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Constitutional Law and the Presidential Nomination Process

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Abstract

The Constitution says nothing about the presidential nominating process and has had little direct role in its evolution from congressional caucuses to party national conventions to our current primary-dominated system. Yet, constitutional law is a factor in empowering and constraining the principal actors in the nomination process and in shaping the framework for potential future changes.

The constitutional law of the presidential nomination process operates along two axes: government-party, and state-national. The government-party dimension focuses on the tension between the states and the federal government in writing the rules for and administering the electoral process -- which may include the primary elections that determine the nominees of the political parties -- and the right of the parties to determine how to pick their nominees. Doctrinally, this involves Supreme Court's efforts to reconcile the power of the states to write the rules for state-run elections, including the primary elections that decide party nominations, with the freedom of political association guaranteed to the parties under the First Amendment.

This government-party axis affects all nominations for state and federal office. Presidential nominations, however, are distinct. For most elections, federal as well as state, most of the rules are determined by state law. But presidential nominations involve a national-level party decision for a nation-wide office. As a result, national party rules and federal laws factor into shaping the nomination process and add the possibility of conflicts between national- and state-level rules to the more common government-party tensions. Key Supreme Court rulings have held that national party rules and the decisions of the national party conventions take precedence over conflicting state laws and state party decisions. To date, Congress has played a minimal role in this area, and its authority to regulate the nomination process has been contested, but its powers need to be understood if Congress is to be involved in reforming this process.

The chapter concludes by suggesting that although the multiplicity of constitutionally-empowered actors may be -- and has been -- a source of conflict and complexity in the presidential nomination process, it may also be a strength. By permitting so many avenues for change, the constitutional framework creates multiple openings for reform.

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I. Introduction

The Constitution says nothing about the presidential nominating process and has had little direct role in the evolution of that process from congressional caucuses to party national conventions to our current primary-dominated system of selecting convention delegates.¹ Yet, constitutional law is a factor in empowering and constraining the principal actors in the nomination process and in shaping the framework for potential future changes.

The constitutional law of the presidential nomination process operates along two axes: government-party, and state-national. The government-party dimension focuses on the tension between the states and the federal government in writing the rules for and administering the electoral process -- which may include the primary elections that determine the nominees of the political parties -- and the right of the parties to determine how to pick their nominees. This government-party axis affects all nominations of candidates for state and federal office. Presidential nominations, however, are distinct. For most elections, federal as well as state, most of the rules are determined by state law. But presidential nominations involve a national-level party decision for a nation-wide office. As a result, national party rules and federal laws factor into shaping the nomination process and add the possibility of conflicts between national- and state-level rules to the more common government-party tensions.

This chapter reviews the constitutional context for the presidential nomination process and its implication for reforms. Part II considers the government-party axis, and especially the Supreme Court's efforts to reconcile the power of state governments to write the rules for state-run elections, including the primary elections that decide party nominations, with the freedom of political association guaranteed to the parties under the First Amendment.²

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¹ On the evolution of the presidential nomination process, see generally Stephen Gardbaum & Richard H. Pildes, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 N.Y.U. L. REV. 647, 652–66 (2018).

² Technically, in cases dealing with state law, the courts are applying the First Amendment as incorporated into the Fourteenth Amendment. For the sake of simplicity, this chapter will refer to these as First Amendment cases.

Part III add national concerns to the mix. It examines the key Supreme Court rulings holding that national party rules and the decisions of the national party conventions take precedence over conflicting state laws and state party decisions. Part IV completes the treatment of the state-national dimension by considering the power of Congress to regulate the presidential nominating process. To date, Congress has played a minimal role in this area, and its authority to regulate the nomination process has been contested, but its powers are important to understand if Congress is to be involved in reforming this process.

Part V concludes by suggesting that although the multiplicity of constitutionally-empowered actors may be – and has been – a source of conflict and complexity in the presidential nomination process, it may also be a strength. By permitting so many avenues for change, the constitutional framework creates multiple openings for reform.

II. The Political Parties, Party Nominations, and the States

The Constitution says nothing about political parties. Indeed, as Madison's concerns in Federalist No. 10 about "the mischiefs of faction"³ and Washington's denunciation in his Farewell Address of the "common and continual mischiefs of the spirit of party"⁴ both suggest, the Framers were hostile to political parties. Nonetheless, political parties quickly emerged, and they played a crucial role in presidential elections as early as 1800. By the late nineteenth century, our political process was thoroughly dominated by organized political parties. As private organizations, these political parties initially operated outside the scope of legal regulation. That began to change in the closing decades of the nineteenth century with the adoption of official state ballots.

A. State Regulation of the Party Nomination Process

At one time, it was common for the parties to print their own ballots and then try to persuade voters to take the party's ballot into the polls. As the Supreme Court put it, "[a]pproaching the polling place under this system was akin to entering an open auction place. As the elector started his journey to the polls, he was met by various party ticket

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³ THE FEDERALIST NO. 10 (James Madison), https://avalon.law.yale.edu/18th_century/fed10.asp.

⁴ *Transcript of President George Washington's Farewell Address*, OURDOCUMENTS.GOV (Sept. 17, 1796), <https://www.ourdocuments.gov/doc.php?flash=false&doc=15&page=transcript>.

peddlers ‘who were only too anxious to supply him with their party tickets.’ Often the competition became heated when several such peddlers found an uncommitted or wavering voter.”⁵ To combat the resulting problems of “voter intimidation and fraud,” between about 1888 and 1896 virtually all of the states adopted the reform, first made popular in Australia, of requiring voters to use a ballot printed by the state.⁶ But that meant the states had to decide which candidates or parties would be listed on that ballot. That, in turn, led the states to take a greater role in overseeing and, ultimately, mandating the procedures that the parties use to select their nominees.

In most states, that state-mandated procedure became the party primary. In the South, the party primary was a device for evading the Fifteenth Amendment’s ban on racial discrimination in voting. As the primary was considered to be an internal party election, the Supreme Court held that a primary vote was not a “vote” within the meaning of the Constitution.⁷ In the North and West, by contrast, the primary was a progressive reform that provided a means of challenging party bosses’ control of the nomination process.⁸ When challenged in state courts, primary requirements were generally sustained as promoting party integrity, preventing “fraud or oppression,” and “increasing the power of the people to govern their parties.”⁹ The party primary also provided an opportunity for an actual competitive election in the many one-party states.¹⁰ Primaries were hailed as a mechanism for combatting the corrupt domination of party bosses and for vindicating the right to vote by extending it to the nomination process.¹¹

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⁵ *Burson v. Freeman*, 504 U.S. 191, 202 (1992).

