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PRESIDENTIAL NOMINATION REFORM: LEGAL RESTRAINTS AND PROCEDURAL POSSIBILITIES

by

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Presidential Nomination Reform: Legal Restraints and Procedural Possibilities

Daniel H. Lowenstein*

I. Introduction

Discontent with the process for nominating presidential candidates has been a constant in American politics for the past five decades at least. From the 1960s through the 1980s the leading causes of controversy included the limited ability of ordinary voters directly to influence the selection of major party candidates and the demographic representativeness of delegates to the national nominating conventions. Beginning in the 1980s and continuing through the period leading up to the 2008 nominations, the greatest cause for concern has been the timing of "nominating events"—a term I shall use to refer collectively to presidential primaries and caucuses.

This chapter concerns itself primarily not with the substantive merits of the various proposals that have been either adopted or proposed to reform the nomination process but with the processes by which reforms may be adopted and the legal constraints to which they may be subject. The politics and law of presidential nomination reform are complicated by the multiple entities that play a direct and major part in determining the nomination process. The actual nominations take place at the Democratic and Republican National Conventions each presidential election year. For more than a century, from the 1830s when national nominating conventions began (McCormick,

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1984) through the 1950s, selection of delegates was mostly controlled by state party organizations, though beginning early in the twentieth century delegates in a minority of the states were elected in direct primaries (Pomper, 1963). Once the national parties—especially the Democrats—sought to regulate delegate selection following the troubled Democratic National Convention in 1968, the resulting nomination procedures were the result of cooperation, infighting, and bargaining between the state parties, the state legislatures, and the national parties (Shafer, 1983).

In recent years, as the timing of nominating events has attracted increased attention, the pursuit of national legislation has increased concomitantly. The possibility of congressional intervention raises a new set of legal and political questions that will be addressed in this chapter. Early on reformers complained that the nominating process was too long and drawn out (Udall, 1980-81), but more recently "front-loading" became the primary cause of concern, as states moved their nominating events earlier and earlier (Mayer and Busch, 2004a). This problem appeared to reach an alarming climax in the period leading up to 2008 (*e.g.*, Halloran, 2007). The Senate Rules Committee conducted hearings in September, 2007, on a bill to require states to hold regionally oriented nominating events on specified dates (Senate Committee on Rules and Administration, 2007). Other proposals have abounded.

Some observers may have believed that in 2008 the compression of nominating events would create a sufficiently negative reaction in the public to make congressional action against front-loading a political possibility. To almost everyone's surprise, however, the nominating contests did not end in a relative flash. Even on the Republican side, although John McCain had pretty clearly emerged as the nominee following the

February 20 "Super-Tuesday"—by historical standards a very early finish—the Republican contest had gone through enough twists and turns, many of them surprising and dramatic, that the public's impression of compression, if any, was mitigated. In any event, given that the Democrats control the 110th Congress and, as of mid-2008, seem likely to control the 111th, the Democratic contest is more likely to affect the prospects for legislation in the immediate future. By the time the close contest between Barack Obama and Hillary Clinton was resolved, most Democrats were bemoaning the length rather than the brevity of the primary season. No one can doubt that Iowa, New Hampshire, other early states such as South Carolina, and the states that voted on February 20 all had considerable influence on both contests. Nevertheless, on the Democratic side, later states such as Maryland, Virginia, and the other states that gave Obama a string of victories and a commanding lead that Clinton was unable to overcome, and even later states such as Ohio and Pennsylvania that permitted her to come close, were also influential.

Given these events, the pressure for legislative action to mitigate or prevent front-loading will probably soften, at least to some degree. But 2008 did not eliminate the causes of front-loading and the debate will no doubt continue. This chapter reviews the legal question of whether Congress may, under the Constitution, control when nominating events take place in the states. The question is complex, in part for the very reason that Congress has declined recently to intervene in presidential nominations, meaning that there is a paucity of precedents defining the limits of Congress' power. I conclude, as the majority of scholars have done, that while there is no certain answer, congressional action probably would be constitutional. However, I give reasons for moderate skepticism over whether far-reaching congressional regulation is likely to be beneficial. A simple ban of nominating events before a specified date, say the beginning of March, could do little harm and might be of some benefit. Beyond that, if Congress finds it necessary to intervene at all, it ought to consider facilitating solutions devised by the national parties rather than imposing its own solutions.

Congress could seek to regulate other aspects of the presidential nominating process besides the timing of nominating events. For example, Congress could seek to control the allocation of delegates to the conventions or control the form of the ballot used in presidential primaries (cf. Hasen, 2008; Coenen and Larson, 2002). Much of the following analysis would be applicable to these and other forms of regulation, though each would have to be evaluated on its own merits. However, experience shows that Congress is not easily induced to intervene in the presidential nomination process. That could change, but for the foreseeable future it appears that if Congress intervenes at all—which is by no means certain, or perhaps even probable—it will be on the subject of timing.

II. Constitutional Limits on Congressional Power

There are two distinct constitutional questions raised by proposals for Congress to regulate the timing of presidential nominating events in the states. Because the powers of the federal government are limited to those delegated to it in the Constitution and do not include the residual powers enjoyed by the states and other sovereigns, any congressional intervention into the presidential nominating process must be the exercise of a delegated power. By its terms, the Constitution appears to give Congress considerable power to oversee congressional elections but very limited powers over presidential elections.

