RULES, *supra* note 34, at 22; DEMOCRATIC PARTY DELEGATE SELECTION RULES, *supra* note 34, at 3, 15. If unaffiliated voters are allowed to participate, the nominating event is considered an “open” primary or caucus, versus a “closed” primary or caucus when only registered party members are allowed to participate. For example, Tennessee is an open primary state; therefore, voters do not have to be affiliated with a party to participate and need only request the Democratic primary election ballot. TENNESSEE DELEGATE SELECTION PLAN 3–4 (2016).

37. Only the Republican Party allows states to award all of their delegates on a winner-take-all basis. REPUBLICAN NATIONAL COMMITTEE RULES, *supra* note 34, at 19.

38. N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 202 (2008).

39. One scholar noted that “these landmark cases reflect repeated and varied state attempts to ensure that black voters could not influence the decisive political issues of the day.” See Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 653 (1998).

40. *Nixon v. Herndon*, 273 U.S. 536, 541 (1927).

to only white voters. A few years later, the Court in *Nixon v. Condon* struck down the revised Texas law, citing *Herndon* as precedent.⁴¹ In a major setback to civil rights advocates, however, the Court in *Grove v. Townsend* upheld the Texas Democratic Party's power to limit membership in the party to white voters through an internal resolution (not through a state law) because it was not a state action and thus not subject to the limits of the Fourteenth or Fifteenth Amendments.⁴²

Fortunately, the Court's decision did not last. In 1944, the Court in *Smith v. Allwright* explicitly overruled *Townsend* and held that Texas and the Texas Democratic Party violated the Fifteenth Amendment when the state allowed the party to restrict participation in the party primary elections to only white voters.⁴³ The Court stated that "[t]he party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party."⁴⁴ The decision resulted in the elimination of white-only Democratic Party primaries in the United States, but did not eliminate white-only primaries conducted by non-party private citizens' organizations.⁴⁵

Terry v. Adams addressed this gap in the Court's jurisprudence and struck down the discriminatory practices of the Jaybird Association, a whites-only private organization closely affiliated with the Democratic Party.⁴⁶ There, the Jaybird Association circumvented the restrictions placed on the Democratic Party by holding its own primary elections open to its members.⁴⁷ The successful candidates would then enter the Democratic primaries and run as the Jaybird-endorsed candidate, typically winning without significant opposition.⁴⁸ Eight members of the Court held that the discriminatory practices of the organization violated the Fifteenth Amendment, though there was no majority opinion.⁴⁹ Four justices found that the Jaybirds were so closely associated with

41. *Nixon v. Condon*, 286 U.S. 73, 89 (1932). The Court stated:

The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere. They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly.

Id. at 88.

42. 295 U.S. 45, 48 (1935).

43. 321 U.S. 649, 664-66 (1944).

44. *Id.* at 663.

45. See Issacharoff & Pildes, *supra* note 39, at 654.

46. 345 U.S. 461, 463 (1953).

47. *Id.*

48. *Id.*

49. *Id.* at 461.

the Democratic Party that the Fifteenth Amendment covered their actions.⁵⁰ Three justices found that the state violated the Fifteenth Amendment when it allowed the Jaybirds to duplicate state election processes to produce an “equivalent of the prohibited election.”⁵¹ Finally, one justice believed that the Fifteenth Amendment applied because state election officials oversaw the administration of the Jaybird primaries.⁵²

The White Primary Cases provide a foundation for judicial intervention to stop racially discriminatory practices by political parties. These cases should be used by the Court to address other forms of racial discrimination in the presidential nomination process, to be discussed *infra* Part II.

2. *Equal Protection Jurisprudence Addressing Disparate Impact*

Putting the White Primary Cases aside, Fourteenth Amendment challenges to state laws regulating the presidential nomination process on the basis of race will likely be held to a standard of review that requires more than a showing of disparate impact. While the Court has not directly addressed this question as it applies to the presidential nomination system, existing case law may influence how the Court adjudicates these challenges in the future. This Section briefly touches on a key case from the D.C. Circuit as well as standards articulated by the Court in two closely related areas of the law.

First, existing case law suggests that the unequal allocation of delegates in the nominating process of an election is legally permissible. In 1971, the D.C. Circuit in *Bode v. National Democratic Party* upheld the National Democratic Party’s delegate allocation formula (then brand new), even though it did not comply with the “one person, one vote” values of *Reynolds* or *Baker v. Carr*.⁵³ The court upheld an allocation formula that apportioned delegates on the basis of past party strength in the state (the average number of votes for the Democratic candidate in the last three presidential elections) and Electoral College strength (granting more delegates to states with more electoral votes).⁵⁴ The court distinguished the “one person, one vote” standard in legislative elections from that of presidential nominations and cited the Electoral College, which violates the “one person, one vote” principle, in support of the notion that unequal

50. *See id.* at 477 (J. Clark, concurring).

51. *Id.* at 469 (J. Black, concurring).

52. *Id.* at 477 (J. Frankfurter, concurring). Justice Frankfurter explained: “That it was the action in part of the election officials charged by Texas law with the fair administration of the primaries, brings it within the reach of the law.” *Id.* at 476–77.

53. *Bode v. National Democratic Party*, 452 F.2d 1302 (D.C. Cir. 1971); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds*, *supra* note 4, at 558. The formula in *Bode* allocated forty-six percent of delegates on the basis of a “State’s average Democratic voting strength in the past three Presidential elections” and fifty-four percent of delegates on “a basis of a multiple of three times the state’s electoral college strength.” *Bode*, 452 F.2d at 1303–04.

54. *Bode*, *supra* note 53, at 1303.

delegate allocation is permissible.⁵⁵ The court also explained that the plaintiffs provided no data that the allocation would “fail to give the electorate an opportunity, insofar as the nominating process is involved, to govern themselves through the exercise of the right to vote.”⁵⁶ While the court cited the White Primary Cases as imposing limits on parties, and did not foreclose future challenges based on uneven delegate allocation, it squarely rejected the plaintiff’s proposal that allocation should be based only on party strength (a “one Democrat, one vote” standard).⁵⁷

Likewise, the standard articulated in racial gerrymandering cases may influence how the Court approaches challenges to the presidential nomination process under the Fourteenth Amendment. In general, the Equal Protection Clause of the Fourteenth Amendment prevents a state from separating its citizens into different voting districts on the basis of race without a sufficient justification.⁵⁸ A plaintiff must “show, either through circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature’s [districting] decision,” which requires proving “that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations.”⁵⁹ In 2017, the Court in *Cooper v. Harris* reiterated this standard and explained that plaintiffs had to show that (1) “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district” and, if so, (2) that race-based sorting of voters “serves a ‘compelling interest’ and is ‘narrowly tailored’ to that end.”⁶⁰ The Court found the plaintiffs met the test and struck down the maps as unconstitutional.⁶¹

Finally, the Court may look to its decision in *Washington v. Davis* as imposing an intent requirement in constitutional challenges to the presidential nomination process.⁶² There, the Court held that a facially neutral law “does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact.”⁶³ The same standard applies to facially neutral laws

55. *Id.* at 1308 (“The Court has never held, however, that it is an impermissible departure from this fundamental theory [of one person, one vote] to permit the electoral college analogy to have some part in the allocation of delegates to a national convention which is to nominate candidates, not for state or county offices, but for President and Vice-President, whose very elections are to be made by the electoral college.”).

56. *Id.* at 1309.

57. *Id.* at 1309–10.

58. See *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017).

59. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

60. 137 S. Ct. 1455, 1464 (2017). The Court found that race *was* the predominant factor in the state’s district line drawing. The Court subsequently rejected the state’s defense that it was being responsive to the requirements of the Voting Rights Act. *Id.* at 1469.

61. *Id.* at 1469.

62. See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 256 (1979) (quoting *Washington v. Davis*, 426 U.S. 229 (1976)).

63. *Id.*

that have a disparate impact on women.⁶⁴ This standard could be invoked in the context of the presidential nomination process, because the party rules that create a disparate impact on certain groups stem from facially neutral party rules. The Court may require evidence of discriminatory intent as a result.

The Court's Fourteenth Amendment jurisprudence leaves plaintiffs in murky waters. If the Court looks to the D.C. Circuit in *Bode*, plaintiffs would at a minimum have to show how the inequalities in the system surpass that of the 1972 formula. While possible, it would likely be difficult for plaintiffs to meet this burden. If the Court invokes its gerrymandering jurisprudence, it would probably require plaintiffs to present evidence that the current rules and nomination calendar were race-motivated. Disparate impact alone may not be enough for a successful constitutional challenge in this context.

3. *First Amendment Jurisprudence*

Finally, the Court's First Amendment jurisprudence may be implicated by potential challenges to the nomination system. The First Amendment protects the right of citizens to unite in furtherance of common political beliefs.⁶⁵ Political parties are one prominent vehicle that citizens use to organize and pursue common objectives; the right to associate with a party is "an integral part of this basic constitutional freedom."⁶⁶ Both major parties in the United States, for example, have organizations at the local, state, and national levels to facilitate party activities.

Over the past several decades, the Court has been highly protective of the associational rights of parties in cases addressing campaign finance issues, ballot access laws, and the regulation of internal party elections.⁶⁷ State regulations that burden a party's First Amendment associational rights are reviewed under a strict scrutiny standard. Accordingly, the state's regulation must be narrowly tailored to achieve a compelling state interest.⁶⁸

64. *Id.*

65. See U.S. CONST. amend. I; *Tashjian v. Republican Party*, 479 U.S. 208, 214–15 (1986).

66. *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). A majority of voters affiliate with the Democratic Party or the Republican Party. Additionally, President Donald Trump and all members of the 115th Congress, except for Senator Bernie Sanders (I-VT) and Senator Angus King (I-ME), affiliate with the Democratic or Republican Party. See *A Deep Dive Into Party Affiliation*, PEW RES. CTR. (Apr. 7, 2015), <http://www.people-press.org/2015/04/07/a-deep-dive-into-party-affiliation> [https://perma.cc/LQZ3-734M].

67. See ROBERT C. WIGTON, *THE PARTIES IN COURT: AMERICAN POLITICAL PARTIES UNDER THE CONSTITUTION* 72, 135–36 (2014) (defining various mechanisms by which states regulate political parties). *But see* Adam Winkler, *Symposium: Voters' Rights And Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886-1915*, 100 COLUM. L. REV. 873, 874–75 (2000) ("Between 1886 and 1915, courts by and large rejected the contention that parties were private, voluntary associations entitled to autonomy. Instead, in adjudicating electoral reforms, courts emphasized 'voters' rights'—i.e., the right of individuals to an effective, meaningful, and useful ballot and to an orderly and clean electoral process.").

68. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 582 (2000).

The balance struck under the First Amendment between allowable actions by states, political parties, and national party organizations underscores the Court's protection of associational rights. In general, states may not regulate internal party affairs, such as imposing term limits for party officials or forbidding the governing bodies of political parties from endorsing in party primaries.⁶⁹ States are also limited in determining which registered voters are allowed—or not allowed—to participate in a party's primary election.⁷⁰ However, parties may exclude candidates who do not align with their values even if the candidates otherwise meet state requirements for ballot access.⁷¹ Further, national party organizations are able to establish their own rules without interference from state regulations.⁷² In short, under current First Amendment jurisprudence, parties have the right to choose nominees through conventions, caucuses, primaries, or an entirely different process, provided they do not violate other constitutional provisions.

The First Amendment favors internal reform by political parties over external reform by the government. It provides a safe haven for parties to implement reform on their own, but it simultaneously complicates the potential for regulation by states or the federal government.