⁶ *Id.* at 200–02.

⁷ *Grove v. Townsend*, 295 U.S. 45 (1935); *cf.* *Newberry v. United States*, 256 U.S. 232 (1921). States laws that *mandated* the exclusion of African-Americans from party primaries were held to violate the Fourteenth Amendment. *See Nixon v. Herndon*, 273 U.S. 536 (1927). But when the exclusion resulted from a party rule, it was a matter of private activity, not state action.

⁸ *See, e.g., New York State Board of Elections v. Lopez Torres*, 552 U.S. 196, 205 (2008) (states “set their faces against ‘party bosses’ by requiring party-candidate selection through processes more favorable to insurgents, such as primaries”).

⁹ *See* Stephen E. Gottlieb, *Rebuilding the Right of Association: The Right to Hold a Convention as a Test Case*, 11 HOFSTRA L. REV. 191, 196–200 (1982).

¹⁰ *See* LEON D. EPSTEIN, *POLITICAL PARTIES IN THE AMERICAN MOLD* 129–30, 171 (1986). As the Pennsylvania Supreme Court observed in an 1886 decision, “[i]n many portions of the state, as is well known, a nomination by a convention of one of the parties is practically the equivalent of an election. In some instances, it is the precise equivalent.” *Leonard v. Commonwealth*, 4 A. 220, 225 (Pa. 1886).

¹¹ *See* Adam Winkler, *Voters’ Rights and Parties’ Wrongs: Early Political Party Regulation in the State Courts, 1886–1915*, 100 COLUM. L. REV. 873 (2000).

State primary laws were often accompanied by other measures that required certain forms of party organization, structures, and procedures for the selection of both party officers and party nominees but that also typically guaranteed the leading parties placement on state ballots. The states came to treat the major parties as institutions akin to public utilities – they were powerful entities that dominated political competition and provided an essential public service in organizing the electoral process but also needed to be overseen and regulated in order to protect the “democratic legitimacy” of that process.¹²

The Supreme Court implicitly recognized this “public utility” model in 1941, in *United States v. Classic*,¹³ which disavowed the Court’s prior position that a party primary is simply the internal procedure of a private organization. *Classic* held that the federal law criminalizing fraud in elections to federal office applied to Louisiana’s congressional primary. As the Court explained, the primary “was conducted by the state at public expense,”¹⁴ and was “an integral part of the procedure” that Louisiana had chosen for the election of members of Congress.¹⁵ Indeed, “the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election.”¹⁶ As a result, the Court in *Classic* held that Congress’s power under Article I, Section 4 of the Constitution to regulate the “times, places, and manner of holding elections” for members of Congress includes the power to regulate the party primaries that select the nominees who run in congressional elections.¹⁷

Three years later, in *Smith v. Allwright*,¹⁸ the Court observed that, due to *Classic*, “[i]t may now be taken as a postulate that the right to vote in . . . a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution.”¹⁹ *Smith* held that the Texas Democratic party could not exclude African-Americans from participating in its primary.

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¹² See EPSTEIN, *supra* note 10, at 173–74.

¹³ 313 U.S. 299 (1941).

¹⁴ *Id.* at 311.

¹⁵ *Id.* at 314.

¹⁶ *Id.* at 319.

¹⁷ *Id.* at 319–21.

¹⁸ 321 U.S. 649 (1944).

¹⁹ *Id.* at 661–62.

Although such exclusion was due to a party rule, and not a state law, it was still “state action,” so that the Constitution’s ban on racial discrimination in voting applied. Given the many state laws governing the internal structure of the party and the procedures for making party decisions, the party was “an agency of the state in so far as it determines the participants in a primary election.”²⁰ Moreover, by making primaries “a part of the machinery for choosing officials, state and national” and “prescrib[ing] a general election ballot made up of party nominees . . . chosen” in primaries, the state had effectively “endorse[d], adopt[ed], and enforce[d]” the party’s racial discrimination.²¹ The Court concluded that although, as a matter of internal autonomy, the party could set its own rules for membership, when party membership became “the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state.”²²

Nine years later, in *Terry v. Adams*,²³ the Court held that the internal elections of a Texas county political association which were open only to the county’s white voters, and which, over a sixty-year period, effectively determined the winners of the Democratic primary and the general election, also constituted state action. There was no single opinion for the Court but the justices who composed the majority looked to the power of the party organization,²⁴ the state’s acceptance and ratification of that power,²⁵ and its de facto incorporation into the decision-making of the county Democratic Party. The party organization had become part of the “electoral apparatus” of the state, and, thus, was subject to the constitutional anti-discrimination requirements that apply to state action.²⁶

Four decades later, in *Morse v. Republican Party of Virginia*,²⁷ the Court held that the preclearance provision of Section 5 of the Voting Rights Act – which required Department of Justice approval of any new “standard, practice or procedure with respect

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²⁰ *Id.* at 662–63.

²¹ *Id.* at 664.

²² *Id.* at 664–65.

²³ 345 U.S. 461 (1953).

²⁴ *Id.* at 463–70 (opinion of Justice Black, joined by Justices Douglas and Burton); *id.* at 484 (opinion of Justice Clark, joined by Chief Justice Vinson and Justices Reed and Jackson).

²⁵ *Id.* at 468–70.

²⁶ *Id.* at 484.

²⁷ 517 U.S. 186 (1996).

to voting” adopted by a “covered jurisdiction” – applied to the Virginia Republican Party’s decision to impose a registration fee on anyone who wanted to become a delegate to the party convention that was called to nominate a candidate for the United States Senate.²⁸ Although there was no majority opinion for the Court, the two opinions that together made a majority relied on *Smith* and *Terry* in concluding that the party exercises a power delegated to it by the state when it chooses a nominee who will later appear, pursuant to state law, on the state’s general election ballot. As a result, when the state places the candidate chosen by the convention on the ballot, “it ‘endorses, adopts and enforces’ the delegate qualifications set by the party.”²⁹

B. First Amendment Protection of the Party Nomination Process

Starting In the 1970s and 1980s, the Supreme Court began to voice a new theme in its treatment of the political parties by emphasizing that parties are political associations that enjoy the freedom of association guaranteed by the First Amendment. Moreover, the selection of a party’s general-election nominees was deemed to be at the core of the party’s First Amendment rights.