Thus, the first question is whether the Constitution affirmatively empowers Congress to regulate presidential nominating procedures, such as by controlling the timing of nominating events.

Once it is established that a power is delegated to the federal government by the Constitution, that power must still be exercised in a manner consistent with limitations placed on Congress' power, such as the prohibition in the Fifth Amendment against taking property without due process of law. The particular limit that is most relevant to governmental intervention into the presidential nominating process is the first amendment protection of freedom of association. True, if you check your pocket copy of the Constitution, you will not find any mention of freedom of association in the First Amendment, but the Supreme Court has long maintained that such freedom is implied by the other freedoms that are expressly protected (Tribe, 1988, pp. 1012-1022). Thus, the second question is whether a congressional exercise of power to regulate presidential nominations, assuming such a power exists, violates the parties' freedom of association.

A. Congress' Affirmative Power

The Constitution expressly gives Congress only one discretionary power in connection with presidential elections, the power to designate two dates. In the words of Article II, section 1:

> The Congress may determine the Time of Chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.[1]

[1] Article II, section 1 also gave the component parts of Congress certain additional duties and powers. These provisions were superseded by the Twelfth Amendment, which provides that after the certified electoral votes have been sent to the government of the

The Constitution does not by its terms give Congress power to regulate the timing of presidential nominating events or, indeed, to regulate the presidential nomination process in any way.[2] However, powers delegated to Congress may be implied by the Constitution. Indeed, the Constitution expressly calls for recognition of implied powers in Article I, section 8:

> The Congress shall have Power … To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof.

This "Necessary and Proper Clause" has long been interpreted to permit Congress broad latitude to legislate even on matters that are distantly and indirectly related to its enumerated powers.[3] The clause can be and has been invoked in defense of proposed congressional regulation of presidential nominating events (Hasen, 2008, p. 261).

If Congress limits itself to requiring that presidential nominating events occur not prior to a specified date, or that they occur during a specified time period, the case that its

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United States, "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall be counted…." The Twelfth Amendment further provides that if there is less than a majority in the electoral college, the House selects the president from the three top electoral vote-getters and the Senate selects the vice president from the top two.

[2] The statement in the text is overly broad in a respect that does not affect the subject of this essay. Various amendments to the Constitution give Congress authority to enforce those amendments. Congress can regulate presidential nominating events, as it can regulate anything else, in the course of enforcing those amendments. For example, Congress can legislate to prevent the denial of voting rights in primaries on grounds of race, pursuant to its power to enforce the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment. See *Smith v. Allwright* (1944). However, no one has suggested that any of the amendments expressly enforceable by Congress controls the timing of presidential nominating events.

[3] The seminal case is *McCulloch v. Maryland* (1819).

action is authorized by the Necessary and Proper Clause would be a persuasive one. Congress is delegated the express power to set the date for choosing presidential electors. In a sequential electoral system, consisting of nominating events followed by the party national conventions followed by the national election, it is prudent to assure that the first of these steps is neither too distant in time from the last nor too close. Congress' determination that nominating events should take place within a specified time period would be a means of assuring that its carrying out of its expressly delegated power to set the date of the national election could be performed effectively.

By and large, however, those defending congressional power to regulate the nominating process have relied less on the Necessary and Proper Clause and more on structural interpretation of the Constitution. The premise of structural interpretation is that the Constitution in its entirety creates a government of a certain nature, from which certain powers or limits on power can be derived (Black, 1969). There are several reasons why lawyers and scholars have turned to structural arguments in support of Congress' implied power to regulate the presidential nominating process.

First, although the Necessary and Proper Clause would work well to support a simple requirement that nominating events occur within a specified time period, it is less clear that further regulation of the dates on which particular states should hold their nominating events—for example, by region—are related to Congress' express power to set the date for the national election. The Necessary and Proper Clause would provide even less support for regulation of the nominating process beyond the timing of nominating events. Second, the structural argument is plausible when applied to congressional regulation of presidential nominations. The president is the head of one of the three branches of the federal government and the single most powerful official in the United States. It seems a matter of common sense that it should be within Congress' power to assure that the presidential selection process is sound. As we shall see, there is a potent counter-argument, but not one that will detract from this common sense plausibility. Third, the structural argument appears to be well supported by precedent.

The leading case is *Burroughs v. United States* (1934). In *Burroughs*, the defendants challenged the constitutionality of campaign finance disclosure provisions of the Corrupt Practices Act, which applied to committees seeking to influence the election of presidential electors in more than one state. The defendants' constitutional argument was that Congress' power over presidential elections, under the provisions we have reviewed, was limited to setting the date for Election Day. The key passage from the Court's opinion is worth quoting at some length:

> The congressional act under review seeks to preserve the purity of presidential and vice presidential elections. Neither in purpose nor in effect does it interfere with the power of a state to appoint electors or the manner in which their appointment shall be made. It deals with political committees organized for the purpose of influencing elections in two or more states, and with branches or subsidiaries of national committees, and excludes from its operation state or local committees. Its operation, therefore, is confined to situations which, if not beyond the power of the state to deal with at all, are beyond its power to deal with adequately. It in no sense invades any exclusive state power.
>
> … The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect

> upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.