II.

DISENFRANCHISEMENT THROUGH CAUCUSES AND THE DISPROPORTIONATE INFLUENCE OF IOWA AND NEW HAMPSHIRE

This Part will address two aspects of the presidential nomination process that are inconsistent with democratic principles and result in the disenfranchisement of African American and women voters. The first Section will discuss the use of caucuses as a means of delegate selection and the second Section will discuss the disproportionate influence of Iowa and New Hampshire in the nomination process.

69. See *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 216 (1989).

70. See *Tashjian v. Republican Party*, 479 U.S. 208 (1986) (striking down a state law restricting primary elections to registered party members when one major party wanted both party members and independents to participate). *But see* *Clingman v. Beaver*, 544 U.S. 581 (2005) (upholding a state law that permitted only registered party members and registered Independents to vote in party primaries).

71. See *Duke v. Massey*, 87 F.3d 1226, 1231 (11th Cir. 1996) (stating that parties have a right to exclude individuals).

72. *Democratic Party v. Wisconsin*, 450 U.S. 107 (1981). In violation of National Democratic Party rules, Wisconsin allowed for open primaries whereby both Democrats and Independents could vote in the Democratic Primary. *Id.* at 109. The National Democratic Party refused to seat Wisconsin's delegates to the 1980 Democratic National Convention, because the delegates were selected in violation of the party rules. *Id.* The Court upheld the National Democratic Party's decision as part of the party's First Amendment right of political association. *See id.* at 108. To be clear, states *can* burden the associational rights of the national party, but not without a compelling state interest, which was not found here. *See id.* at 121, 124–25.

A. Caucuses

Caucuses have been integral to party affairs for most of US history despite their exclusionary nature and advances in elections administration that have made elections more inclusive and credible. This Section will have four Subsections. First, it will discuss the structure of caucuses. Second, it will discuss imperfections in caucus administration. Third, it will describe how and why caucuses systematically disenfranchise African American and women voters. Finally, it will briefly conclude.

1. Structure of the Caucus System

Since the reforms to the nomination process in 1972, caucuses have been one of two ways that parties typically select delegates to the national convention. For the purposes of this Note, I will describe the Iowa Caucuses as a representative example of how presidential nomination caucuses operate. The Iowa Caucuses are the most well-known caucus event due to their position as the first nominating event in the country. Most caucus states follow a structure that is similar to the Iowa caucuses.

Iowa conducts a multi-level process to select their delegates. The first step is a precinct-level⁷³ caucus, where party members meet to elect a designated number of precinct delegates who will then participate in the county-level convention. The precinct caucuses are what the public typically envisions when they think of the Iowa Caucuses. In 2016 approximately 1,700 precinct caucuses were held across the state.⁷⁴ Caucuses are held in the evening and continue until the business of the caucus is complete.⁷⁵ Participants must remain at the caucus location for their preference to count.⁷⁶ Democratic caucus-goers stand in certain areas of the room to indicate support for their preferred candidate. If a candidate does not garner the support of at least fifteen percent of attendees,⁷⁷ that candidate's supporters must join a different candidate's group during a stage called "realignment."⁷⁸ Republican caucus-goers indicate their support via a

73. A precinct is a voting district covering a particular geographic area, designated by the city, county, or state government.

74. *How the Iowa Caucuses Work*, WALL ST. J. (Jan. 26, 2016), <http://graphics.wsj.com/elections/2016/how-do-the-iowa-caucuses-work> [https://perma.cc/XB8X-Y6UJ].

75. *See It's About to Get Real: What You Need to Know About the Iowa Caucuses*, USA TODAY (Feb. 1, 2016), <https://www.usatoday.com/story/news/politics/onpolitics/2016/02/01/what-time-are-the-iowa-caucuses/79613764> [https://perma.cc/SVU2-DYPA].

76. *Id.*

77. This threshold also applies to the subsequent levels, meaning, a candidate must also secure fifteen percent of total precinct-level delegates at the county convention to earn a delegate to the congressional and state conventions. *See How the Iowa Caucuses Work*, *supra* note 74.

78. *See How do the Iowa Caucuses Work?*, DES MOINES REG. (Jan. 30, 2016), <https://www.desmoinesregister.com/story/news/elections/presidential/caucus/2016/01/30/how-do-iowa-caucuses-work/79568908> [https://perma.cc/9HVV-UFQ5].

presidential preference poll, often on slips of paper.⁷⁹ In both parties, precinct delegates are awarded proportionately based on the level of support for each candidate.

A few weeks after the precinct-level caucuses are complete, the precinct delegates participate in the county convention. Each of Iowa's ninety-nine counties holds a convention where the precinct delegates select county delegates to both a congressional district convention and a state convention. The third and final level includes the congressional district and state conventions, which select the state's delegates to the national convention.⁸⁰

The composition of the state's delegation will typically reflect the preferences of the precinct-level caucuses, but until recently, the Democratic Party did not formally bind delegates at any stage of the process.⁸¹ This means that while a precinct-level delegate may be chosen by caucus-goers to represent Candidate *A*, that person may arrive at the county convention and instead support Candidate *B*. In contrast, Republican delegates are bound by the results of the precinct caucuses during the first round of voting.⁸²

2. Imperfections in Caucus Administration

Caucus rules are difficult to implement and open to manipulation. One scholar notes that a caucus "sometimes takes on the trappings of a Middle Eastern bazaar."⁸³

The caucus system eliminates the possibility of a secret ballot, a procedural safeguard used to prevent manipulation of the voting process by outside parties. Caucus-goers are required to attend the caucus and indicate their support for a candidate in the company of their neighbors, co-workers, religious leaders, and strangers. While a public proclamation of one's candidate preference may serve some deliberative functions,⁸⁴ it is ripe for intimidation and puts the integrity of

79. See *How Exactly do the Iowa Caucuses Work?*, NPR (Jan. 30, 2016), <https://www.npr.org/2016/01/30/464960979/how-do-the-iowa-caucuses-work> [<https://perma.cc/N6Z8-X6U7>].

80. Most delegates are selected through the congressional district conventions, but each party reserves some delegates for statewide "at-large" delegates for the state convention to select. See *How the Iowa Caucuses Work*, *supra* note 74.

81. See *id.* The Democratic Unity Reform Commission recommended binding delegates in later caucuses to support candidates in proportion to the precinct-level results. See REPORT OF THE UNITY REFORM COMMISSION 18–19 (Dec. 8–9, 2017), http://s3.amazonaws.com/uploads.democrats.org/URC_Report_FINAL.pdf [<https://perma.cc/T3PY-EPE7>]. The Democratic National Committee adopted the Unity Reform Commission recommendations. See *DNC Passes Historic Reforms to the Presidential Nominating Process*, DNC (Aug. 25, 2018), <https://www.democrats.org/Post/dnc-passes-historic-reforms-to-the-presidential-nominating-process> [<https://perma.cc/GF7E-K9A2>].

82. See *How the Iowa Caucuses Work*, *supra* note 74.

83. JAMES W. DAVIS, U.S. PRESIDENTIAL PRIMARIES AND THE CAUCUS-CONVENTION SYSTEM: A SOURCEBOOK 46 (1997).

84. See Chad Flanders, *What Do We Want in a Presidential Primary? An Election Law Perspective*, 44 U. MICH. J. L. REFORM 901, 931–32 (2011).

the electoral process into question. The United States adopted a system of secret ballots at the turn of the twentieth century in part because of “widespread intimidation of voters, fraud, and violence.”⁸⁵ In fact, political parties printed and distributed their own ballots in each state until 1888, which employers, party bosses, saloonkeepers, and others used to ensure voter support.⁸⁶

The rationale used to justify the secret ballot in 1888 still applies to party caucuses today. Although anecdotal, reports in 2016 of caucus workers wearing Donald Trump T-shirts⁸⁷ or labor unions sending union organizers to caucus sites⁸⁸ to ensure that workers support union-endorsed candidates make it harder for caucus-goers to indicate their support free of invidious pressures. The increasing polarization of the electorate further underscores the importance of a secret ballot, as public voting may incite greater hostility from members of the opposing party.⁸⁹

Second, the caucus rules leave room for mischief on the part of parties and candidates. The allocation of precinct-level delegates and the cascading series of conventions reduces accountability to ordinary party members. The 2016 Democratic Caucus in Nevada is illustrative. There, 52.6 percent of precinct caucus-goers supported Hillary Clinton and 47.3 percent supported Bernie Sanders.⁹⁰ Based on these proportions, Clinton was projected to earn twenty of the state’s thirty-five pledged delegates. But because of his campaign organization, Sanders was able to beat Clinton at the second level county convention⁹¹ by ten points and was expected to limit Clinton to eighteen delegates as opposed to twenty. At the final stage of delegate selection, the advantage swung back to Clinton as a result of challenges to the credentials⁹² of

85. Michael Waterstone, *Civil Rights and the Administration of Elections—Toward Secret Ballots and Polling Place Access*, 8 J. GENDER RACE & JUST. 101, 106 (2004).

86. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 348–52 (2d ed. 2002).

87. See, e.g., *Reports of Irregularities at Nevada Caucuses*, HILL (Apr. 20, 2017 at 3:14 PM), <http://thehill.com/blogs/ballot-box/presidential-races/270538-gop-officials-looking-at-irregularities-at-nevada-polls> [<https://perma.cc/C6ZX-UVBC>] (showing that volunteers running Republican caucuses in Nevada were wearing Donald Trump T-shirts, potentially intimidating caucus participants).

88. See *Harnessing Labor Vote Essential to Clinton’s Chances in Nevada*, NEWSWEEK (Apr. 21, 2017 at 9:05 PM), <http://www.newsweek.com/democrats-clinton-labor-nevada-428816> [<https://perma.cc/A62K-3PZX>].

89. See John Gramlich, *America’s Political Divisions in 5 Charts*, PEW RES. CTR. (Apr. 20, 2017), <http://www.pewresearch.org/fact-tank/2016/11/07/americas-political-divisions-in-5-charts> [<https://perma.cc/A5LL-9MYG>].

90. *Hillary Clinton Wins Nevada Caucuses*, NPR (Apr. 20, 2017), <http://www.npr.org/2016/02/20/467503655/hillary-clinton-projected-to-win-nevada-caucuses> [<https://perma.cc/8HRH-FU44>].

91. See *Will It Matter that Sanders Won NV County Conventions?*, RENO GAZETTE-J. (Apr. 20, 2017), <http://www.rgj.com/story/news/politics/2016/04/05/will-matter-sanders-won-nv-county-conventions/82648052> [<https://perma.cc/5AH2-AEQD>].

92. Delegates must be “certified” by the Party at the convention and meet certain basic requirements, such as being a member of the Party and being from the district or precinct the delegate wishes to represent.