In *Tashjian v. Republican Party of Connecticut*,³⁰ the Court held that the Connecticut law requiring that a party choose its nominees in a closed primary – that is, one limited to party members – unconstitutionally burdened the First Amendment rights of a party that wanted to open its primary to independent voters, that is, voters not registered with any party. The state law, the Court determined, “place[d] limits upon the group of registered voters whom the Party may invite to participate in the ‘basic function’ of selecting the Party’s candidates.”³¹ The state’s action “thus limit[ed] the Party’s associational opportunities *at the crucial juncture* at which the appeal to common principles may be translated into concerted action, and hence to political power in the

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²⁸ At the time *Morse* was decided, Virginia was a “covered jurisdiction,” subject to the preclearance requirement of the Voting Rights Act. Two decades later, the Court struck down the provision of the Voting Rights Act setting the formula for the determination of covered jurisdictions, thus effectively terminating the preclearance requirement. See *Shelby Co. v. Holder*, 570 U.S. 529 (2013).

²⁹ *Morse*, 517 U.S. at 197–200 (opinion of Justice Stevens, joined by Justice Ginsburg). See also *id.* at 235, 239 (opinion of Justice Breyer, joined by Justices O’Connor and Souter, citing *Smith* as authority for application of Voting Rights Act to party nomination processes). See also *id.* at 212–18, 236–40 (citing *Terry*).

³⁰ 479 U.S. 208 (1986).

³¹ *Id.* at 216.

community.”³² The Court subjected the imposition of the closed primary requirement to strict judicial scrutiny, and concluded that it was not narrowly tailored to promoting a compelling state interest. The Court found one of the justifications the state offered – ensuring the administrability of the primary system – was not compelling, while the others -- avoiding voter confusion, and protecting the responsibility of party government – were not advanced by the closed primary requirement.³³

In *Eu v. San Francisco County Democratic Central Committee*,³⁴ the Court struck down a law that barred the governing bodies of political parties from endorsing candidates in party primaries. The endorsement ban sought to reduce the role that the party organization had over the selection of party nominees, and it reflected the same goal that was the impetus behind forcing parties to hold primaries. But the Court nonetheless found that the ban interfered with the ability of the party to “select a ‘standard bearer who best represents the party’s ideologies and preferences.’”³⁵

And in *California Democratic Party v. Jones*,³⁶ the Court invalidated California’s blanket primary law, adopted by voter initiative, which would have allowed each voter to vote in any party’s primary for each office on the ballot, including different party primaries for different offices (e.g., a voter could potentially vote in the Democratic primary for governor but in the Republican primary for attorney general). The Court reiterated that “states have a major role to play in structuring and monitoring the election process, including primaries,”³⁷ but emphasized that “the processes by which political parties select their nominees” are not “wholly public affairs that the state may regulate freely.” Rather, the First Amendment “reserves” a “special place” and accords “special protection” to “the process by which a political party ‘select[s] a standard bearer who best represents the party’s ideologies and preferences.’”³⁸ The blanket primary severely burdened party First Amendment rights by allowing those who “at best, have refused to affiliate with the party,

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³² *Id.* (emphasis added).

³³ *Id.* at 217–24.

³⁴ 489 U.S. 214 (1989).

³⁵ *Id.* at 224.

³⁶ 530 U.S. 567 (2000).

³⁷ *Id.* at 572.

³⁸ *Id.* at 572–75.

and, at worst, have expressly affiliated with a rival” to participate in the party’s nomination process.³⁹ That could change both the identity of a party’s nominee and the policy positions its candidates take, effectively “adulterat[ing]” the party’s candidate selection process. “We can think of no heavier burden on a political party’s associational freedom,” the Court wrote. It then determined that the principal justifications advanced for the blanket primary – making party nominees more representative of the general electorate and allowing otherwise “disenfranchised voters” to participate in the primary process – were not compelling.⁴⁰ Indeed, these justifications were actually inconsistent with the rights of parties and party members to select their own nominees. Other justifications – such as that the blanket primary would be “fairer” to nonparty members in districts effectively controlled by one party, and that the blanket primary protected political privacy by enabling voters to participate in a primary without having to formally declare affiliation with a party – were dismissed as either non-compelling or capable of being satisfied by a less burdensome mechanism than the blanket primary.⁴¹

The Court in *Jones* stressed that its concern was with the state’s opening *the party’s nomination process* to non-party members. The state could still structure the ballot to facilitate participation by non-party voters in the selection of general-election candidates by creating a *nonpartisan* -- or “top two” -- primary in which all candidates for an office run on the same ballot regardless of party affiliation, and all voters can vote in that election, with the top two vote-getters moving on to the general election.⁴² In such a primary, non-party voters would not actually be picking a party’s nominee, and the party would be free to use its own internal processes for endorsing its preferred candidate. Indeed, in 2010 California voters passed a ballot proposition creating such a top-two system for congressional and state-level elections.⁴³

C. An Uncertain Synthesis

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³⁹ *Id.* at 577.

⁴⁰ *Id.* at 579–82.

⁴¹ *Id.* at 582–86.

⁴² *Id.* at 585–86.

⁴³ CAL. CONST. art. II, § 5.

States have the constitutional power to regulate their elections, including elections for federal offices; to set the terms for the placement of parties and candidates on the state's ballot; and, as a result, to regulate the process by which parties determine their nominees. States can also use this power to promote other goals, such as the integrity and stability of the political party system.⁴⁴ Yet, the parties, as political associations, are protected by the First Amendment, and that protection extends to the party's selection of its nominees to contest the general election. These two constitutional norms do not easily fit together. In recent years, the doctrinal pendulum, which had swung first towards treating the parties as subject to state regulation and then towards a recognition of parties as bearers of First Amendment rights, appears to be swinging at least moderately back towards affirming state regulatory authority.

In *Timmons v. Twin Cities Area New Party*,⁴⁵ the Court upheld Minnesota's "anti-fusion" law that prohibited a party from nominating a candidate who had been nominated by another party. A few years later, in *Clingman v. Beaver*,⁴⁶ the Court rejected a party's argument that a state's semi-closed primary law, which permitted participation by party members and independent voters, but not voters registered with another party, violated the party's First Amendment right to choose to open its primary fully to voters registered with other parties. In both cases, the unsuccessful plaintiff was a minor party, so the results may be chalked up to the Court's preference for the two-party system⁴⁷ and its implicit hostility to minor parties.⁴⁸ But the Court's mode of analysis was not limited to minor parties. Instead, in both cases, the Court applied the so-called *Anderson-Burdick* balancing test, which it developed to deal with challenges brought by candidates and voters to state election regulations.⁴⁹ *Anderson-Burdick* reflects the judgment that "States may, and inevitably must, enact regulations of parties, elections, and ballots to reduce election- and campaign-related disorder,"⁵⁰ even though those regulations will also

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⁴⁴ See, e.g., *Storer v. Brown*, 415 U.S. 724 (1974).