One obvious objection to applying *Burroughs* to congressional regulation of presidential nominations is that the *Burroughs* defendants were prosecuted for campaign disclosure requirements in the general election, not in primaries. However broad Congress' implied powers may be in connection with the actual selection of presidential electors, does it apply to party nominations, which are nowhere mentioned in the Constitution? That question appears to have been answered in the affirmative in *United States v. Classic* (1941). In that celebrated case, defendants were charged with federal offenses for falsely counting ballots cast in a congressional primary election in Louisiana. The Court rejected their defense that Congress' power to regulate congressional elections—which, as we shall see, is broader than its power to regulate presidential elections—does not extend to primaries, which were not contemplated when the Constitution was adopted. The primary, said the Court, is "an integral part of the procedure for the popular choice of Congressman" (313 U.S. at 314). That primaries were unknown to the framers of the Constitution was not dispositive, because "in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses" (316). The result in *Classic* was surely influenced in part by the single-party dominance that made the Democratic primary dispositive in Louisiana elections in 1941, but the statement that the primary is "an integral part" of the overall election process is equally true of the much more competitive presidential elections of that time and ours. *Classic* makes it difficult to argue against application of *Burroughs* to presidential nominations simply on the premise that Congress' powers to regulate elections do not extend to primaries. But it leaves open the more difficult question whether the structural principles of *Burroughs* extend to congressional regulation of timing of presidential nominating events.

The greatest obstacle to a structural argument for broad congressional power to control presidential nominations is the contrast in the Constitution between the power given to Congress over presidential and congressional elections. As we have seen, the only powers expressly delegated for presidential elections are to set the times for appointment of electors and for the electors to cast their votes for president and vice president. In contrast, Article I, section 4 of the Constitution gives Congress final control of congressional elections:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Scholars who argue for congressional power to regulate at least the timing of presidential nominating events usually concede the negative implication of the express grant of power to Congress to "make or alter" regulations affecting the "Manner" of conducting congressional elections in conjunction with the very limited grant of power over presidential elections. The question is whether *Burroughs* and *Classic* nullify such textual considerations. William Mayer and Andrew Busch, whose book *The Front-Loading Problem in Presidential Elections* qualifies them as the leading students of front-loading, are also the leading skeptics of congressional power to regulate (2004a, 2004b). Mayer and Busch read *Burroughs* narrowly to give Congress only the ability to protect the "purity" of presidential elections against "force or corruption."

Given the emphasis in the passage from *Burroughs* quoted above on the importance to the nation of the office of president, it may be somewhat arbitrary to suppose that Congress can protect against force and corruption but not other problems that might seriously impair presidential elections. This is especially so, given the Court's observation that the campaign disclosure requirements of the Corrupt Practices Act were directed only to interstate activities "beyond [an individual state's] power to deal with adequately." A similar problem of coordination makes it difficult for states to solve the problem of front-loading, which arises not because of the action of any one state but because of the aggregate effect of states seeking to avoid a competitive disadvantage in influence over the nominations.

The reasoning of *Burroughs* therefore seems fairly applicable to congressional efforts to control problems in addition to force and corruption. Nevertheless, the *Burroughs* structural interpretation of the Constitution does not necessarily solve the textual problem for supporters of congressional intervention against front-loading. As *Burroughs* noted, "[n]either in purpose nor in effect does [the Corrupt Practices Act] interfere with the power of a state to appoint electors or the manner in which their appointment shall be made." The use of the word "manner" is probably no accident, as it is the "Manner" of holding elections that Congress is authorized to regulate in congressional but not presidential elections. The Corrupt Practices Act did not regulate the administration of the presidential election, but only the activities of individuals and committees seeking to affect the outcome of the election. The structure of the original Constitution, giving Congress authority over the "Manner" of holding congressional but not presidential elections suggests an intention to leave the states free from federal control over the latter, except as to the date of selecting the electors. In *Burroughs*, the Court pointed out that when Congress regulated campaign committees, it was leaving the states alone to administer the election in whatever "Manner" they wished.

In *Oregon v. Mitchell* (1970), the Supreme Court upheld Congress' ability to lower the voting age to 18 for federal elections but struck down its attempt to do the same for state elections.[4] Four justices would have upheld the reduction of the voting age for all elections and four would have struck it down for all elections. Because Justice Black was the only justice who found the reduction valid for federal but not state elections, he held the decisive vote on the Supreme Court. In his opinion, he wrote:

> I would hold, as have a long line of decisions in this Court, that Congress has ultimate supervisory power over congressional elections. Similarly, it is the prerogative of Congress to oversee the conduct of presidential and vice-presidential elections and to set the qualifications for voters for electors for those offices. It cannot be seriously contended that Congress

[4] Soon after, the 26th Amendment lowered the voting age to 18 for all elections.

> has less power over the conduct of presidential elections than it has over congressional elections.