Sanders's delegates. Most of the challenges were successful and fifty-six Sanders state convention delegates were not seated.⁹³ Clinton eventually secured a majority of delegates at the state convention and twenty pledged delegates as originally projected.⁹⁴

While Clinton ultimately secured the nomination, the episode demonstrates how candidates have historically exploited the rules to stymie the popular vote. Eight years earlier, Clinton beat then-candidate Barack Obama by six points in the 2008 Nevada Democratic caucuses, yet came away with fewer delegates as a result of the Obama campaign's organizational efforts.⁹⁵ Likewise, Republican candidate Ted Cruz won 45.9 percent of the precinct caucus vote at the 2016 Republican Caucus in Maine, but secured his preferred slate of delegates to the national convention after he out-organized other campaigns in the succeeding conventions.⁹⁶ Cruz, like Obama and Sanders, was able to use the rules to secure an outcome that differed from the preferences of the precinct-level caucus-goers.⁹⁷

Third, the informal nature of the caucus system makes it difficult to manage and erodes its credibility. Caucuses do not have the same level of professionalization as primary elections in part because they are not run by the state but by the political parties⁹⁸ and in part because the process is inherently chaotic. One scholar noted that getting an accurate count of people present in the

93. See *Here's What Happened at Saturday's Dramatic Nevada Democratic Convention*, WASH. POST (May 15, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/05/15/heres-what-happened-at-saturdays-dramatic-nevada-democratic-convention/?utm_term=.70c195ce1c54 [<https://perma.cc/P6QH-NUKH>]. Note that the Sanders delegates were challenged on the basis of their credentials. This means that the Clinton Campaign did not convince state delegates to change their allegiance, but rather had the party disqualify the Sanders delegates on other bases. While the Democratic Unity Reform Commission recommended basing the allocation of national delegates on precinct-level results, allowing multiple levels of caucuses gives campaigns and parties more opportunities than in primary elections to influence the process in ways that go against the preferences of ordinary voters. The commission did not eliminate this issue. See REPORT OF THE UNITY REFORM COMMISSION, *supra* note 81, at 18–19. See also *Iowans Claim Instances When Sanders was Shorted Delegates*, DES MOINES REG. (Feb. 6, 2016), <http://www.desmoinesregister.com/story/news/elections/presidential/caucus/2016/02/06/iowans-claim-instances-when-sanders-short-delegates/79902080> [<https://perma.cc/E38C-4GH4>] (discussing reported irregularities in Iowa).

94. See *WTF Happened at the Nevada Democratic State Convention*, ROLLING STONE (May 17, 2016), <https://www.rollingstone.com/politics/politics-news/wtf-happened-at-the-nevada-democratic-state-convention-202352> [<https://perma.cc/P63S-TEB3>].

95. *Clinton, Romney Win Nevada; Obama Claims Delegate Victory*, ABC NEWS (Apr. 20, 2017), <http://abcnews.go.com/Politics/story?id=4167990&page=1> [<https://perma.cc/VK8L-X2UY>].

96. *Ted Cruz Wins Almost All of Maine's Delegates at Convention*, CNN (Apr. 20, 2017 at 3:05 PM), <http://www.cnn.com/2016/04/23/politics/maine-republican-delegates-unity-ticket-gop-governor> [<https://perma.cc/Z6YY-PZ83>].

97. There is also a wealth of political science literature considering the ideological makeup of caucuses. For a summary of the political science literature, see STEVEN E. SCHIER & TODD E. EBERLY, POLARIZED: THE RISE OF IDEOLOGY IN AMERICAN POLITICS 67–70 (2016).

98. See *What is a Caucus and How Does It Work?*, FOX NEWS POL. (Apr. 20, 2017), <http://www.foxnews.com/politics/2016/01/18/what-is-caucus-and-how-does-it-work.html> [<https://perma.cc/5MSE-GDPE>].

room—which could number in the hundreds—is difficult.⁹⁹ The caucus system is plagued by reports of long lines of over two hours, overcrowding, confusion about procedures, and misinformation about registration requirements.¹⁰⁰ The imagery of hundreds of citizens shuffling around a high school cafeteria and crowds of people yelling at each other contribute to this appearance.¹⁰¹ In 2016, voters cited widespread reports about Hillary Clinton winning delegates based on coin flips¹⁰² as evidence of caucus illegitimacy. In the 2016 Democratic caucus in Colorado, the party misreported the number of supporters in ten precinct locations, leading to an extra delegate being erroneously awarded to Clinton.¹⁰³ Additionally, it took the Nevada Republican Party three days in 2012 to tally and release the results of its caucus due to the unwieldy process.¹⁰⁴

Imperfections in caucus administration have led activists and prominent officials to criticize the use of caucuses. President Trump, for example, noted that “a lot of strange things happen” in the caucus system and that it is “dangerous.”¹⁰⁵ In 2008, supporters of Hillary Clinton pushed to eliminate caucuses through an amendment to the Democratic Party Platform, but that effort was ultimately unsuccessful.¹⁰⁶ Further, leaders in multiple states have advocated for switching to a primary election.¹⁰⁷

99. See DAVID P. REDLAWSK, CAROLINE J. TOLBERT & TODD DONOVAN, WHY IOWA? HOW CAUCUSES AND SEQUENTIAL ELECTIONS IMPROVE THE PRESIDENTIAL NOMINATING PROCESS 54–55 (2011).

100. See Jennifer L. Patin, *The Caucuses and the Right to Vote*, LAW COMMITTEE FOR CIV. RTS UNDER L. (Apr. 28, 2016), <https://lawyerscommittee.org/caucuses-right-vote> [<https://perma.cc/5JEX-CXRA>].

101. See *Iowa Democratic Caucus*, C-SPAN (Jan. 3, 2008), <https://www.c-span.org/video/?203323-1/democratic-iowa-caucus> [<https://perma.cc/3NVG-GVJM>] (showing video footage of an entire Democratic precinct caucus in Iowa).

102. See *Coin-Toss Fact-Check: No, Coin Flips Did Not Win Iowa for Hillary Clinton*, NPR (Feb. 2, 2016), <http://www.npr.org/2016/02/02/465268206/coin-toss-fact-check-no-coin-flips-did-not-win-iowa-for-hillary-clinton> [<https://perma.cc/8Q4B-RNDG>].

103. See *Colorado Democrats Admit Mistake That Cost Bernie Sanders Key Delegate*, DENVER POST (Feb. 29, 2016), <http://www.denverpost.com/2016/04/11/colorado-democrats-admit-mistake-that-cost-bernie-sanders-key-delegate> [<https://perma.cc/5BSZ-UU8U>].

104. See Editorial Board, *States Should Abandon Caucus System for Primaries*, BOSTON GLOBE (Mar. 14, 2016), <https://www.bostonglobe.com/opinion/editorials/2016/03/14/state-caucuses-seem-downright-undemocratic/afC0tuW4Szoj4VsJeuPRuI/story.html> [<https://perma.cc/469U-ZJY7>].

105. Hanna Trudo, *Trump Trashes ‘Dangerous’ Caucus System*, POLITICO (Feb. 23, 2016), <http://www.politico.com/story/2016/02/donald-trump-nevada-caucuses-219654> [<https://perma.cc/J88H-MZKA>].

106. See Peter Nicholas, *Clinton Loyalists Fail in Bid to End Caucuses*, LA TIMES (Aug. 10, 2008), <http://articles.latimes.com/2008/aug/10/nation/na-campaign10> [<https://perma.cc/59W5-6SVH>].

107. See Kevin Miller, *Bill to Switch Maine to Presidential Primaries Moves Forward*, PORTLAND PRESS HERALD (Apr. 4, 2016), <https://www.pressherald.com/2016/04/04/bill-to-switch-maine-to-presidential-primaries-moves-forward> [<https://perma.cc/ZE9N-8E6Z>]; John Frank, *Colorado Considering Change to Presidential Primary After 2016 Caucus Uproar*, DENVER POST (Apr. 14, 2016), <https://www.denverpost.com/2016/03/04/colorado-considering-change-to-presidential-primary-after-2016-caucus-uproar> [<https://perma.cc/4VDG-9VYK>].

3. *Disenfranchisement in Caucuses*

Caucuses were never intended to be a vehicle for mass participation and they remain effectively off limits to many groups of voters. Their cumbersome rules and demanding time and physical requirements mean that certain voters, such as the elderly, workers, students, and members of the military, are often left out of the process. Unlike primary elections, citizens typically cannot vote in a caucus with an absentee ballot.¹⁰⁸ Voter turnout in caucus states is approximately one-third of the turnout in primary states.¹⁰⁹

Legal scholarship has rarely considered inequities in the caucus system directly.¹¹⁰ Political science literature considers other aspects of the caucus system, such as the ideological makeup of attendees, its history, or its implications on the electoral process.¹¹¹ News reports and opinion pieces have highlighted inequities, but seldom do so with the use of data and often cite anecdotal accounts.¹¹² Even those scholarly or news articles that do discuss inequities rarely include a discussion of race or gender.¹¹³ This Subsection

108. See, e.g., Kathie Obradovich, *Democrats Consider Absentee Voting for Iowa Caucuses*, DES MOINES REGISTER (Dec. 10, 2016), <https://www.desmoinesregister.com/story/news/politics/kathie-obradovich/2016/12/10/democrats-consider-absentee-voting-iowa-caucuses/94671446> [<https://perma.cc/ZU2M-2ZQM>].

109. See Larry J. Sabato, *Primaries Versus Caucuses: The Score So far*, RASMUSSEN REP. (Apr. 21, 2016), http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_larry_j_sabato/primaries_versus_caucuses_the_score_so_far_in_2016 [<https://perma.cc/4XGT-WQKR>].

110. See generally Heather R. Abraham, Note, *Legitimate Absenteeism: The Unconstitutionality of the Caucus Attendance Requirement*, 95 MINN. L. REV. 1003 (2012) (arguing that the caucus attendance requirement is unconstitutional); Justin Driver, Note, *Underenfranchisement: Black Voters and the Presidential Nomination Process*, 117 HARV. L. REV. 2318 (2004) (arguing that Section 2 of the Voting Rights Act should be the basis for judicial reform of the presidential nomination process); Flanders, *supra* note 84 (discussing the overall values of the presidential nomination system).

111. See, e.g., ENDURING CONTROVERSIES, *supra* note 10, at 193–291 (2004); David Redlawsk, et al., *Comparing Caucus and Registered Voter Support for the 2008 Presidential Candidates in Iowa*, 41 POL. SCI. AND POLITICS 129 (2008); CHRISTOPHER C. HULL, GRASSROOTS RULES: HOW THE IOWA CAUCUS HELPS ELECT AMERICAN PRESIDENTS 29–37 (2008); Costas Panagopoulos, *Are Caucuses Bad for Democracy*, 125 POL. SCI. Q. 425 (2010).

112. See, e.g., Editorial, *Primary Reforms*, N.Y. TIMES (June 8, 2008), <http://www.nytimes.com/2008/06/08/opinion/08sun1.html> [<https://perma.cc/4F66-HXD2>] (calling for parties to abandon the caucus); Jim Kessler, *Want to Help End Voter Suppression? Junk the Caucuses*, WASH. POST (June 21, 2016), https://www.washingtonpost.com/opinions/want-to-help-end-voter-suppression-junk-the-caucuses/2016/06/20/2dfe75b0-372a-11e6-8f7c-d4c723a2becb_story.html?utm_term=.bf47a87304fe [<https://perma.cc/4FRG-LPAD>].

113. The only scholarly piece that highlights the role of race in the presidential nomination system is in Driver, *supra* note 110. Driver also iterates that “legal observers have dedicated strikingly little attention to the presidential nomination system’s racial inequities.” *Id.* at 2320. While the piece provides a promising discussion about using the Voting Rights Act to achieve reform, the author provides only one paragraph with basic statistical information about the demographics of Iowa and New Hampshire to support his position. *Id.* at 2319. Given that the piece was written prior to the 2004 presidential election, the author was unable to consider recent history and scholarship. Legal scholarship must provide deeper analysis for reforms enacted by the courts, state legislatures, Congress, or the parties themselves to be successful.

attempts to synthesize survey data and political science empirical analysis to—at least partially—fill this problematic gap in legal scholarship.

a. Caucuses Disproportionately Reduce Turnout Among African American and Women Voters

A state's decision to hold a primary or a caucus has a dramatic impact on overall turnout, with caucuses drawing about a third of the participants compared to primaries. Data collected from the 2008 caucuses and primaries show that African American and women voters are particularly impacted by a state's decision to hold a caucus.