⁴⁵ 520 U.S. 351 (1997).

⁴⁶ 544 U.S. 581 (2005).

⁴⁷ See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. at 367 (1997).

⁴⁸ See, e.g., *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Jenness v. Fortson*, 403 U.S. 431 (1971).

⁴⁹ *Anderson-Burdick* derives from *Anderson v. Celebrezze*, 460 U.S. 780 (1983), in which an independent candidate sought a place on the general election ballot, and from *Burdick v. Takushi*, 504 U.S. 428 (1992), which considered a voter's claim to cast, and have counted, a write-in ballot in the state's general election.

⁵⁰ *Timmons*, 520 U.S. at 358.

inevitably burden First Amendment associational rights. When an election regulation is challenged, the Court will first assess the “character and magnitude” of the burden of the state’s rule. If the burden is severe, the law will have to be narrowly tailored to advancing a compelling state interest. But “[l]esser burdens . . . trigger less exacting review” and “‘important regulatory interests’ will usually be enough to justify ‘reasonable, nondiscriminatory restrictions.’”⁵¹

The preliminary determination of the magnitude of the burden of the state’s law on protected associational freedom is key. In both *Timmons* and *Clingman*, the Court found the burdens to be relatively modest. *Timmons* reasoned that in light of the general laws that limit the eligibility of candidates, a party does not have an absolute right to nominate any particular candidate it wants. Moreover, although the anti-fusion law barred the party from nominating its preferred candidate, it was still free to endorse and support him.⁵² This certainly seems in tension with the Court’s prior decisions that had emphasized the vital importance of the party nominee as the “standard bearer who best represents the party’s ideologies and preferences.”⁵³ In *Clingman*, four members of the Court’s majority did not find that the limit on the party’s right to open its primary to non-members was much of a burden on the associational rights of the party at all.⁵⁴ The other two justices in the majority acknowledged that some “significant associational interests [were] at stake” but thought the burden imposed by a semi-closed primary was “modest and politically neutral” as it barred only those voters who had chosen to affiliate with another party from participating in the plaintiff party’s primary.⁵⁵ Again, this is hard to square with *Tashjian*’s emphasis on the party’s interest in determining who can vote in its primary. Both *Timmons* and *Clingman* found the laws at issue were justified by the general state interests in the stability of the party system⁵⁶ and in maintaining the integrity of political parties as “viable

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⁵¹ *Id.*

⁵² *Id.* at 359–60.

⁵³ See *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224 (1989).

⁵⁴ *Clingman v. Beaver*, 544 U.S. at 587–91 (plurality opinion of Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy).

⁵⁵ *Id.* at 602–04 (opinion of Justice O’Connor, joined by Justice Breyer).

⁵⁶ *Timmons*, 520 U.S. at 366–70.

and identifiable interest groups,”⁵⁷ even when political parties actually opposed those notionally pro-party rules.

In *Washington State Grange v. Washington State Republican Party*,⁵⁸ the Court employed the *Anderson-Burdick* standard to assess a First Amendment challenge brought by a major party. In the aftermath of *California Democratic Party v. Jones*, Washington voters adopted a top-two primary system, but that law allowed a candidate to indicate a “party preference” on the ballot.⁵⁹ The state’s Republican Party sued, claiming that the “party preference” provision violated the party’s constitutional rights because voters would associate a candidate with the party of his or her stated party preference even for “a candidate who is unaffiliated with” the party “or even repugnant to” it.⁶⁰ Stressing that the party was bringing only a facial challenge, the Court concluded that the party had failed to provide the evidence necessary to prove that the “party preference” provision would inevitably be a severe burden on its associational rights.⁶¹ As a result, the state only had to show that the party preference provision served an “important regulatory interest.” The Court agreed with the state that the interest in providing voters with information about the candidates on the ballot was such an interest.⁶² *Washington Grange* was less clearly at odds with the view that the First Amendment protects party control over the nomination process than *Timmons* or *Clingman* but all three decisions certainly reflect the Court’s continuing commitment to giving the states significant control over their primaries.

The strong statements in *Tashjian*, *Eu*, and *Jones* concerning the fundamental importance of the nomination process to party autonomy implicitly challenge the power of the states to mandate the use of a primary election to choose party nominees. In *American Party of Texas v. White*⁶³ -- decided before the leading party autonomy cases -- the Court declared that “it is too plain for argument . . . that the State . . . may insist

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⁵⁷ *Clingman*, 544 U.S. at 593–94.

⁵⁸ 552 U.S. 442 (2008).

⁵⁹ *Id.* at 444.

⁶⁰ *Id.* at 447.

⁶¹ *Id.* at 454–58.

⁶² *Id.* at 458.

⁶³ 415 U.S. 767 (1974).

that intraparty competition be settled before the general election by primary election or by party convention.”⁶⁴ But the power to require a primary was not at issue in *White*, which concerned a Texas law that provided for different nomination processes for minor and new parties as opposed to the established major parties. The Court repeated *American Party’s* “too plain for argument” line in *Jones*⁶⁵ and more recently in *New York State Board of Elections v. Lopez Torres*,⁶⁶ although again a state’s power to mandate a primary was not at issue in either case.⁶⁷ Indeed, the Court has never addressed a direct challenge to the constitutionality of the mandatory primary or explained how it squares with a party’s powerful First Amendment interest in deciding the selection of its nominees. *Lopez Torres*, which turned back a challenge to New York’s hybrid primary-and-convention system for selecting judicial candidates, gestured at a reason for the constitutionality of a primary requirement when it linked state regulation of the nomination process to the state’s decision to “give[] the party a role in the election process . . . by giving certain parties the right to have their candidates appear with party endorsement on the general-election ballot.”⁶⁸ But even then the Court noted that the state’s power was limited by the First Amendment, citing the trio of *Tashjian*, *Eu*, and *Jones*.⁶⁹

The constitutionality of the primary requirement was implicated in two post-*Jones* federal court of appeals decisions. In *Alaska Independence Party v. Alaska*,⁷⁰ two minor parties challenged the Alaska law allowing any voter registered with a party – and any voter could choose to register with any party -- to seek that party’s nomination. The parties expressed the concern that because they could not control who registers with them and thus who may run for their nominations, the primary law prevented them from excluding candidates they found objectionable. The U.S. Court of Appeals for the Ninth Circuit, however, observed that the very purpose of the direct primary requirement is to shift control over the nomination process from “party leadership” to “rank-and-file party voters.”