The only explanation he gave for the latter conclusion—other than a reference to *Burroughs*, which for the reasons given in the previous paragraph may not be sufficient—was in a footnote:

> [I]nherent in the very concept of a supreme national government with national officers is a residual power in Congress to insure that those officers represent their national constituency as responsively as possible. This power arises from the nature of our constitutional system of government and from the Necessary and Proper Clause.[5]

Although Justice Black's vote was decisive in *Oregon v. Mitchell*, he wrote only for himself. Therefore his stated rationale for his decision does not have binding force. Nor is his structural argument persuasive, for two reasons. One is that it does not account for the constitutional text's sharply different authority given to Congress in presidential and congressional elections. Furthermore, like most of the scholars who have argued for congressional authority to regulate presidential nominations, he does not acknowledge the decentralized system that the framers of the Constitution seem to have had in mind for presidential elections. It was the *design* of the original Constitution that the selection of electors in each state and the electors' deliberations on potential presidents should occur independently of other states. In the words of one historian (Kuroda, 1994, p. 23):

> Article II, section I sought to maximize participation in presidential elections by rejecting the establishment of a single electoral college

[5] 400 U.S. at 124 n.7.

located at the nation's capitol. Electors chosen for the specific purpose of electing a President, holding no federal office[,] having no legislative business, congregating in their own states, having little time to consult electors in other states, being required to vote on the same day and for two persons for President, and being disbanded promptly afterwards, would be insulated from corruption.

If the original Constitution had never been amended, then Justice Black's reasoning and that of many contemporary scholars would stand on a weak historical foundation. However commonsensical we may find Justice Black's assertion that there should be a residual power in Congress to assure that the president and other federal elected officials "represent their national constituency as responsively as possible," the framers acted on the belief that the best way to assure the integrity of the process was to decentralize it in the states. That historical understanding explains well the different delegations to Congress of power over presidential and congressional elections.

In my judgment, what redeems the structural argument for congressional authority, at least over the timing of presidential nominating events, is the Twelfth Amendment. Under the original Constitution, each elector cast electoral votes for two people. If the top vote-getter's total equaled a majority of the number of electors casting votes, then he was elected president and the next highest vote-getter was vice president. This system reflected the understanding of the framers described above, that the system would be decentralized and uncoordinated. By 1800, however, national politics had crystallized into a competition between Jefferson's Democratic-Republican Party and Adams' Federalist Party. Jefferson won the 1800 election and his electors all dutifully cast electoral votes for Jefferson and for his running mate, Aaron Burr. The result was that Jefferson and Burr received the same number of electoral votes, throwing the presidential election into the House of Representatives. With the help of the Federalists, Burr tried to capture the presidency for himself. This effort failed in the end, but not before causing what appeared to be a constitutional crisis. In response, and before the next election, Congress proposed and the states ratified the Twelfth Amendment, which called for each elector to cast separate votes for a presidential and a vice presidential candidate.

The importance of the Twelfth Amendment for understanding the Constitution's treatment of presidential elections has been underappreciated. Although by its terms it merely introduced a seemingly modest and mechanical change in the process of choosing a president, it was based on an entirely different conception of how presidents actually were being elected than had been foreseen by the framers. The incident that gave rise to the Twelfth Amendment resulted from a national party system in which electors were selected in each state for the specific purpose of voting for one of the parties' candidates. The expectation of a decentralized process had been displaced by the reality of a party-based, nationally coordinated process. A proper structural interpretation of the Constitution should take into account its amendments, not simply the original Constitution. As amended, the Constitution contemplates at least the possibility that presidential electors will be pledged to support candidates nominated by national parties. For a Constitution with that contemplation, unlike the original Constitution, Justice Black's assertion that there must be a residual power in Congress to maintain the proper working of the nomination system is sound.

It appears, then, that although the reasoning of some of the scholars who have found an implied power in Congress to regulate at least the timing of presidential nominating events may have been incomplete, their conclusion is probably correct.

B. Parties' Freedom of Association

Assuming that regulation of at least the timing of nominating events is within the delegated powers of Congress, there remains the question whether a given regulation would be void as a violation of rights guaranteed by the Constitution. To resolve that question, it is crucial to ask who would object to whatever regulation Congress might adopt. In the case of congressional regulation of the timing of nominating events, there are three major types of entities who might object: state governments, state parties, and national parties.

State governments are not protected by the Bill of Rights. If, as we are now hypothesizing, an action comes within Congress' delegated powers, the states have no ground on which to challenge it. In contrast, parties may claim the protection of the Bill of Rights. As we shall see, under certain circumstances the chances of a national party succeeding in a challenge to congressional regulation of the timing of nominating events are better than the chances of a state party. That is a matter of considerable practical importance, because the likelihood of Congress regulating the timing of nominating events over the strenuous objection of the national parties is much less than the likelihood of its doing so over the strenuous objection of one or more state parties. Indeed, strenuous objection by some state parties to any imaginable timing requirements set by Congress, with the possible exception of proscription of nominating events before a specified date, is nearly inevitable. For example, any such regulation that Congress adopted would have to either recognize the customary priority that has been given to New Hampshire and, more recently, Iowa, or not do so. In the former event, some other state parties—those of Michigan, for example, which held its 2008 primaries earlier than allowed by either national party, largely to protest the Iowa and New Hampshire priority—would almost surely object. In the latter event, the state parties in Iowa and New Hampshire would object.

To understand why a challenge by the national parties to congressional regulation could have a better chance of succeeding than a challenge by state parties, we must review the relation between parties, nominations, and the Constitution. Elsewhere, I have suggested that the history of party regulation can usefully be divided into three broad periods (Lowenstein, forthcoming).

The first period, extending into the 1880s, was one of benign neglect. Parties were regarded as private associations and were left by the state and federal governments to their own devices. The second period, extending through the 1960s, was one of increased regulation of parties. The introduction of the secret ballot made a degree of regulation almost inevitable. The secret ballot had to be provided by the state at the polling place, meaning the state had to develop criteria for listing parties and their candidates on the ballots. Another major cause for increased regulation was the suspicion and even hostility often expressed toward parties by political movements such as the Mugwumps, the Populists, and the Progressives. The most important form of regulation of parties around the turn of the twentieth century and later was the requirement of nominations by direct primaries.