According to a study¹¹⁴ conducted by political scientist Costas Panagopoulos, Director of the Center for Electoral Politics at Fordham University, African American and women voters are underrepresented in the caucus electorate by a statistically significant margin.¹¹⁵ While African Americans and women made up 3.9 percent and 48.6 percent of the public in caucus states, they represented only 2.6 percent and 36.9 percent of the caucus electorate respectively.¹¹⁶ There was no statistically significant difference for white or Hispanic voters in the study.¹¹⁷

Conversely, African Americans were not underrepresented and women were less underrepresented in states with primary elections. In states that held primaries, African Americans and women made up thirteen percent and fifty-two percent of the public and thirteen percent and forty-seven percent of the primary electorate respectively.¹¹⁸ While the proportion of women participants was still lower, the gap was much smaller. The data also showed that white voters were slightly overrepresented and Hispanic voters were slightly underrepresented, both by a statistically significant margin.¹¹⁹

The demographic disparities from Panagopoulos's study are particularly noteworthy given the unique context of the 2008 presidential election. Both parties had particularly competitive presidential nomination campaigns and

114. The study uses data from the 2008 Cooperative Congressional Election Study (CCES) managed by Harvard and Stanford Universities.

115. See Panagopoulos, *supra* note 111, at 435.

116. *Id.*

117. Panagopoulos opines that there may be no statistically significant difference for Hispanic representation in caucus states versus primary states because of high concentrations of Hispanics in caucus states. For example, Nevada's caucus electorate is more heavily Hispanic and commands a higher turnout compared to other caucus states later in the calendar. It is also important to note that this data is from 2008, which in many ways was a high-water mark for participation. *Id.* at 431 ("Caucuses attracted a larger share of Hispanic voters, compared to primary elections, perhaps because many states with high concentrations of Latinos hold caucuses, while primaries attracted higher percentages of African Americans.").

118. *Id.* at 435.

119. *Id.*; see *supra* note 117 (noting a possible explanation for the Hispanic skew in the data).

achieved record turnout.¹²⁰ The candidacies of Barack Obama and Hillary Clinton in particular helped energize African American and women voters,¹²¹ suggesting that the data presented by Panagopoulos may *over* represent those voters in comparison to the average presidential election. Consequently, racial and gender disparities in voter turnout may be even larger on average than the results of Panagopoulos's study suggest.

Panagopoulos does not explore the reasons why African American and women voters may be particularly disadvantaged by caucuses. However, research suggests that these voters are disproportionately impacted by the time requirements of a caucus. Data shows that on average, African Americans earn lower wages than white workers and are more likely to work in retail or service jobs, where taking a night off to caucus may not be feasible.¹²² These trends especially burden African American women because they not only receive lower wages and work in retail or service jobs more frequently than white workers, but also juggle increased household and childcare duties.¹²³

Women are also impacted by time requirements of the caucus system because childcare and household duties disproportionately fall on women. On average, women spend almost twice as much time as men caring for children.¹²⁴ According to a recent study, the gender gap is “not erased . . . [for] dual earner households, households where women are very high earning, or where women earn the majority of household income.”¹²⁵ Additionally, in 2016, twenty-three percent of children lived with a single mother as opposed to about four percent

120. See Rhodes Cook, *High Primary Turnouts: Any Clues for the Fall?*, RASMUSSEN REP. (May 17, 2016), http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_rhodes_cook/high_primary_turnouts_any_clues_for_the_fall [https://perma.cc/6FMQ-EXCT].

121. See Nate Silver, *Black, Youth and Latino Turnout, and Obama's Electoral Map*, FIVETHIRTYEIGHT (May 11, 2008), <https://fivethirtyeight.com/features/black-youth-and-latino-turnout-and> [https://perma.cc/DYW8-5L3W].

122. See Laura Huizar & Tsedeye Gebreselassie, *What A \$15 Minimum Wage Means for Women and Workers of Color*, NAT'L EMP. L. PROJECT (Dec. 2016), <http://www.nelp.org/content/uploads/Policy-Brief-15-Minimum-Wage-Women-Workers-of-Color.pdf> [https://perma.cc/TW8E-FG4U]; E. Tammy Kim, *Black Workers Embody the new Low-Wage Economy*, ALJAZEERA AM. (Sep. 12, 2013), <http://america.aljazeera.com/articles/2013/9/12/black-workers-embodythenewlowwageeconomy.html> [https://perma.cc/S66K-6UX2].

123. See Katherine Richard, *The Wealth Gap for Women of Color*, CTR. FOR GLOBAL POL'Y SOLUTIONS 7 (Oct. 2014), <http://www.globalpolicysolutions.org/wp-content/uploads/2014/10/Wealth-Gap-for-Women-of-Color.pdf> [https://perma.cc/J83Q-SEQ4].

124. See *Time Adults Spent Caring for Household Children as Primary Activity 2012–2016*, BUREAU OF LAB. STAT. (June 17, 2017), <https://www.bls.gov/news.release/atus.t09.htm> [https://perma.cc/3PE8-2C4Z].

125. See Dawn Langan Teelee, Joshua Kalla & Frances Rosenbluth, *The Ties that Double Bind: Social Roles and Women's Underrepresentation in Politics*, 112 AM. POLI. SCI. REV. 525, 536 (Aug. 2018), <https://www.cambridge.org/core/journals/american-political-science-review/article/ties-that-double-bind-social-roles-and-womens-underrepresentation-in-politics/617A9986FF59B8934BC300DA21984121/share/106a3a075988089e6a28314cf2d71a84b13824#f0c> [https://perma.cc/5KBN-ECRZ].

who lived with single fathers.¹²⁶ And recent data show that forty percent of women are the “sole or primary source of income for the family,” up from just eleven percent in 1960.¹²⁷ On average, women have more work obligations than before and more often serve as the economic backbone of their family unit, yet still retain the childcare and household duties associated with traditional gender roles. Caucuses often require multiple hours of a voter’s time, which is a time requirement that disproportionately burdens women.¹²⁸

Voting policies should promote, rather than discourage, participation from African American and women voters. The data show that caucuses systematically disenfranchise these groups. And while Panagopoulos concluded that these differences in participation were “not as substantively meaningful as critics of caucuses would lead us to believe,” his inquiry primarily focused on whether differences led to imbalances in terms of political attitudes or policy preferences.¹²⁹ He did not discuss the more fundamental question of whether a disparate impact on certain groups should lead us to reconsider the caucus, a question this Note addresses.

b. Caucus States Are Whiter Than Primary States

States that hold caucuses are less racially diverse than those that hold primaries, and this may influence the state’s decision to hold a caucus in the first place. In the 2016 presidential election, fourteen states held Democratic caucuses and eleven held Republican caucuses.¹³⁰ Of those, ten Democratic caucuses and eight Republican caucuses were held in states with an above-median white

126. See *The Majority of Children Live With Two Parents, Census Bureau Reports*, US CENSUS (Nov. 17, 2016), <https://www.census.gov/newsroom/press-releases/2016/cb16-192.html> [<https://perma.cc/9QEJ-57YV>]; Gretchen Livingston, *The Rise of Single Fathers*, PEW RES. CTR. (July 2, 2013), <http://www.pewsocialtrends.org/2013/07/02/the-rise-of-single-fathers> [<https://perma.cc/TZL9-4RHT>] (showing that although single fatherhood is on the rise, men are more likely than women to have a higher income to support children and are more likely to live with a cohabitating partner).

127. See Wendy Wang, et. al., *Breadwinner Moms*, PEW RES. CTR. (May 29, 2013), <http://www.pewsocialtrends.org/2013/05/29/breadwinner-moms> [<https://perma.cc/57M3-34S7>].

128. The gravity of these disparities is highlighted by the fact that women continue to be underrepresented in representative institutions, comprising only twenty to twenty-five percent of the US Congress and State Legislatures. See Anna Brown, *Despite Gains, Women Remain Underrepresented Among U.S. Political and Business Leaders*, PEW RES. CTR. (Mar. 20, 2017), <http://www.pewresearch.org/fact-tank/2017/03/20/despite-gains-women-remain-underrepresented-among-u-s-political-and-business-leaders> [<https://perma.cc/PSU5-2DVN>].

129. See Panagopoulos, *supra* note 111, at 434.

130. See *Election 2016 Calendar: Primaries and Caucuses*, *supra* note 33. Democratic caucuses were held in the following states: Iowa, Nevada, Colorado, Minnesota, Kansas, Maine, Nebraska, Idaho, Utah, Alaska, Hawaii, Washington, Wyoming, and North Dakota. Republican caucuses were held in Iowa, Nevada, Alaska, Minnesota, Wyoming, Kansas, Kentucky, Maine, Hawaii, and Utah. The Colorado Republicans held a convention in lieu of a caucus, but for the purposes of this Note, I analyze alongside the caucus states.

population.¹³¹ Six of the top ten whitest states hold caucuses.¹³² All but two caucuses were held in states with a below-median African American population.¹³³ This is confirmed by data from the 2008 caucuses and primaries in Panagopoulos study, which found that the African American population in caucus states was 3.9 percent, versus 13 percent in primary states.¹³⁴

There may be several reasons for this correlation, including the size of the states,¹³⁵ tradition, or norms of political participation. It is hard, if not impossible, to probe the motives behind each state's decision. Regardless, the below-median representation of African Americans in caucus states raises the possibility that state legislatures may be less cognizant of the fact that caucuses disparately impact underrepresented groups, since the constituency of non-white voters is smaller compared to most other states.¹³⁶ The fact that African Americans (and non-white residents generally) are a smaller constituency in caucus states should not excuse a state legislature from ignoring the effects of a decision to hold caucuses.

4. Conclusion

Caucuses are irreparably flawed. The process is overly complex and difficult for the average party member to understand. The implementation of caucuses is imperfect and leaves too much opportunity for manipulation. And data show that the decision to hold a caucus will more heavily disenfranchise African American and women voters in comparison to the general population, leaving a large swath of caucus state electorates at a disadvantage.

B. *The Disproportionate Influence of Iowa and New Hampshire in Presidential Nominations*

Iowa and New Hampshire have held the nation's first caucus and primary since the nomination system was overhauled in 1972. The data show that this

131. See 2016 American Community Survey 1-Year Estimates, U.S. CENSUS (July 15, 2018). The median state white population is 78.1 percent. States range from 25.1 percent to 94.4 percent white. See *id.*

132. *Id.* The states include Maine, Wyoming, Iowa, Idaho, Nebraska, and North Dakota.

133. The median state has an African American population of 7.4 percent. States range from .4 percent to 38 percent. See *id.* Only Nevada and Kentucky have an African American population greater than 7.4 percent.

134. Panagopoulos, *supra* note 111, at 435.

135. Conventional wisdom suggests that organizing caucuses is easier in states with smaller populations.

136. This analysis uses overall demographic data. Survey data show that white and African American voters have similar rates of voter registration (eighty-five percent and eighty-one percent respectively), so the analysis would be similar for registered voters. Rates among other historically underrepresented groups, such as Asians and Hispanics are dramatically lower, raising the possibility that the differential in political power may be even *more* pronounced, since large portions of the voting age population are not registered. See Jeffrey M. Jones, *In U.S., Voter Registration Lags Among Hispanics and Asians*, GALLUP (Nov. 6, 2013), <http://www.gallup.com/poll/165752/voter-registration-lags-among-hispanics-asians.aspx> [<https://perma.cc/3BL5-JDVT>].

preferential treatment has a significant effect on the outcome of each party's nomination process. This Section will proceed in three Subsections. They will discuss the historical roots of Iowa and New Hampshire's role in the process, the demographics of each state, and the disenfranchisement that results from their outsized role in the nomination process.