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⁶⁴ *Id.* at 781.

⁶⁵ *California Democratic Party v. Jones*, 530 U.S. 657, 572 (2000).

⁶⁶ 552 U.S. 196, 203 (2008).

⁶⁷ *See also* *Tashjian v. Republican Party of Connecticut*, 486 U.S. 208, 237 (1986) (Scalia, J. dissenting, quoting and citing the line from *American Party*).

⁶⁸ *Lopez Torres*, 552 U.S. at 203.

⁶⁹ *Id.*

⁷⁰ 545 F.3d 1173 (9th Cir. 2008).

As candidacy was limited to those who had chosen to affiliate with the party, and the party leadership remained free to endorse its preferred candidates and disavow undesired candidates, the court determined that the law's burden on party autonomy was modest. Even if it could be considered severe, "the state's interest in eliminating the fraud and corruption that frequently accompanied party-run nominating conventions is compelling."⁷¹

In 2018, *Utah Republican Party v. Cox*⁷² vindicated a state's authority, in the face of a First Amendment objection, to alter a party's nomination process. Utah Republican Party rules provided for nominations by a convention composed of delegates elected at neighborhood caucuses. If a candidate won more than sixty percent of the convention vote, there would be no primary; if no candidate won sixty percent at the convention, there would be a primary limited to the two candidates who got the most convention votes. Utah's Republican-controlled legislature, however, passed a new law enabling any candidate who collected a qualifying number of petition signatures from party voters to participate in the primary, whether or not that candidate had sought the nomination in the convention or had been one of the top two convention candidates.⁷³ The Tenth Circuit rejected the state party organization's claim that this state-directed change to the nomination process severely burdened its freedom of association. In the court's view, the law was not an attack on party autonomy but a determination by the "overwhelmingly" Republican legislature of who actually spoke for the party – the relatively small group of activists who participate in the caucus-and-convention process, or the "roughly 600,000 registered Republicans"⁷⁴ eligible to participate in the primary. With the primary limited to party voters, the court's majority saw little burden on associational rights,⁷⁵ and concluded the law was justified by the state's interests in increasing voter participation and access to the ballot.⁷⁶ However, the dissent found that by superseding the party's rules, the

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⁷¹ *Id.* at 1179–80.

⁷² 892 F.3d 1066 (10th Cir. 2018).

⁷³ The law actually authorized two types of parties – "registered parties" and "qualified parties." All candidates for the nomination of a registered party would have to collect a certain number of signatures in order to qualify for placement on the primary ballot. Qualified parties – such as the Utah Republican Party – could also place their top convention candidates on the primary ballot without having to collect petition signatures. *Id.* 1072-73.

⁷⁴ *Id.* at 1082.

⁷⁵ *Id.* at 1081–83.

⁷⁶ *Id.* at 1083–85.

primary law necessarily interfered with party autonomy. The dissent also emphasized the tension between the mandatory primary and the Supreme Court's recognition of party autonomy in cases like *Jones*,⁷⁷ and contended that the "behemoth, corrupt party machines" invoked to justify mandatory primaries are a thing of the past. Indeed, the dissent urged the Supreme Court to directly address the constitutionality of the mandatory primary in light of the cases emphasizing party associational rights.⁷⁸ The Supreme Court, however, denied certiorari.⁷⁹

Assuming a mandatory primary is constitutional, open primaries, as fifteen states require for at least some elections,⁸⁰ may be subject to challenge. *Jones* noted that an open primary "may be constitutionally distinct" from the invalidated blanket primary as "the voter is limited to one party's ballot," but *Jones* was also careful to say that it was not passing on the constitutionality of open primaries.⁸¹ Moreover, the same concern of compelling party members to associate with non-members in the nomination process that was at issue in *Jones* is surely implicated by the open primary, in which any registered voter is entitled to vote, regardless of the voter's party affiliation. In the handful of challenges to open primary laws since *Jones*, the lower federal courts have generally been reluctant to find open primary laws facially unconstitutional,⁸² but several have left open the possibility of as-applied challenges, and at least two courts have sustained those challenges when the parties provided evidence that there was likely to be a sufficiently high level of "cross-over voting" – that is, voting by members of other parties – to affect the nomination.⁸³ That would be a "severe burden" on the party's freedom of association, not justified by any compelling state interest.

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⁷⁷ *Id.* at 1110–11 (opinion of Tymkovich, C.J., concurring in part and dissenting in part).

⁷⁸ *Id.* at 1072 (Tymkovich, C.J., concurring in denial of rehearing en banc).

⁷⁹ *Utah Republican Party v. Cox*, 139 S. Ct. 1290 (2019).

⁸⁰ *See State Primary Election Systems*, NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org/documents/Elections/Primary_Types_Table_2017.pdf.

⁸¹ *California Democratic Party v. Jones*, 530 U.S. 657, 577 n.8 (2000); *see also id.* at 576 n.6.

⁸² *See, e.g., Ravalli Co. Republican Central Comm. v. McCulloch*, 154 F.Supp.3d 1063 (D. Mont. 2015); *Democratic Party of Hawaii v. Nago*, 982 F.Supp.2d 1166 (D. Hawaii 2013); *Greenville Co. Republican Party Exec. Comm. v. State*, 824 F.Supp.2d 655 (D.S.C. 2011); *Miller v. Brown*, 503 F.3d 360, 368 (4th Cir. 2007); *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277 (9th Cir. 2003).

⁸³ *See, e.g., Utah Republican Party v. Herbert*, 144 F.Supp.3d 1263, 1270–82 (D. Utah 2015); *Idaho Republican Party v. Ysursa*, 765 F.Supp.2d 1266 (D. Idaho 2011).