Though this early regulation of parties was sometimes challenged on constitutional grounds, the regulations were almost invariably upheld by judges who often shared the anti-party outlook of the Progressives (Winkler, 2000). Later, the judiciary used the Constitution affirmatively to further regulate the parties. Most important were the *White Primary Cases*, in which the Supreme Court prohibited the exclusion of African Americans from the Democratic primaries in Texas.[6]

It is the third period that is most important for our present purpose. This period can itself be divided into two sets of Supreme Court cases. The first began in the 1970s with a series of controversies in which state parties, state legislatures, state courts and the national parties—actually, in all the cases to reach the Supreme Court it was the Democratic Party—contested the procedures for delegate selection. Generally speaking, though with some nuances we shall have to consider, the Court resolved these controversies in favor of the national parties. There were two major constitutional elements in these cases. One was a fairly conventional application of the First Amendment right of freedom of association, first recognized by the court in *NAACP v. Alabama* (1958). The other was an analogue of federalism. Just as the national government in our federal system is given various powers because of the need for a unified national policy, so the national parties require a degree of autonomy from state governments and state parties if they are to carry out a nationally coherent presidential nominating process. Because both of these elements were present in the first set of Supreme Court, it was difficult to be sure whether either element, taken in isolation, was either necessary or sufficient for a decision in favor of the national party.

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[6] The key decision was *Smith v. Allwright* (1944). For a detailed history of the *White Primary Cases*, see Lawson (1976).

The last and most important case of that type, *Democratic Party of United States v. Wisconsin ex rel. La Follette*, was decided in 1981. The later set of cases began with *Tashjian v. Republican Party of Connecticut* (1986). Most of these cases were controversies over who could vote in party primaries. In all the cases, state parties invoked their freedom of association under the First Amendment to challenge state regulations. Both sets of cases have been given extensive analysis elsewhere that will not be repeated here (Garrett, 2002; Lowenstein, 1993, 2006, and forthcoming; Persily, 2001). But a review of the highlights and of certain points is necessary for understanding the constitutional questions raised by congressional regulation of presidential nominations.

The first set of cases began with controversies over the seating of delegates from Illinois and California in the Democrats' 1972 convention. In *Brown v. O'Brien* (1972), the Supreme Court overturned a ruling of a lower court, adjudicating which delegations from these states should be seated. Giving as its reason the shortage of time and the fact that the rejected delegations could appeal to the convention itself for relief, the Court also expressed "grave doubts" about judicial intervention because of possible infringement of "vital rights of association." In Illinois, a state court had ordered one of the contesting groups of delegates, known as the Wigoda group, not to accept delegate seats. The convention seated them anyway and a state court held the Wigoda delegates in contempt for violating the pre-convention order. In *Cousins v. Wigoda* (1975), the Supreme Court overruled the contempt finding on the ground that a state court could not control the actions of the national convention.

La Follette arose out of the Democratic National Committee's effort to require closed primaries for the 1980 convention.[7] The DNC was trying to enforce a policy that the Democratic candidate should be chosen only by Democrats. But Wisconsin had been using open primaries since 1903 and was unwilling to switch (Wekkin, 1984). The state party induced a state court to order the Democrats to seat the delegation chosen in the Wisconsin open primary. The Democrats did so, in violation of their rules, despite the fact that the Supreme Court stayed the Wisconsin court order before the convention. In *La Follette*, decided the following year, the Supreme Court overruled the Wisconsin court.

The Supreme Court did not say that the national party could prevent the state and the state parties from conducting an open primary. Justice Stewart, writing for the Court, claimed that Wisconsin's interest in conducting its primaries as it wished and the national party's interest in controlling how the delegates to its convention were selected were compatible:

> The National Party rules do not forbid Wisconsin to conduct an open primary. But if Wisconsin does open its primary, it cannot require that Wisconsin delegates to the National Party Convention vote there in accordance with the primary results, if to do so would violate Party rules. (450 U.S. at 126)

Justice Powell made the point in dissent that the purpose of holding a primary is to determine how much support the competing presidential candidates will receive from the

[7] A "closed primary" is one in which only members of the party can vote, in contrast to an "open primary," in which all voters can select the party whose primary they wish to vote in, regardless of the voters' party affiliation.

state's delegation to the national convention. What good does it do to tell the state that it is perfectly free to run its primary any way it chooses, but that the primary will count only if it is run the way the national party orders?

However telling Justice Powell's logic may have seemed, he overlooked the politics of the situation. As events showed, Justice Stewart was right that his ruling preserved both the state's and the national party's interests. True, his ruling gave the national party the last word. But that last word must be exercised, in the end, in the highly public setting of the national convention. As we have seen, the Democrats seated the Wisconsin delegation, chosen at an open primary, despite the fact that by the time of the convention they were under no legal compulsion to do so. In 1984 Wisconsin used caucuses to select delegates, as the national party took a more firm position against the open primary. But by 1988, the national party had given in, modifying its rules to allow Wisconsin to use an open primary (Epstein, 1986, p. 400 n.81). The political balance that exists between the states and the national party, despite the national party's "last word" thanks to *La Follette*, became apparent again in 2008, when the Democrats lacked the political will to entirely deny seating to the delegations from Michigan and Florida, despite the fact that their rules called for exclusion by reason of the two states' conducting their presidential primaries earlier than was permitted.