1. History

Iowa and New Hampshire's placement in the presidential nomination calendar occurred almost entirely by accident.¹³⁷ In order to leave sufficient time between the precinct caucuses and the subsequent conventions, the Iowa Democrats decided to hold their precinct caucuses in January 1972.¹³⁸ New Hampshire occupied an early position even before the 1972 reforms and scheduled its presidential primary for March 1972, which was in line with its historical practice.¹³⁹ Both states, recognizing the benefits of holding their contests first, codified their positions in the nomination process in state law; if another state tries to schedule its nominating event earlier, each state will automatically move its nominating event to retain its first in the nation status.¹⁴⁰

Although states tried to leapfrog Iowa and New Hampshire, their efforts were unsuccessful, in part because of the strong protection provided by the national party organizations.¹⁴¹ Both major parties require states to schedule their nomination events in a window of time after the Iowa Caucuses and New Hampshire primary.¹⁴² As recently as 2008, Michigan and Florida tried to flout

137. See PEVERILL SQUIRE, *THE IOWA CAUCUSES AND THE PRESIDENTIAL NOMINATING PROCESS 2* (1989) (discussing the scheduling of the Iowa Democratic Caucuses in 1972 and how the party did not expect the event to garner national attention).

138. See Stark, *supra* note 17, at 335–36.

139. *Id.* at 336–37; see *Chronology of Political Events: Jan 1971–Nov. 1972*, CQ ALMANAC (1972), <https://library.cqpress.com/cqalmanac/document.php?id=cqal72-1249975> (last visited Oct. 29, 2018) (showing that New Hampshire always occupied an early position and, in 1971, moved its primary one week earlier to ensure it continued as the first-in-the-nation primary).

140. See Stark, *supra* note 17, at 336–37.

141. See *id.*; see also Michael D. Shear, *DNC Strips Florida of 2008 Delegates*, WASH. POST (Aug. 26, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/25/AR2007082500275.html> [<https://perma.cc/6MWH-6VNN>].

142. The Democratic Party rules state:

No meetings, caucuses, conventions or primaries which constitute the first determining stage in the presidential nomination process (the date of the primary in primary states, and the date of the first tier caucus in caucus states) may be held prior to the first Tuesday in March or after the second Tuesday in June in the calendar year of the national convention. Provided, however, that the Iowa precinct caucuses may be held no earlier than 29 days before the first Tuesday in March; that the New Hampshire primary may be held no earlier than 21 days before the first Tuesday in March; that the Nevada first-tier caucuses may be held no earlier than 10 days before the first Tuesday in March; and that the South Carolina primary may be held no earlier than 3 days before the first Tuesday in March. In no instance may a state which scheduled delegate selection procedures on or between the first Tuesday in March and the second Tuesday in June 1984 move out of compliance with the provisions of this rule.

See DEMOCRATIC PARTY DELEGATE SELECTION RULES, *supra* note 34;

The Republican Party rules state:

the rules and schedule presidential primaries in January 2008.¹⁴³ Both states wanted to have more influence in the process and Michigan specifically framed itself as representing the needs of industrial states, which were underrepresented in the presidential nomination calendar.¹⁴⁴ In response, the Democratic Party stripped both states of their delegates, and the Republican Party reduced each state's delegation by half.¹⁴⁵ All Democratic candidates pledged to skip the contests, and only one major candidate appeared on the Michigan ballot.¹⁴⁶ In fact, the Democratic National Committee (DNC) Rules specifically stated (and continue to state) that any candidate who campaigned in a state that violated the timing provisions of the party rules could be stripped of all delegates to the national convention.¹⁴⁷ By violating the rules, the rogue states effectively cut themselves out of the process.

In the most recent presidential election, Iowa and New Hampshire remained the first caucus and primary in the presidential nomination process, and there are no plans for the schedule to change for the 2020 presidential election or beyond.

2. *Demographics of Iowa and New Hampshire*

Iowa and New Hampshire are not representative of the United States, which makes their role at the forefront of the nomination calendar all the more perplexing. Both states fall well below the national average on key demographic indicators, most notably, race. Iowa and New Hampshire are among the least racially diverse states in the country. African Americans make up 3.5 percent

(1) No primary, caucus, convention, or other process to elect, select, allocate, or bind delegates to the national convention shall occur prior to March 1 or after the second Saturday in June in the year in which a national convention is held. Except Iowa, New Hampshire, South Carolina, and Nevada may conduct their processes no earlier than one month before the next earliest state in the year in which a national convention is held and shall not be subject to the provisions of paragraph (c)(2) of this rule.

See REPUBLICAN NATIONAL COMMITTEE RULES, *supra* note 34.

143. See John Zarrella & Patrick Oppmann, *Florida, Michigan Seek Exit from Democratic Penalty Box*, CNN (Mar. 6, 2008), <http://www.cnn.com/2008/POLITICS/03/06/florida.michigan/index.html?iref=nextin> [<https://perma.cc/E6NU-E92G>].

144. See Governor Jennifer Granholm, LETTER TO REPUBLICAN AND DEMOCRATIC PRESIDENTIAL CANDIDATES (Aug. 30, 2007), https://www.politico.com/pdf/PPM43_070830_primarylettertocandidates.pdf [<https://perma.cc/XT5F-CSDK>].

145. See Zarella & Oppmann, *supra* note 143. Both delegations were eventually seated in both conventions, a decision that was made after the nomination contests were effectively decided.

146. See Michael Tomasky, *A Possibly Super Problem*, N. Y. REV. OF BOOKS (Mar. 20, 2008), <http://www.nybooks.com/articles/2008/03/20/a-possibly-super-problem> [<https://perma.cc/P67R-WXTE>].

147. DEMOCRATIC PARTY OF THE UNITED STATES, DELEGATE SELECTION RULES FOR THE 2008 DEMOCRATIC NATIONAL CONVENTION 20–21 (2006), https://s3.amazonaws.com/apache.3cdn.net/3e5b3bfa1c1718d07f_6rm6bhyc4.pdf [<https://perma.cc/7B4X-5YP5>].

and 1.5 percent of the Iowa and New Hampshire populations, respectively, compared to 13.3 percent nationally.¹⁴⁸ Hispanics make up a respective 5.7 percent and 3.4 percent of the Iowa and New Hampshire populations, compared to 17.6 percent nationally.¹⁴⁹ For a country that is growing more diverse and expected to be majority-minority within a generation,¹⁵⁰ the fact that such racially homogenous states feature so prominently in the nomination process is concerning. Both states are also smaller and more rural in comparison to national averages, which further contributes to their outlier status. Figure 1 below highlights the demographic disparities between Iowa and New Hampshire and the nation as a whole.

FIGURE 1			
U.S. CENSUS DATA FOR IOWA, NEW HAMPSHIRE, AND U.S.A.			
	Iowa	New Hampshire	National
Population Estimate	3.1 million (20 th smallest state)	1.3 million (9 th smallest state)	4.6 million (median state)
Race (%)			
White	86.7	91	61.6
Black or African American	3.5	1.5	13.3
Hispanic or Latino	5.7	3.4	17.6
Asian	2.4	2.6	5.6
Age (%)			
Under 18	23.3	19.8	22.9
Over 65	16.1	16.5	14.9
Education (%)			
High School Graduate or Higher	91.5	92.3	86.7
Bachelor's Degree or Higher	26.7	34.9	29.8
Economy (% unless noted)			
Median Household Income	\$53,183	\$66,799	\$53,889
Persons in Poverty	12.2	8.2	13.5
Population Per Square Mile	54.5	147	87.4
% Urban (2010 Census)	64	60.3	80.7
Source: 2015-16 and 2010 U.S. Census Estimates ¹⁵¹			

148. U.S. Census data, *infra* note 151.

149. *Id.*

150. See Sarah Carr, *Tomorrow's Test*, SLATE (June 5, 2016), http://www.slate.com/articles/life/tomorrows_test/2016/06/american_is_becoming_a_majority_minority_nation_it_s_already_happened_in.html [https://perma.cc/T55X-SVNK].

¹⁵¹ See *Iowa QuickFacts*, U.S. CENSUS (July 1, 2016), <https://www.census.gov/quickfacts/table/PST045216/19> [https://perma.cc/BTU4-GAZC]; *New Hampshire QuickFacts*, U.S. CENSUS (July 1, 2016), <https://www.census.gov/quickfacts/table/PST045216/33> [https://perma.cc/S64B-GCBL]; *Urban*

3. *Iowa and New Hampshire as Outlier States Contribute to Disenfranchisement in the Presidential Nomination Process*

Surprisingly, legal scholarship scarcely mentions Iowa and New Hampshire's unrepresentativeness and the resulting legal and constitutional implications of their role in the presidential nomination process. This Note incorporates analysis from the fields of economics and political science, which quantifies Iowa and New Hampshire's impact. The results are stark: Iowa and New Hampshire have an overwhelming impact on the outcome of the presidential nomination process, which magnifies the influence of their racially homogenous populations. In this Subsection, I will first explore some of the reasons frequently cited for why Iowa and New Hampshire have such an outsized role in the process. I will then discuss the states' impact on subsequent nomination events.

Iowa and New Hampshire influence the trajectory of presidential nomination campaigns in several ways. First, the two early contests garner a disproportionate amount of attention from the media relative to the delegates at stake. A study of the 2008 presidential nomination found that 50.9 percent and 33.0 percent of news articles about the election by national media organizations referenced the contests in Iowa and New Hampshire, respectively.¹⁵² In comparison, only 10.7 percent referenced California, even though the delegate prize from California dwarfed the other states.¹⁵³ Second, a candidate's performance in Iowa and New Hampshire has a significant impact on candidate fundraising.¹⁵⁴ Third, candidates spend a disproportionate amount of time in Iowa and New Hampshire, compared to other states, and tailor their campaign messages to maximize their appeal to those voters.¹⁵⁵ Finally, a candidate's performance in Iowa and New Hampshire, both before and after the contests, impacts the number of endorsements candidates earn from party insiders and

Percentage of the Population for States, Historical, IOWA COMMUNITY INDICATORS PROGRAM, <http://www.icip.iastate.edu/tables/population/urban-pct-states> [https://perma.cc/JD2U-686W].

152. Dino P. Christenson & Corwin D. Smidt, *Polls and Elections: Still Part of the Conversation: Iowa and New Hampshire's Say within the Invisible Primary*, 42 PRESIDENTIAL STUDIES Q. 597, 601 (Sep. 2012); see also Marcella Bombardieri & Lisa Wangsness, *Clinton, Obama Claim Fund-raising Edge*, BOSTON GLOBE (Jan. 10, 2008), http://archive.boston.com/news/nation/articles/2008/01/10/clinton_obama_claim_fund_raising_edge [https://perma.cc/Q5NL-7GNX] (noting then-candidate Barack Obama raised more than eight million dollars in the first eight days on 2008, which included his victory in the Iowa Democratic Caucuses), http://archive.boston.com/news/nation/articles/2008/01/10/clinton_obama_claim_fund_raising_edge [https://perma.cc/88M9-WYPM]; John Wagner, *In 24 Hours since the Iowa Caucuses, Sanders Donors Pony Up \$3 million, Aides Say*, WASH. POST (Feb. 2, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/02/02/in-24-hours-after-iowa-caucuses-sanders-donors-pony-up-3-million-aides-say/?utm_term=.07cc1be1f03a [https://perma.cc/CEJ8-USM2] (reporting how candidate Bernie Sanders did unexpectedly well in the Iowa Caucuses, earning 49.6 percent of the vote to candidate Hillary Clinton's 49.8 percent).