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The constitutional tension between a state's control of its elections and a party's autonomy with respect to the selection of its nominees remains unresolved, at least in theory. In practice, the constitutionality of the mandatory primary seems settled. This may be due to the state's power to make the automatic listing of party nominees on the general election ballot contingent on the party's use of the primary to select its nominees. It may also reflect the sense that at least when the primary is limited to party voters, the state is not burdening freedom of association but protecting the rights of association members to be heard. The tension becomes sharper when the state requires the party to allow non-party members to participate in the primary process over the party's objection. There have been relatively few cases dealing with this issue, perhaps because the parties -- or at least the major parties -- are likely to have considerable influence with their state legislatures, so that laws the party organizations oppose will not often be enacted, although the recent Utah dispute is a clear counterexample. In the few cases that have arisen, courts have first looked to the states' power to structure their elections, including the regulation of party nominations, and have placed the burden on the challengers to prove that the state-determined voting rule severely infringes their associational rights. In a handful of cases, parties have been able to carry that burden, and it is possible that there will be more challenges in the future.

III. The Constitutional Status of National Party Rules and Conventions

Although the balance of constitutional power between government and party with respect to party nominations remains uncertain in state-level elections, in a trio of cases decided between 1972 and 1981, the Supreme Court made it clear that when it comes to the presidential nomination process, national party rules and the decisions of national party conventions take precedence over the rules and decisions of state-level actors. These decisions swept aside the nascent tendency, evidenced most clearly in a pair of decisions by the United States Court of Appeals for the District of Columbia Circuit in 1971, to extend the *Smith/Terry* treatment of the party nomination process as state action to the national conventions. Those D.C. Circuit decisions involved challenges, brought under the "one person, one vote" doctrine of the Fourteenth Amendment's Equal

Protection Clause, to how the national parties allocated delegates across the states to the 1972 national conventions. Although the D.C. Circuit panels ultimately concluded the parties had not violated “one person, one vote,” both cases agreed that a decision made by parties at the national level “is tantamount to a decision of the States acting in concert and therefore subject to constitutional standards applicable to state action,” and that “there is no doubt that the allocation among the States of delegates to a party national convention is subject to the equal protection requirements of the Fourteenth Amendment.”⁸⁴

Beginning in 1972, however, the Supreme Court determined that the state action/public utility model does not apply to the national conventions and national party rules. In *O’Brien v. Brown*,⁸⁵ the Court addressed two controversies concerning the seating of competing delegations to the 1972 Democratic National Convention. The Illinois delegation had been elected in violation of guidelines adopted by the Democratic National Committee the year before, while the California delegation was entirely pledged to the winner of that state’s winner-take-all primary, in violation of the mandate of the 1968 Democratic National Convention calling for the elimination of winner-take-all rules. The Convention’s Credentials Committee had recommended unseating the Illinois delegation and 151 of the 271 California delegates. Suits were brought challenging both decisions. The D.C. Circuit sustained the district court’s dismissal of the claim brought by the Illinois delegation, but reversed the district court’s dismissal of the California claim, and petitions for certiorari and requests for stays were filed with the Supreme Court in both cases.

Acting on the very eve of the Convention, the Supreme Court stayed the judgments of the court of appeals. In a brief opinion, the Court underscored the status of “our national political parties . . . as voluntary associations of individuals,” and noted that whether there was either state action or a justiciable issue was uncertain “in this unique context.” The Court cautioned against the judiciary acting “to interject itself into the deliberative processes of a national political convention.” Instead, it found the “convention itself . . .

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⁸⁴ *Bode v. National Democratic Party*, 452 F.2d 1032, 1304–05 (D.C. 1971); *accord*, *Georgia v. National Democratic Party*, 447 F.2d 1271, 1274–78 (D.C. Cir. 1971).

⁸⁵ 409 U.S. 1 (1972).

the proper forum for determining intra-party disputes as to which delegates shall be seated.”⁸⁶

The Illinois delegation’s dispute was back before the Court more than two years later in *Cousins v. Wigoda*,⁸⁷ which grew out of the Illinois state court litigation between the delegates who had won election in the March 1972 Illinois Democratic primary (“the Wigoda delegates”) and the alternative delegation (“the Cousins delegates”) who had argued that the procedures used to elect the Wigoda delegation violated the national party’s guidelines. The Wigoda delegates won a state court order enjoining the Cousins group from serving as delegates at the Convention. Nonetheless, the Convention voted to seat the Cousins delegation. An Illinois appellate court subsequently affirmed the injunction previously issued by the state court, finding that the election of convention delegates was “governed by non-discriminatory state legislation” which reflected the “interest of the state in protecting the effective right to participate in primaries” and, thus, took “primacy . . . over the decisions of a national political party convention.”⁸⁸ The Supreme Court reversed in an opinion which emphasized the special nature of a presidential nomination as a nation-level decision.

The Court acknowledged that Illinois has “a compelling interest in protecting the right of its electoral processes and the right of its citizens . . . to effective suffrage,” but pointed to “the significant fact that the suffrage was exercised at the primary election to elect delegates to a National Party Convention.” That necessarily reduced the weight of the state’s interest, as convention delegates “perform a task of supreme importance to every citizen of the Nation regardless of their State of residence.”⁸⁹ The Court minimized the state’s stake in the selection of convention delegates, noting “[t]he States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates,” and then expressed the concern that requiring deference to state law left open the possibility of each state establishing its own qualifications without regard to party policy, “an obviously intolerable result.” Instead, the

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⁸⁶ *Id.* at 4.

⁸⁷ 419 U.S. 477 (1975).

⁸⁸ *Wigoda v. Cousins*, 302 N.E.2d 614, 627 (Ill. App. 1973).

⁸⁹ *Wigoda*, 419 U.S. at 489.

matter ought to be left to the Convention, “which 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.”⁹⁰

A third Supreme Court decision confirmed the primacy of national party decisions over state law and state parties with respect to the presidential nomination process. The national Democratic Party’s rules for the selection of delegates to the 1980 National Convention provided that participation in the delegate selection process must be limited to registered Democrats. Since 1903, however, Wisconsin’s election law had provided for state primaries to be open to all registered voters, and the state – including the state Democratic Party – was unwilling to change this law. The state attorney general (a Democrat) sued the Democratic National Committee on behalf of the state, seeking a declaration that the national Democrats could not refuse to seat a Wisconsin delegation elected through an open primary. The Wisconsin Democratic Party, although technically also a defendant, also sued the national party for an order requiring the national party to recognize the delegates selected according to Wisconsin law. The Wisconsin Supreme Court entered a judgment for the state and the state party.