The Supreme Court's opinions in *O'Brien*, *Cousins*, and *La Follette* all contained language supportive of the national parties' associational rights guarding the national conventions from interference by state legislatures and state courts. However, these cases were also noteworthy on other grounds (Lowenstein, 1993, pp. 1771-1777). One was the degree to which the Court recognized the coordinating function of the national parties in presidential nominations. The clearest statement of this point was in *Cousins*, in response to Illinois' contention that its control of the Democratic primary was in furtherance of the right of its citizens to vote:

> [R]espondents overlook the significant fact that the suffrage was exercised at the primary election to elect delegates to a National Party Convention.… Delegates perform a task of supreme importance to every citizen of the Nation regardless of their State of residence. The vital business of the Convention is the nomination of the Party's candidates for the offices of President and Vice President of the United States…. The States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates. If the qualifications and eligibility of delegates to National Political Party Conventions were left to state law each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result. Such a regime could seriously undercut or indeed destroy the effectiveness of the National Party Convention as a concerted enterprise engaged in the vital process of choosing Presidential and Vice-Presidential candidates—a process which usually involves coalitions cutting across state lines. The Convention serves the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State. (419 U.S. at 489-490, internal quotation marks and citations omitted.)

Tashjian v. Republican Party of Connecticut (1986) resolved whatever doubt may have been left by the delegate selection cases whether the associational rights of parties are strong enough to protect the parties' right to determine who can vote in their primaries, in the absence of national coordinating concerns. Connecticut statutes called for closed primaries. Connecticut Republicans decided that they wanted to open their statewide primaries to independent voters as well as Republicans, while keeping state legislative and other local primaries entirely closed. The Democrats, who controlled the state legislature, refused to enact the proposed change into law for the Republican primaries. After the Republicans won control of the legislature they tried again, but were foiled when their bill was vetoed by a Democratic governor. They then sought relief from the federal judiciary and the Supreme Court ruled that they had an associational right to allow independents to vote in their primaries. Justice Marshall, writing for the majority, made it clear that the Court was not favoring open over closed primaries. That was a question for the parties, not for the courts. The key point was that the nomination of candidates was central to the party's mission, meaning the party had the right to determine which voters should participate in that function.

Tashjian's holding was reaffirmed in *California Democratic Party v. Jones* (2000).[8] In a sense, *Jones* was the reverse of *Tashjian*, because the party was seeking a more closed primary than was provided for in state law. Although California had long held closed primaries, an initiative put into place a "blanket primary." In an ordinary open primary, a voter requests the ballot of whichever party he chooses, regardless of his

[8] The doctrine was further refined in *Washington State Grange v. Washington State Republican Party* (2008), but evidently not in a manner likely to influence the constitutional questions we are concerned with here.

own party affiliation. In a blanket primary there is one ballot, containing the candidates for nomination of each party. A voter can vote for one candidate for each office. For example, a voter could vote for a Republican for governor, a Democrat for attorney general, and a Libertarian for Secretary of State. But as was described above, the reasoning of *Tashjian* did not turn on whether the party wanted a more closed or a more open primary than the state, but on the party's right to determine which voters could participate in its primaries. Therefore, the blanket primary was struck down, at the behest of both major parties and some of the minor parties in California.

The Court also extended *Tashjian* beyond the question of who can vote in the party's primaries in *Eu v. San Francisco County Democratic Central Committee* (1989), which gave parties the right to determine their own governance procedures and to endorse candidates in their primaries, notwithstanding state statutes to the contrary. Nevertheless, the associational rights of parties are not without limits. A dictum in *Jones* said that although the state cannot control who votes in primaries over the party's objection, it can require that candidates be nominated in primaries rather than by other methods. In *Clingman v. Beaver* (2005), Oklahoma's laws called for "semi-closed" primaries, in which a party could choose to allow independent voters to vote in its primaries, but not voters registered in another party. The Libertarian Party sought to open its primaries to all voters, including those registered as Democrats, Republicans, or in other minor parties. The Supreme Court rejected the Libertarians' claim that it had an associational right to invite members of other parties to vote in its primaries.

We are now in a position to evaluate constitutional claims that might be brought against congressional determination of the dates on which presidential primaries can be or must be conducted in particular states. Let us suppose that Congress has passed a law calling for four or five regional primaries to be held a few weeks apart, with the ordering of the regions either to be chosen before each election year by lot or to rotate from one election to the next. There are numerous other plans that have been suggested, each of which has its pros and cons, but for our purposes there probably is little difference between them.[9] Let us then imagine that the Democratic or Republican Party, or each, in one of the states, claims that its associational rights are violated because it wishes to hold its presidential primary earlier than the system enacted by Congress permits.[10]

These state party plaintiffs could and would rely on *Tashjian* and its progeny, but their claims would be significantly weaker than those of the successful plaintiffs in those cases. *Tashjian* and *Jones* turned on the question of who could participate in the selection of the party's candidates, a question that lies at the heart of the party as an association. *Eu* shows that who is permitted to vote is not the only aspect of party primaries that are protected by the First Amendment. But the restriction on the party in *Eu* was a restriction on endorsing candidates in primaries. An endorsement of a candidate is a prototypical speech activity protected by the First Amendment.[11] In our

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[9] For an overview of types of plans that have been proposed, see Mayer and Busch (2004a, chapter 5).