153. Christenson & Smidt, 42 PRESIDENTIAL STUDIES Q. at 597, 601.

154. *Id.* at 617.

155. *Id.* at 601.

other stakeholders.¹⁵⁶ In short, Iowa and New Hampshire “provide signals to the rest of the country about candidate viability”¹⁵⁷ that heavily influence outcomes in the nomination process.

Studies show that the results of Iowa and New Hampshire have a statistically significant impact on the outcome of the presidential nominations. One study of daily polling data from the 2004 Democratic nomination race, conducted by economists Brian Knight and Nathan Schiff, found that voters in Iowa and New Hampshire had five and four times the influence of voters in late states.¹⁵⁸ Before Iowa and New Hampshire, there was significant diversity in candidate preferences across states.¹⁵⁹ But the degree of variance decreased significantly after the Iowa caucuses because voters adjusted their preferences after the release of voting results.¹⁶⁰ Voters put less weight on subsequent voting results, and voters at the end of the nomination process are largely unaffected by primaries held in other states.¹⁶¹ Knight and Schiff conclude that the momentum effects of the early states give Iowa and New Hampshire a disproportionate influence in the process.¹⁶²

Political science forecast models show that the results of Iowa and New Hampshire affect the outcomes of the nomination races because of their early position in the nomination process. Using data from 1980 to 2004, political scientist Wayne Steger created a model that forecasts, based on a number variables,¹⁶³ the Aggregate Primary Vote (APV) in open nomination races in which there is no incumbent.¹⁶⁴ Steger found that the pre-Iowa model predicts

156. *See id.* at 602. *See generally* MARTY COHEN, DAVID KAROL, HANS NOEL & JOHN ZALLER, *THE PARTY DECIDES* (2008) (discussing the “invisible primary” and the impact of endorsements on candidate success).

157. Christenson, *supra* note 152, at 601–02.

158. Brian Knight & Nathan Schiff, *Momentum and Social Learning in Presidential Primaries*, 118 J. POL. ECON. 1110, 1142–43 (2010). In 2016, the Democratic Party gave additional delegates to states that scheduled their nomination contests later in the process. *See* CALL FOR THE 2016 DEMOCRATIC NATIONAL CONVENTION 1 (Aug. 23, 2014). For example, the Democratic Party gave twenty percent more delegates to states holding their contests after May 1, 2016. *Id.* While such a scheme partially counteracts the Iowa and New Hampshire’s influence, the data suggest it is a raw deal since twenty percent is well short of the four-to-five times difference in influence. And practically, the nomination process is all but complete by the time later states weigh in. This incentive system creates the perverse incentive of encouraging states to move later in the process and *reduce* their voters’ influence on the outcome of the process.

159. *Knight & Schiff, supra* note 158, at 1129.

160. *Id.* at 1130.

161. *Id.*

162. *Id.* at 1143.

163. Factors include the Gallup polling average, cash reserves, endorsements, and electability.

164. Wayne Steger, *Who Wins Nominations and Why? An Updated Forecast of the Presidential Primary Vote*, 60 POL. RES. Q. 91 (2007). The Aggregate Primary Vote is the total number of votes a candidate receives during the presidential nomination process. *Id.* at 98. Steger explains:

The aggregate party vote (APV) is useful because candidates receive votes throughout the primaries whether they drop out or not, and some candidates remain in the race after they can- not win to promote their issue positions. Since 1972, the candidate with the most primary votes has become the nominee, so accurately predicting the primary vote shares of candidates

only fifty-nine percent of the variance in the APV, while the post-New Hampshire model predicts ninety-two percent of the variance in the remaining APV.¹⁶⁵ A second study, by political scientists Todd Donovan and Rob Hunsaker, used data from 1980 to 2004 and corroborated these results. The study concluded that Iowa and New Hampshire explain eighty-one percent of the variance in the remaining races.¹⁶⁶ The two models differed, however, in measuring the effect of Iowa alone. Steger found that Iowa does not significantly affect the prediction of the APV, while Donovan and Hunsaker found it has a small, but still significant, impact.¹⁶⁷ Both studies found, however, that the Iowa results are a significant predictor of the results in New Hampshire.¹⁶⁸ Thus, even if the results of Iowa alone are inconclusive according to the models, the fact that they have a statistically significant impact on New Hampshire still make the contest critical. After all, “New Hampshire appears to be standing between the Caucus and the final primary result.”¹⁶⁹

4. Conclusion

Analysis by economists and political scientists shows the overwhelming influence of Iowa and New Hampshire. Iowa has a statistically significant impact on the results of New Hampshire and influences future voters such that a vote in Iowa counts up to five times more than a vote later in the nomination process. Iowa and New Hampshire largely predict the outcome of the nomination campaigns, which comports with a history that shows few candidates can remain viable after poor showings in Iowa and New Hampshire. This is problematic, given the fact that Iowa and New Hampshire are demographic outliers, and should be impetus for reform.

III. PROPOSED SOLUTIONS

The current presidential nomination process offends some of the basic values imbued in our electoral process. The system was “never rationally designed.”¹⁷⁰ Caucuses, used by a substantial minority of states, severely limit participation from African American and women voters. Voters in Iowa and New

will predict the winner correctly.

Id.

165. *Id.* at 95–96.

166. Todd Donovan & Rob Hunsaker, *Beyond Expectations: Effects of Early Elections in U.S. Presidential Nomination Contests*, 42 POL. SCI. & POL. 45, 50 (2009).

167. See Steger, *supra* note 164, at 96; Donovan & Hunsaker, *supra* note 166, at 49. This is also supported by a study done by HULL, *supra* note 111, at 55, which finds that Iowa has a statistically significant impact on the results in New Hampshire, but does not have strong explanatory power on its own. Hull also notes that this result has been found by several other studies.

168. *Id.*

169. HULL, *supra* note 111, at 49.

170. Jeffery Karp & Caroline Tolbert, *Polls and Elections: Support for Nationalizing Presidential Elections*, 40 PRESIDENTIAL STUDIES Q. 771, 774 (2010).

Hampshire “count” up to five times as much as voters later in the process. This outsized influence is also particularly problematic because it effectively means that two small populations of nearly all white voters serve as gatekeepers to each party’s nomination, since candidates are seldom successful without a victory in either state.¹⁷¹

Recognizing the limitations created by Iowa and New Hampshire, the Democratic and Republican Parties amended their nomination calendars in advance of the 2008 elections to allow Nevada and South Carolina, which are more racially diverse, to hold their nomination contests after Iowa and New Hampshire but before all other states and territories.¹⁷² While this was a step in the right direction, it maintained the status quo at its core: caucuses still exist and Iowa and New Hampshire continue in their outsized influence. The three election cycles since this change have not shown meaningful change in how the candidates or parties approach the nomination process.

This Part will proceed in two Sections. First, I will discuss potential reforms that parties should adopt to better enfranchise voters (*what* should be done). Second, I will outline which legal tools are available to parties, courts, state and Congress (*how* it can be done).

A. Policy Proposals

In this Section, I will argue for the elimination of caucuses and the implementation of a national primary. Recognizing that a national primary is unlikely to occur in the current political and legal climate, I also put forward an alternative proposal to hold all early contests on one day.

1. Eliminate Caucuses Immediately

First, parties should eliminate caucuses as a means of selecting delegates and replace them with primary elections. As discussed, data on caucus participation show that African Americans and women are disenfranchised by the caucus system by a statistically significant margin. This is especially notable for women voters, who remain disadvantaged by the caucus system despite voting in higher proportions than men in every presidential election since

171. See, e.g., Joshua Green, *The Front-Runner’s Fall*, ATLANTIC (Sep. 2008), <https://www.theatlantic.com/magazine/archive/2008/09/the-front-runner-s-fall/306944> [<https://perma.cc/7PZH-RWEJ>] (describing internal memos from Hillary Clinton’s 2008 campaign where campaign leaders believed that “Iowa and New Hampshire could determine Clinton’s fate”).

172. See Stephen Ohlemacher, *Democrats Strip Mich. of Delegates for Early Primary*, BOSTON GLOBE (Dec. 2, 2007), http://archive.boston.com/news/nation/articles/2007/12/02/democrats_strip_mich_of_delegates_for_early_primary [<https://perma.cc/5ZRR-MKDK>] (stating that the DNC Rules Committee wanted to respect the historic roles of Iowa and New Hampshire while adding racial and geographic diversity to the early vote).

1980.¹⁷³ In contrast, primaries do not have this disparity and provide African Americans, women, and other underrepresented groups with better access to the nomination process.

Caucus supporters argue that caucuses help build the party base in the form of email lists and volunteers and prepare the party for the general election.¹⁷⁴ These arguments are unconvincing given that a majority of states currently use primary elections and still maintain robust party organizations. State party organizations can effectively build their bases through fundraising, candidate recruitment, messaging, and voter outreach (such as door-to-door canvassing, phone calls, and rallies) regardless of whether the state holds a primary or a caucus. A strong party *and* enfranchised voters are not mutually exclusive.

Caucus proponents also cite deliberation as a key value embodied by the caucus system. A recent law review article by Saint Louis University School of Law Assistant Professor Chad Flanders described deliberation as a constitutional value that is upheld by the current nomination process, including caucuses. “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,” he writes.¹⁷⁵ Caucuses promote deliberation, the argument goes, by providing a forum in which voters can interact, exchange ideas, and debate.

The value of deliberation is critically undercut, however, by the fact that the population of those deliberating is incomplete. Without African American, women, and other diverse voices in the conversation, the quality of the deliberation suffers.¹⁷⁶ Furthermore, in practice, caucuses seldom achieve the deliberative ideal imagined by its supporters. Modern caucuses often take the form of a frenzied process fraught with irregularities, as opposed to groups of neighbors coming together to debate the candidates and issues. It is hard to imagine, for example, how a high school gymnasium with hundreds of voters fosters the type of deliberation and debate envisioned by Flanders and other supporters.¹⁷⁷

173. See *Gender Differences in Voter Turnout*, CTR. FOR WOMEN & POL. (July 20, 2017), <http://www.cawp.rutgers.edu/sites/default/files/resources/genderdiff.pdf> [<https://perma.cc/WVM5-95WP>]; Panagopoulos, *supra* note 111, at 435.

174. See REPORT OF THE DEMOCRATIC CHANGE COMMISSION 20–21, (Dec. 30, 2009), https://www.thegreenpapers.com/P12/Democratic_Change_Commission_Report-2009-12-30.pdf [<https://perma.cc/C2WH-QHTH>].

175. See Flanders, *supra* note 84, at 932.

176. It is well documented that diverse groups are more innovative and come to smarter decisions than non-diverse groups. See, e.g., Katherine W. Philips, *How Diversity Makes Us Smarter*, SCI. AM. (Oct. 1, 2014), <https://www.scientificamerican.com/article/how-diversity-makes-us-smarter> [<https://perma.cc/S6CT-G349>] (arguing that people with different backgrounds are able to bring new information that helps the group make better decisions).