In *Democratic Party of the United States v. Wisconsin ex rel LaFollette*,⁹¹ the Supreme Court reversed, holding that “a State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party’s choice among the various ways of determining the makeup of a State’s delegation to the party’s national convention is protected by the Constitution.”⁹² Wisconsin had a “substantial interest in the manner in which its elections are conducted”⁹³ and was free to hold an open primary, but it could not compel the national party to seat a delegation selected by a procedure that violated national party rules, nor could it compel Wisconsin delegates to vote according to the results of the state primary if that would violate party rules.⁹⁴

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⁹⁰ *Id.* at 489–90.

⁹¹ 450 U.S. 107 (1981). While the case was pending, the Supreme Court stayed the Wisconsin Supreme Court’s order, thus allowing the national party not to seat the Wisconsin delegates, but the Convention chose to seat the delegates. *Id.* at 114–15.

⁹² *Id.* at 123–24.

⁹³ *Id.* at 126.

⁹⁴ *Id.*

LaFollette was the last time the Supreme Court addressed the constitutional status of national party rules and national nominating conventions, and the message of *O'Brien*, *Cousins* and *LaFollette* taken together is clear. National political parties are unique entities, not analogous to the state actors in *White* and *Terry*, and their rules and decisions take precedence over conflicting state laws, state party preferences, and state court decisions. The doctrine resulting from these cases is so well-defined that there have been few significant cases dealing with national conventions or national parties since *LaFollette*. Indeed, immediately following *Cousins*, the D.C. Circuit reconsidered its approach to the convention delegate allocation question, concluding that the “one person, one vote” doctrine did not apply to the parties at all and “reserving” the question of state action.⁹⁵ Subsequently, an Eleventh Circuit panel, relying on *LaFollette*, dismissed as nonjusticiable a challenge to a Florida Republican Party rule, adopted pursuant to a national party directive concerning the apportionment of delegates within the state,⁹⁶ and the Fourth Circuit rejected a challenge to a 1984 Democratic National Committee rule requiring that state delegations to the national convention consist of equal numbers of men and women, observing in the course of its analysis that “the efforts of the states to regulate delegate selection have been consistently rebuffed.”⁹⁷

In short, the national parties’ role in the presidential nomination process benefits from their status as private associations protected by the First Amendment, and even more so, at least relative to the states, as *national* actors engaged in a political process of national significance.

IV. The Constitutional Question of a Role for Congress

One aspect of the current presidential nomination system that has frequently been criticized is the presidential primary timetable. The early dates of the first caucuses and primaries (a problem known as front-loading⁹⁸); the privileged position of small, demographically unrepresentative states like Iowa and New Hampshire; and the

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⁹⁵ *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 580 (D.C. Cir. 1975) (en banc).

⁹⁶ *Wymbs v. Republican State Executive Comm. of Florida*, 719 F.2d 1072 (11th Cir. 1983).

⁹⁷ *Bachur v. National Democratic Party*, 836 F.2d 837, 842 (4th Cir. 1987).

⁹⁸ See, e.g., WILLIAM G. MAYER & ANDREW E. BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* (2003).

seemingly random and unstable nature of the caucus and primary schedules have led to calls for change. Possible reforms include a later start to the nomination calendar, rotating which states get to host the first contests, or regional primaries. Recognizing the difficulty of coordinating the laws of fifty states⁹⁹ and the rules of the state and national parties, some observers have called for federal legislation to address the presidential nomination process while simultaneously also questioning whether Congress has the constitutional authority to enact legislation regulating presidential nominations.¹⁰⁰ This is not just a matter of whether the parties' First Amendment protection precludes congressional regulation, but also whether as a matter of federalism Congress has any authority in this area at all.

The source of the asserted federalism difficulty is the text of Article II, Section 1 of the Constitution (as amended by the Twelfth Amendment), which establishes the procedure for electing a president through the Electoral College, especially when contrasted with the provisions of Article I, Section 4, which deals with congressional elections. Article II provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" equal to the number of its members of Congress; limits the eligibility of who can serve as a presidential elector; lays out the procedure for the Electoral College to vote, and, if the Electoral College fails to produce a majority winner, for the House of Representatives to pick a president. (The Twelfth Amendment modified the procedure to provide for the separate election of a president and vice president.) Congress is authorized to "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." But other than this ability to set uniform days for the selection of Electors and for the Electors to vote, Congress is given no other power at all with respect to election of the Electoral College. Unless and until the Electoral College is

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⁹⁹ There are typically far more than fifty jurisdictional delegations to the presidential nomination conventions. There are regularly delegates from the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa and other overseas jurisdictions. The "fifty states" is merely convenient, if inaccurate, short-hand for the multiple subnational players involved in the process.

¹⁰⁰ See, e.g., MAYER & BUSCH, *supra* note 98, at 131–39; ELAINE C. KAMARCK, PRIMARY POLITICS: EVERYTHING YOU NEED TO KNOW ABOUT HOW AMERICA NOMINATES ITS PRESIDENTIAL CANDIDATES 183–85 (2015).

unable to pick a majority winner, the presidential selection process established by the Constitution is very state-centered.

The argument for very limited Congressional authority with respect to presidential elections is bolstered by a comparison of Article II with the Constitution's treatment of congressional elections. Although Article I, Section 4 begins by stating that "[t]he Times, Places and manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof" it then goes on to provide that "the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." As the Supreme Court recently emphasized, the "substantive scope" of congressional power to regulate congressional elections is "broad."¹⁰¹ Its "comprehensive words embrace authority to provide a complete code for congressional elections"¹⁰² and to supersede any inconsistent state law.¹⁰³ As previously noted, *United States v. Classic* extended that broad power to include the regulation of congressional primaries. The absence of any such constitutional power for Congress to regulate the election of presidential electors is striking, however, and has been cited as the basis for doubting congressional authority to regulate the presidential nomination process.¹⁰⁴

The textual silence of Article II, relative to Article I, notwithstanding, the Supreme Court has recognized Congress's power to regulate presidential elections. In *Burroughs v. United States*,¹⁰⁵ in 1932, the Court sustained the application of the campaign finance disclosure provisions of the Federal Corrupt Practices Act of 1925 to a presidential campaign committee. As the Court explained,

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

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¹⁰¹ *Arizona v. InterTribal Council of Arizona, Inc.*, 570 U.S. 1, 8 (2013).

¹⁰² *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

¹⁰³ *Ex parte Siebold*, 100 U.S. 371, 392 (1880).

¹⁰⁴ *See, e.g.,* *MAYER & BUSCH*, *supra* note 98.