[10] To simplify, we shall assume that the state party has state law on its side. We also assume that the federal legislation permits the state to hold its presidential primary later than the prescribed date, but not earlier. Most of the proposals for federal legislation seem to include that feature. If the federal statute required a state to hold its primary on a specific day, the case for the state party challenging the law would be slightly stronger, but probably not enough to be decisive.

[11] One point elided in *Eu* was that the purpose of the primary is to determine who the party's choice will be. Therefore, a pre-primary decision to endorse must be made by some instrumentality that is a part of the party, such as the state committee or the state convention. It is easy to see why the Court would have held that these entities should have the constitutional right to endorse candidates in primaries, but less easy to see why

hypothetical case, the restriction is not as closely related to the First Amendment. The party's interest in controlling all aspects of its nomination process, including timing, probably will receive less weight than the interests at stake in *Tashjian*, *Eu*, and *Jones*.

This is especially true when the question of federalism is considered. In *Cousins* and *La Follette*, the national party plaintiffs benefited from the Court's recognition of the need for coordinate a coherent nomination process. In our hypothetical case, that need would work in favor of Congress and against state parties. Furthermore, just as the question of timing is less closely related to associational rights than the question of who can participate, so is the timing of a state's primary more obviously and directly related to the need for coordination than who is allowed to vote.

Now let us suppose that the congressional scheme of regional primaries is challenged by one or both national parties. As was mentioned at the beginning of this section, it is less likely that legislation affecting presidential nominations would be passed over the objection of either of the national parties than over the objection of some state parties. For the party in power to pass such a law over the objection of the opposing party would undoubtedly require not only unified control of the government by one party, but also a filibuster-proof Senate or something close to it. Legislation opposed by both parties, is even more unlikely. True, Democrats and Republicans in Congress do not always have the same outlook as the Democratic and Republican National Committees. But the perceived electoral pressure on Congress would probably have to be intense to induce legislation of the sort we are hypothesizing under any circumstances, and it would have to be extremely intense to induce legislation opposed by both national parties. In

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they should have the right to endorse in the name of the party. For criticism of *Eu* along these lines, see Lowenstein (1993).

short, the constitutional issue we are about to consider is one that theoretically could arise, but is quite unlikely.

Let us nevertheless suppose, however improbably, that a system of regional primaries enacted by Congress is challenged by one or both national parties as a denial of freedom of association. In *O'Brien*, *Cousins*, and *La Follette*, the need for coordination was on the side of the national parties and against the states. In the hypothetical litigation considered above in which state parties challenged Congress' regional scheme, coordination was on the side of Congress. But if the national parties challenged a regional system adopted by Congress, it would be a contest between national forces on both sides, each capable of coordinating the nomination system as a whole.

The case, then, would be more like the cases of a state party objecting to state regulation, because the element of coordination would be a wash and the outcome would turn solely on the parties' freedom of association. . Because there is no precedent for a federal statute regulating presidential nominations being challenged by a national party, no one can say with complete confidence how the case would be decided. Although the state parties have been successful in several of the cases challenging state regulations—*Tashjian*, *Eu*, and *Jones*—there are three reasons to believe the hypothesized national legislation is constitutional.

First, as we have already seen, regulation of the timing of primaries does not infringe on first amendment rights to the same degree as regulation of who can vote in primaries or of endorsements of candidates. If Congress were to require all presidential nominating events to be closed—or, alternatively, to be open—a party objecting to the requirement would have a stronger first amendment claim than the party objecting to a congressionally enacted scheme of regional primaries.

Second, though it might seem that whatever the force and whatever the limits of the right of free association protected by the First Amendment, that right ought to be the same against either state or federal infringement, in practice the Supreme Court sometimes is more reluctant to overturn federal than state legislation.

Third, though both Congress and the national parties can consider the nomination process as a whole, the national parties have found it difficult to enforce their rules against the states and state parties (Stark, 1996). The longer this continues to be the case, the more plausible it will be to conclude that though both Congress and the national parties can take the national view, only Congress is capable, as a practical matter, of providing the necessary coordination of presidential nominations, at least so far as the timing of nominating events is concerned.

To summarize, if Congress were to coordinate presidential nominations by imposing some system such as regional primaries, it likely would be challenged by state parties but the challenge would likely to fail. If the system were challenged by either or both of the national parties, the outcome would be less certain but it is still unlikely that the congressionally enacted scheme would be unconstitutional. Even less likely, however, is that Congress will pass a scheme objectionable to either or, especially, both national parties.

III. A CONSTRUCTIVE ROLE FOR CONGRESS?

Part II concluded that if Congress acts to remedy front-loading, it will probably do so constitutionally. Whether Congress ought to act is a different question. My assignment in this book, to survey legal and procedural questions relating to presidential nominations, has given me the luxury of avoiding hard questions about whether the increasing trend, now persistent over decades, toward front-loading is harmful; if so, in what ways; and what, if anything, should be done about it. Mayer and Busch (2004a) conclude that front-loading is harmful for several reasons; that all of the proposed solutions, especially those that confront front-loading directly, are seriously flawed; and that an important drawback of any direct solution imposed by Congress is that it would be a rigid imposition of a system whose consequences would be hard to predict.