177. See, e.g., Iowa Democratic Caucus, *supra* note 101 (showing video from a Democratic caucus in 2008).

Party officials have taken note of this disparity, but so far have declined to take action that would eliminate the use of caucuses. Following the 2008 elections, which featured one of the most competitive nomination contests in recent history, the Democratic Party established a Commission (the “Democratic Change Commission”) to evaluate the nomination process.¹⁷⁸ The Commission issued a report where it found that caucuses create a “participation barrier” and that states have “varying levels of experience with running caucuses.” Nonetheless, the Commission ultimately decided to retain caucuses because some states found they strengthen the party.¹⁷⁹ In endorsing the continued use of caucuses, the Commission called for improved access while also upholding the “spirit” of caucuses.¹⁸⁰ The Republican Party established similar committees after the 2008 and 2012 elections to evaluate the nomination process, but it, too, allowed caucuses to remain as a valid mechanism for selecting delegates.¹⁸¹

After the 2016 presidential election, the Democrats established another commission called the “Democratic Unity Reform Commission,” but the Commission failed to endorse abolition of caucuses in its final report to the Democratic National Committee.¹⁸² The Commission reaffirmed its support for caucuses because of their purported party-building benefits and mentioned that caucuses, which are party-run as opposed to state-run, are sometimes preferable to primaries as a way to escape “state-imposed voter suppression.”¹⁸³ It also found that caucuses are “often the only method available” for parties in the absence of a government-run primary.¹⁸⁴ On the other hand, the Commission recommended reforms to improve access, such as requiring absentee voting and requiring that votes be submitted in writing.¹⁸⁵ These recommendations were aimed at addressing concerns that “caucuses disenfranchise voters, such as seniors, members of the military, working families, students, and parents of

178. See REPORT OF THE DEMOCRATIC CHANGE COMMISSION, *supra* note 174; see also REPORT OF THE COMMISSION ON PRESIDENTIAL NOMINATION TIMING AND SCHEDULING (Dec. 10, 2005), http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051215_comm_issionfinal.pdf [https://perma.cc/RXT3-648Q] (evaluating the nomination calendar, but not caucus administration).

179. REPORT OF THE DEMOCRATIC CHANGE COMMISSION, *supra* note 174, at 20.

180. *Id.* at 21.

181. See Josh Putnam, *How the Republican Party made it harder for convention delegates to vote against Trump*, WASH. POST (July 17, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/17/how-the-republican-party-made-it-harder-for-convention-delegates-to-vote-against-trump/?utm_term=.90b709c4a429 [https://perma.cc/E446-LQ77]. No reports from these committees are publicly available.

182. See REPORT OF THE UNITY REFORM COMMISSION, *supra* note 81. The reforms were subsequently adopted by the Democratic National Committee. See *DNC Passes Historic Reforms to the Presidential Nominating Process*, *supra* note 81.

183. *Id.* at 18.

184. *Id.* Presumably parties could also opt for a party-run primary in the absence of a government-run primary. The Commission did not address why the party would be able to hold a caucus, but not a primary, in that situation.

185. *Id.*

young children.”¹⁸⁶ Women and people of color were not explicitly included on the list of constituencies disparately impacted by caucuses, which raises a question of about whether the Democratic Party is aware of these alarming disparities.¹⁸⁷

The Democratic Party missed an opportunity to be more searching in its review of caucuses. As part of its work, the Commission heard hours of testimony from party officials from around the country, including testimony from caucus states. Some, but not all, party officials from caucus states testified that they believed caucuses supported party building activities and relied heavily on anecdotal accounts.¹⁸⁸ Neither the testimony nor final report offered a comparative quantitative analysis to support the claim that caucuses are meaningfully better for building the party than the tactics used by primary states.¹⁸⁹ This is problematic because the stakes are so high. Choosing to use a caucus results in lower turnout overall and disproportionately reduces turnout among women and African Americans. This data should not be taken lightly.

Furthermore, it is unclear how certain reforms such as requiring absentee balloting will impact caucuses. For example, will voters need an excuse in order to vote absentee? How will absentee voting interact with the structure of caucuses, which often require multiple rounds of voting? How does absentee voting impact the deliberative value of caucuses—might it actually *reduce* the amount of interaction between people from different groups, since certain constituencies might be more likely to vote absentee than others? How will parties pay for and implement an absentee system without the institutional support of the state government? Even though absentee voting is a step in the right direction, the reform still raises more questions than it answers and the Democratic Party has not clarified the details. It is also unlikely that absentee ballot access alone will close the turnout gap between caucuses and primaries. Similar critiques could be made of other reforms, such as same-day registration or same-day party affiliation changes.¹⁹⁰ Parties can make reforms aimed at inclusion, but there is simply no way to reform caucuses to make them as inclusive as primaries.

186. *Id.*

187. *Id.* However, there was discussion in the Commission’s public meetings that caucuses could impact these constituencies. One Commission member, Emmy Ruiz of Texas, cited some positive aspects of caucuses such as voter registration and community organizing, but also stated, “I do remain deeply concerned that they’re [caucuses] deeply, deeply, deeply, deeply disenfranchising to communities of color.” Ruiz also discussed the undue influence employers could have on their workers. The Democrats, *DNC Unity Commission in Chicago*, YOUTUBE (Sep. 13, 2017), <https://youtu.be/nxfKqUKsZTs?t=1h22m31s> [<https://perma.cc/PP3B-CZNF>].

188. *See* The Democrats, *DNC Unity Commission in Chicago*, YOUTUBE (Sep. 13, 2017), <https://youtu.be/nxfKqUKsZTs?t=1h22m31s> [<https://perma.cc/PP3B-CZNF>] (noting testimony from Nevada, Iowa, and Washington party officials).

189. *See* REPORT OF THE UNITY REFORM COMMISSION, *supra* note 81; *DNC Unity Commission in Chicago*, *supra* note 187.

190. *See* REPORT OF THE UNITY REFORM COMMISSION, *supra* note 81.

Primary elections tear down many of the barriers created by caucuses. Data show that participation rates increase by up to three times in primaries as opposed to caucuses.¹⁹¹ Voting in a primary takes less time than participating in a caucus. Most states allow primary voters to participate via well-established absentee ballot procedures or through early voting. The secret ballot solves concerns that arise out of a public declaration of support for one's preferred candidate. States are accustomed to administering elections like primaries, since states administer general elections in substantially the same way. It is also likely that the quality of the political discourse will be stronger because candidates have an incentive to court a more diverse electorate rather than catering to just one constituency. Thus, caucuses can and should be eliminated from the presidential nomination process.

2. *Implement a National Primary*

The Iowa caucuses and New Hampshire primary have a disproportionate impact on the outcome of the presidential nomination process, with one vote in those contests having up to five times more influence than a vote later in the process. This is particularly concerning considering neither state is representative of the country. A national primary would solve the immediate issue of Iowa and New Hampshire being gatekeepers of the nomination process, since all states would vote on the same day, similar to the way the United States administers general elections.

The idea of a national primary dates back to the early twentieth century and over 250 bills have been introduced in Congress to establish a national primary.¹⁹² Many countries in Europe successfully use a national primary to winnow the field of candidates, showing such a system is viable in an advanced democracy such as the United States.¹⁹³ Public opinion is also squarely in favor of a national primary, with upwards of sixty to seventy percent of voters supporting the idea.¹⁹⁴

However, legal and political science scholars remain divided on whether a national primary would be in the national interest. On the one hand, a national primary would make each vote equally meaningful and increase turnout since the nomination would not be a foregone conclusion.¹⁹⁵ On the other hand, it would disadvantage lesser-known candidates who do not have the funding and name recognition to compete on a national scale against more established

191. See Sabato, *Primaries Versus Caucuses*, *supra* note 109.

192. See Stark, *supra* note 17, at 381 n.216.

193. See Caroline Tolbert, David Redlawsk & Daniel Bowen, *Reforming Presidential Nominations: Rotating State Primaries or a National Primary?*, 42 AM. POL. SCI. ASSOC. 71, 73 (2009).

194. See Karp & Tolbert, *supra* note 170, at 776. It is peculiar that a national primary enjoys wide support, yet lawmakers and parties have taken no action. This may be because of a confluence of factors ranging from apathy from the electorate to preferences of the party elite.

195. See Tolbert et al., *supra* note 193.

candidates.¹⁹⁶ Critics also point to the demise of retail politics, which would accompany a national primary, as candidates would not have the opportunity to meet with small groups of voters in diners, town halls, and people's homes.¹⁹⁷

While opponents of the national primary raise valid concerns, they underestimate the distortion caused by the role of Iowa and New Hampshire. Opponents also fail to take into account the realities of modern campaigning and overvalue a vision of Iowa and New Hampshire serving as a level playing field for lesser-known candidates. First, even in the current system, viable candidates need strong name recognition and substantial funding. The four most recent nominees—Hillary Clinton, Donald Trump, Barack Obama, and Mitt Romney—had national profiles and access to significant funding during their nomination campaigns. Second, while critics are right to point to retail politics as an important value, our system should reward candidates who can connect one-on-one not only with a relatively homogenous group of voters, but also with a more diverse group. Eliminating Iowa and New Hampshire as the gatekeepers of the process would provide the incentive for candidates to reach a more diverse subset of America. Finally, a national primary would provide candidates with more democratic legitimacy, since a wider swath of the country will have been engaged in the primary election and voted. It also eliminates regional biases at play in the current system as evidenced by the fact that Iowa and New Hampshire are not geographically representative of the electorate. A national primary is a strong policy option because it would promote important democratic values of access and inclusivity.

3. *Eliminate Staggering of First Four States to Achieve Better Balance*

Despite the benefits of national primary, there are no signs that Congress, political parties, or states plan to seriously consider it. This Note proposes a realistic policy change that would address some of the concerns surrounding disenfranchisement in the presidential nomination process. I propose that Iowa, New Hampshire, Nevada, and South Carolina should hold their nomination contests on the same day, thus eliminating the staggered nature of the early contests and ensuring the first nomination contests are more racially representative of the United States.

Figure 2 shows overall demographic data for the United States, each of the early states and the early states combined. It supports the conclusion that one reasonable path forward would be for the parties to hold all four contests on one day, bringing the average white population down to seventy-five percent and increase the average African American and Hispanic percentages from approximately one to three percent and two percent, respectively, to thirteen percent and six percent. Iowa and New Hampshire are both outlier states because

196. *Id.*

197. See Flanders, *supra* note 84, at 908.

of their small African American and Hispanic populations. By adding Nevada and South Carolina, the parties can bring the combined population totals significantly closer to the national average.

FIGURE 2 Demographic Attributes of Voting-Aged Population (%)				
	White	African American	Hispanic	Other
United States	69	12	12	7
Combined Early States	75	13	6	5
Iowa	92	3	2	3
New Hampshire	94	1	2	4
Nevada	58	8	18	15
South Carolina	68	27	3	2

Source: 2014 U.S. Census Bureau Population Estimates; William H. Frey, *How Unrepresentative Are the Early Presidential Primary States?*, THE BROOKINGS INSTITUTION (Feb. 3, 2016), <https://www.brookings.edu/opinions/how-unrepresentative-are-the-early-presidential-primary-states/>.

Combining the four nomination contests on the same day would not remove the influence of the early states on the remainder of the process, but it would incentivize candidates to appeal to a more diverse electorate. Instead of candidates focusing disproportionately on Iowa and New Hampshire, which both have populations that are over ninety percent white, candidates would focus on a combined electorate that is only seventy-five percent white. As candidates craft their policy platforms and campaign strategy, they will have an incentive to increase their focus on issues important to non-white voters. Since all four states would vote on the same day, no one state would be able to dominate the conversation. The combined states would be better gatekeepers than Iowa and New Hampshire.

This proposal is feasible. First, both parties already privilege Iowa, New Hampshire, Nevada, and South Carolina in the process. If the parties and states have assented to their privileged status, this shift should not be insurmountable. Second, the vast majority of the nomination calendar would be unaffected. Other than Iowa and New Hampshire, the other states and territories would not lose influence in the nomination process, which should mitigate opposition. Third, the four states would still retain the purported advantages of the current system—namely, the ability for lesser-known candidates to excel in a retail politics setting and for the populace to engage in deliberation. Finally, the proposal would open

the door for additional consolidation of the nomination calendar, which could enfranchise more voters over time.

Despite the benefits on this incremental proposal, it still leaves most of the current system intact. The demographics of the four states combined are not fully representative of the overall electorate (for example, Hispanic voters are underrepresented) and only four percent of the voting-age population will have a chance to participate in the early vote. The change would also likely not have an appreciable impact on voter turnout in later contests and the four states would likely still have a disproportionate impact on the outcomes of the nomination contests. Nonetheless, this proposed reform is a practical step in the right direction since it reduces the influence of Iowa and New Hampshire and increases the influence of people of color.

4. *Alternative Proposals*

Policymakers and scholars have proposed a number of alternative reforms that the parties could implement to address some of the deficiencies of the current system. Most notable among these alternatives is the idea of regional primaries. The basic idea is that multiple groups of contiguous states would hold their primaries on the same day. For example, one proposal would divide the country into five regions: Northeast, Midwest, South, Great Plains, and Far West.¹⁹⁸ Another would divide the country into four: East, South, Midwest, and West and rotate the order of the regions' primaries.¹⁹⁹ Some scholars have even put forward a time-zone based primary system.²⁰⁰ I do not give these proposals exhaustive consideration in this Note since they face substantial hurdles to implementation and would not solve many of the underlying deficiencies of the current system.²⁰¹

B. *Legal Implementation*

In this Section, I will outline which legal tools are available to parties, courts, and states to make reforms. I will advocate for reform through the national party organizations, as was done following the disastrous 1968 Democratic Convention, and explore alternatives.

1. *Political Parties*

The Democratic and Republican parties enjoy wide latitude under the First Amendment and are best equipped to eliminate caucuses and change the

198. See WILLIAM MAYER & ANDREW BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* 100 (2004).

199. *Id.* at 100–01.

200. *Id.* at 101.

201. See Danielle Kurtzleben, *No Way to Pick a President? Here are 6 Other ways to do it*, NPR (Jan. 26, 2016), <http://www.npr.org/2016/01/26/463870736/no-way-to-pick-a-president-here-are-6-other-ways-to-do-it> [<https://perma.cc/JAN4-GWEX>].

nomination calendar to reduce the privileged position of Iowa and New Hampshire.²⁰² Historically, the most significant changes to the nomination process have come from the parties themselves. In fact, the current iteration of the presidential nomination system stems from party activism following the 1968 Democratic National Convention. With over fifty years of hindsight, parties can once again be vehicles for change.

While the national parties cannot force states to eliminate caucuses or modify the timing of their nomination events, they have a number of options at their disposal to achieve reform. First, they could be a facilitator and bring state party organizations together to discuss the nomination process and build consensus for banning caucuses and modifying the nomination calendar. Second, parties could unilaterally make a change in the national party rules to eliminate caucuses and the preferential role of Iowa and New Hampshire.

For example, the parties could simply choose not to seat delegates to the national convention who are selected through a caucus or outside of the national party's prescribed calendar. This is what happened in *Democratic Party v. Wisconsin*, when Wisconsin's delegates were selected in violation of national party rules.²⁰³ There, the Court held that the national party could choose not to seat the Wisconsin delegates to the Democratic National Convention, effectively cutting the state out of the process.²⁰⁴ Here, states would face a choice of complying with the national rules or being denied representation at the national convention.²⁰⁵

Parties regularly reevaluate the nomination process, evidenced in part by the several commissions established over the years to study it. Sustained activism and increased dialogue around the racial inequities in the system may put enough pressure on the parties to make reforms.

2. Reform through Judicial Intervention

Reform to the nomination process could also come through the courts, but it would be an uphill battle. Plaintiffs would claim that (1) the use of caucuses and (2) the nomination calendar enforced by the national political parties are unconstitutional per the Equal Protection Clause of the Fourteenth Amendment.

First, as a threshold matter, plaintiffs would have to determine that the parties' actions amount to *state* action. For state political parties like the Iowa Democratic Party or Nevada Republican Party, this threshold is easily met. The

202. See *supra* Part I-B (discussing the legal status of the nomination process and parties' ability to reform it).

203. 450 U.S. 107, 108–09 (1981).

204. *Id.*

205. As discussed earlier in the Note, this happened as recently as 2008. Both Michigan and Florida moved their primary date in violation of Democratic and Republican Party rules. The Democrats initially stripped all delegates from both states and the Republicans cut each state's representation in the national convention by half. See Zarella & Oppmann, *supra* note 141.

White Primary Cases, which are still good law, show that political parties are state actors when they administer elections. Although the Supreme Court has never held the same for national party organizations like the Democratic National Committee or the Republican National Committee, the D.C. Circuit in *Bode v. National Democratic Party* held that “a national nominating convention is the instrumentality of the [state] action.”²⁰⁶ The national parties, by structuring and enforcing the national nomination calendar, amount to state actors in much the same way as state parties. Thus, both the state and national party organizations, acting as state actors, would almost certainly be subject to the limitations imposed by the Fourteenth Amendment.

The next step would be to show a disparate impact under the current system. Part II of this Note outlines how (1) caucuses and (2) the privileged position of Iowa and New Hampshire disparately impact African American and women voters.²⁰⁷ The first claim is likely the stronger of the two, because plaintiffs could point to caucus turnout numbers and outdated procedures to make their case. The data clearly show that the caucuses add a number of hurdles to participation and that they disparately impact African Americans and women.

The second claim, that the nomination calendar results in a disparate impact, is more difficult to prove. Plaintiffs would argue that by putting Iowa and New Hampshire first and second, the parties put their thumbs on the scale for white voters since the electorates in those states are overwhelmingly white. The overwhelming influence of Iowa and New Hampshire as gatekeepers creates a disparate impact by effectively controlling which candidates can be successful in later, more diverse states. The fact that this is an indirect impact will be a potential challenge to caucuses. The D.C. Circuit in *Bode* explained, however, that nomination process has to be based on “so unrepresentative a basis as to cause the candidates to fail to give the electorate an opportunity, insofar as the nominating process is involved, to govern themselves through the exercise of the right to vote.”²⁰⁸ This poses a high bar for plaintiffs, especially since the delegate allocation formula considered by the court in *Bode* does not substantially differ from the one used today.

With that said, however, courts and observers have nearly fifty years of history and data to pull from, something the *Bode* court did not have and may now provide grounds for a renewed challenge. The data show a powerful, measurable impact from caucuses and the role of Iowa and New Hampshire, and it should encourage courts to reexamine the issue and intervene. Practically

206. See *Bode v. Nat’l Democratic Party*, 452 F.2d 1302, 1309 (D.C. Cir. 1971). See also *id.* at 1304–05 (“[T]he decision made by the Democratic Party at the national level, here challenged, is tantamount to a decision of the States acting in concert and therefore subject to constitutional standards applicable to state action.”).

207. The underrepresentation of Hispanics in Iowa and New Hampshire could also be brought in to support the second claim. See *supra* Part III.A.3, Figure 2.

208. *Bode*, 452 F.2d at 1309.

speaking, the nomination races are all but over by the time the final states vote, which deprives late-state voters of a meaningful choice.

Third, even if plaintiffs could show a disparate impact in (1) the use of caucuses and (2) the privileged role of Iowa and New Hampshire, plaintiffs would likely still have to show the parties *intended* to disenfranchise voters on account of their race or gender.²⁰⁹ This would be a heavy lift. Unlike the White Primary Cases, neither party has an official rule or policy statement explicitly excluding (or seeking to exclude) voters on a basis of race or gender. Many party deliberations on this issue are private, not recorded, or otherwise inaccessible to plaintiffs. However, plaintiffs may be able to obtain some of this evidence through discovery during the course of litigation, if they are able to overcome a motion to dismiss. Plaintiffs could also present circumstantial evidence, such as the exclusionary history of caucuses; the official acknowledgement of—and lack of effective action towards—solving disparities; the status of minority voters as comparatively less powerful in the most influential states; and the structure of the nomination calendar itself. Despite the strong arguments in favor of the court intervening to protect “discrete and insular minorities,” the bar for proving intent may simply be too high.²¹⁰

As discussed, *supra* Part II, the privileged position of Iowa and New Hampshire was created entirely by accident and not the product of a well-thought-out scheme. The use of caucuses is a vestige of a time when exclusivity was the *modus operandi*. It is unclear that the states’ and parties’ asserted interest in deliberation or party building is legitimate given our recent experience and other policy options, but courts would be hesitant to rule out a system that has been in place for nearly a half century. And any extension of Fourteenth Amendment Equal Protection doctrine in this area may implicate political parties’ associational rights under the First Amendment, leaving courts in a predicament. Thus, I conclude that courts are an unlikely partner for reform.

3. *Reform by States*

Individual states may intervene on a basis of making the system more inclusive, but the difficulties of coordinating among the states render this approach unlikely. It is also possible that leaving it to individual states to solve representational issues would be fruitless in the face of an unwilling national party organization that ultimately determines which delegates may be seated at the national convention.

209. See *Washington v. Davis*, 426 U.S. 229 (1976); *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788 (2017).

210. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

4. Reform through Congress

Some legal scholars believe Congress has the power to mandate a national primary or a system of rotating primaries, finding that the *timing* of primaries is distinct from determining *who* can vote in primaries.²¹¹ But given that members of Congress have a strong incentive to cooperate with the political parties that nominate them, it is unlikely that they would intervene in any significant way to reform the nomination process. Historically this has been an ineffective means of reform.²¹²

CONCLUSION

Reforming the presidential nomination process to make it more inclusive would enfranchise voters who have been historically underrepresented in the process, especially African American and women voters. In this Note, I have illuminated the severe disparities that arise from the use of caucuses and the outsized influence of Iowa and New Hampshire. I have synthesized data and scholarship from the fields of law, political science, and economics to make the case that these disparate impacts should be the basis for reforms, such as the elimination of caucuses, the creation of a national primary, or more incremental reform.

The path of least resistance will likely be through the political process and the parties themselves. Activists pushed the parties to reform fifty years ago and can do so again, equipped with data from recent elections and a heightened consciousness of political inequality. The Democratic Party re-evaluated its nomination process after the 2016 election and made positive changes, but failed to make fundamental reforms.²¹³ Sustained activism, now and in the future, will be essential. The reforms proposed in this Note are in line with the democratic values that underpin our electoral process and can help ensure that all voters, regardless of race or gender, have a voice in the presidential nomination process.

211. See generally Daniel H. Lowenstein, *Presidential Nomination Reform: Legal Restraints and Procedural Possibilities*, U.C.L.A. SCHOOL OF LAW, PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES 1, 27 (2008); 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. COLLOQUY 253, 263 (2008) ("The one person, one vote cases are grounded in the Equal Protection Clause, and a congressional determination that equality in presidential elections requires imposition of the same rule in presidential party nominating contests would merit serious consideration by the Court.")

212. See, e.g., Stark, *supra* note 17, at 381 n.216 (stating that over 250 bills have been introduced in Congress to address the issue).

213. See *Unity Reform Commission*, THE DEMOCRATIC PARTY, <https://democrats.org/page/unity-reform-commission> [https://perma.cc/G6DN-KRBJ].