The one insight I should like to add to Mayer and Busch's thoughtful discussion is that debates over presidential nominations, like many other debates in election law, are particularly subject to the phenomenon of the grass being greener on the other side of the fence. When presidential nominations were settled in backrooms by state party leaders, it seemed that the grass would be greener if we had more direct popular participation. When we had lots of popular participation it seemed, even to some of the very keenest political analysts, that the grass would be greener if we handed more of the decision back to the political pros (Polsby, 1983). When contested primaries lasted from February to June, we thought that a quicker process would be more verdant, but when we were besieged by front-loading we tried to think of ways to spread out the process—until, that is, the Obama-Clinton contest made the Democrats amongst us think that quicker might be better, after all. If we take the long view, it is difficult to find that the quality of the presidents we have produced has been systematically influenced by the portion of the meadow we have occupied at any given time.

There are good reasons, then, for agnosticism on the substantive question of whether the schedule of nominating events ought to be reformed. With one small exception. As has already been intimated, little harm could be done and some good perhaps accomplished by starting the nominating events later in the presidential election year. In 2008, the Iowa caucuses were held on January 3. The point is not, as some may suppose, that moving the starting date later would shorten the period of presidential campaigning. Nowadays, the beginning date of most presidential campaigns is set more by the date of the preceding presidential election or the preceding off-year congressional election than by the end-point of the presidential nominating events.

Nevertheless, a very early starting date, such as we experienced in 2008, can have some modestly harmful effects. Although the Democratic contest lingered until June, in a more typical election both major-party candidates would have been identified by February, which would mean a lengthening of the period between the end of the nominating contests and the national conventions. It is hard to see any benefit from that. Perhaps the worst consequence of the early starting date in 2008 was not to harm the electoral process itself, but was simply the inappropriate intrusion of politics into the Christmas and New Year's season. A starting date of, say, mid-February or early March would be an improvement and could be imposed by Congress.

Beyond the starting date, there are two well-known structural influence on the process that might be addressed, consistently with agnosticism on whether reform is desirable. First, the tendency for the first few states that hold nominating events to wield disproportionate influence has created an incentive for states to race to the start. This situation may be conceived as a tragedy of the commons or as a multi-player prisoner's dilemma. It is consistent with agnosticism to recognize that leaving each state to set the date for its own nominating event creates an incentive structure that leads to front-loading even if there are no actors in the system who favor front-loading.

Second, the national parties face two structural difficulties in their efforts to override front-loading that occurs as a by-product of that incentive structure. First, as we have seen, it is hard for them, in practice, to enforce their rules against state parties. Second, although occasionally the Republicans and Democrats hold their nominating events in a given state on different dates, it is cumbersome for them to do so. Therefore, the best way for each national party to coordinate its own nomination process would be for the two national parties to do so jointly. But this is difficult for various reasons, not all of which are obvious. For example, the Republican National Convention adopts rules for the next convention, while the Democratic National Committee adopts its party's rules during the year or so following the Democratic National Convention.

Without taking a position on what coordination system, if any, is best, Congress could adopt modest measures to assist the national parties to overcome the structural problems that obstruct them from coordinating nominating events in the states. To help the national parties enforce their rules, Congress could condition aid to the states—either new aid to help finance the conduct of primaries, or existing aid such as that under the Help America Vote Act—on compliance with national party rules that meet certain conditions, including that the rules of the two national parties be compatible with each other.

To assist the parties in exploring the possibility of a joint plan, Congress could set up and finance a structure within which the parties could conduct joint deliberations and negotiations. To overcome the problem resulting from the parties' adopting their rules at different times, the process should be pointed toward the second presidential election after the period within which the process takes place. For example, if Congress and the parties created such a process starting in 2009, it would be working on a system for 2016, not 2012. Such a system, if agreed on, could be adopted by the Republicans at their 2012 convention and by the Democratic National Committee thereafter. Congress could provide various benefits to the parties if they participated in an agreed-upon system, such as enhanced funding for the national conventions.

The purpose of such measures would not necessarily be to induce the parties to agree on a coordinated system that would be effectively enforced against the states by Congress. It may be that such a system would not be beneficial or that one or both of the parties would have no interest in creating such a system, regardless of structural obstacles that presently prevent them from doing so. In the spirit of agnosticism, the point would be simply to eliminate the structural obstacles, without which the parties conceivably would come to some agreement.

CONCLUSION

Congress has not intruded into presidential nominations except in peripheral ways, such as the regulation of campaign finance. In the absence of direct precedent, it is difficult to be confident of the constitutional limits on the power of Congress to intervene. For the reasons set forth in Part II above, it is likely that Congress has the power under the Constitution to adopt any form of regulation it is at all likely to adopt in the foreseeable future.

Despite Congress' probable power to regulate under the Constitution, there is little reason to believe Congress is capable of coming up with a particularly beneficial system, and any system it imposed on the nation would have unpredictable consequences that would be difficult to remedy. Short of major substantive regulation, Congress might constructively prohibit states from holding nominating events until some time in February or early March of a presidential election year. Beyond that, Congress could adopt modest steps to assist the national parties in enforcing their rules against the states and to create a structure within which the parties could explore possibilities for an agreed system of nominating events. Although there is no particular reason to believe such an agreement would emerge, Congress could give whatever possibility exists a fair chance by removing or alleviating structural obstacles that presently exist.

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