¹⁰⁵ 290 U.S. 534 (1934).

and institutions of the general government from impairment or destruction, whether threatened by force or corruption.¹⁰⁶

Citing *Burroughs*, the Supreme Court again “recognized broad Congressional power to regulate in connection with the elections of the President and Vice President” in *Buckley v. Valeo*,¹⁰⁷ in which it generally upheld most of the contribution restrictions and disclosure requirements of the Federal Election Campaign Act without distinguishing between the law’s application to congressional elections as opposed to presidential elections. Moreover, *Buckley* upheld the public funding provisions which dealt exclusively with presidential elections, including presidential primaries and the presidential nominating conventions.¹⁰⁸ Indeed, federal campaign finance law,¹⁰⁹ federal law dealing with fraud and misconduct in federal elections,¹¹⁰ and other federal voting related measures have all been applied by Congress to presidential elections.

The Supreme Court also invoked the unique national nature of the presidency and presidential elections when it invalidated Ohio’s early filing deadline for independent candidates in *Anderson v. Celebrezze*.¹¹¹ As the Court noted, “in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. . . . Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State’s boundaries.”¹¹² Although *Anderson* addressed only the limits on state regulatory power rather than the existence or scope of national regulatory power, its implication is that if

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¹⁰⁶ *Id.* at 545.

¹⁰⁷ 424 U.S. 1 (1976).

¹⁰⁸ *See id.* at 85–109.

¹⁰⁹ On the consequences of federal campaign finance law for the ability of the national parties to sponsor debates among candidates for presidential nominations, see Bob Bauer, *A Debatable Role in the Process: Political Parties and the Candidate Debates in the Presidential Nominating Process*, 93 N.Y.U. L. Rev. 589 (2018).

¹¹⁰ *See, e.g.*, 18 U.S.C. § 594.

¹¹¹ 460 U.S. 780 (1983).

¹¹² *Id.* at 794–95.

there is going to be regulation of presidential elections it should at least in part be national in scope.

The foundation for congressional regulation of the presidential nomination process is ultimately structural rather than any specific provision of constitutional text. As Justice Black once put it, “inherent 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.”¹¹³ Scholars have also found constitutional authority for congressional action in Congress’s power to count the electoral votes (combined with the Necessary and Proper Clause)¹¹⁴; the Times, Places, and Manner Clause that authorizes federal regulation of congressional elections, as presidential elections are often held at the same time and on the same ballots as congressional elections;¹¹⁵ and the Twelfth Amendment, which, it has been argued, implicitly recognizes the role of political parties in presidential elections.¹¹⁶

Congressional power to regulate presidential nominations also likely includes the power to impose obligations on the states. Although the Supreme Court’s anti-commandeering doctrine bars Congress from directing state legislatures to pass laws or from requiring state and local officials to implement federal laws,¹¹⁷ several lower courts have held that the anti-commandeering principle does not apply to federal laws, such as the National Voter Registration Act, adopted pursuant to Congress’s Times, Places, and Manner power.¹¹⁸ Assuming, as the Supreme Court indicated in *Burroughs* and *Buckley*,

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¹¹³ *Oregon v. Mitchell*, 400 U.S. 112, 124 n.7 (1970) (Justice Black, announcing the judgments of the Court in an opinion expressing his own view of the cases). See also Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 87-909 (2002).

¹¹⁴ *Id.* at 909-16.

¹¹⁵ See *id.* at 916-20; Vikram David Amar, *The Case for Reforming Presidential Elections by Sub-Constitutional Means: The Electoral College, the National Vote Compact and Congressional Power*, 100 GEO. L.J. 237, 260 (2011).

¹¹⁶ See Daniel H. Lowenstein, *Presidential Nomination Reform: Legal Restraints and Procedural Possibilities*, in REFORMING THE PRESIDENTIAL NOMINATION PROCESS 181-82 (Melanie J. Springer & Steven S. Smith eds., 2009).

¹¹⁷ See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

¹¹⁸ See, e.g., *Association of Community Organizations for Reform Now (“ACORN”) v. Miller*, 129 F.3d 833 (6th Cir. 1997); *ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995).

that congressional power to regulate presidential elections is comparable to its power to regulate federal elections generally, the anti-commandeering doctrine ought not apply.

Congress, thus, ought to have as much power to regulate the presidential nomination process as it has to regulate federal elections generally. The real constraint on Congress, then, is not federalism but the First Amendment. As Part II has indicated, the extent of that constraint is uncertain. The Supreme Court would likely apply the *Anderson-Burdick* test, with the nature of the judicial review turning on the severity of the legislative burden that congressional regulations would have on a political party's freedom of association. As Part II has also shown, what counts as a severe burden – and what compelling interests might justify such a burden – is far from clear. It is tempting to speculate that some congressional regulation of the nomination process, such as changes to the timing and tempo of the nomination calendar, would not be seen as severe (especially if not opposed by the national parties) and could be justified by the “reasonable, nondiscriminatory” purpose of equalizing the influence of different states in the nomination process or giving candidates more time to bring their campaigns to more voters.¹¹⁹ Conversely, it seems likely that a federal effort to regulate the inner workings of a Convention, such as by strengthening (or weakening) the influence of super-delegates, would be seen as a severe burden as such a change would likely change the type of candidate who gets nominated. But given the paucity of cases, and the tensions built into the Supreme Court's doctrine, these are necessarily speculative observations.

V. Conclusion

As a recent Congressional Research Service study concluded, “[t]he presidential nominating process is the single most complicated feature of the nation's electoral system, because it relies on national and state political party rules and practices, as well as aspects of federal and state election laws.”¹²⁰ Political scientist Elaine Kamarck has also noted that “[n]o one is really in charge of the presidential nomination system; there

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¹¹⁹ Accord Lowenstein, *supra* note 116, at 188-90; Richard L. Hasen, “Too Plain for Argument?” *The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees Through Direct and Equal Primaries*, 102 NW. U. L. REV. 2009, 2017-19 (2008).

¹²⁰ Kevin J. Coleman, *The Presidential Nominating Process and the National Party Conventions, 2016: Frequently Asked Questions*, CONG. RES. SERV., at 9 (Dec. 30, 2015).

is no ‘decider.’”¹²¹ This chapter’s review of Supreme Court doctrine necessarily focused on the kinds of conflicts between participants in the process that generated contested cases, but the process is marked by cooperation and bargaining as least as much as it is by litigated conflict.¹²² The national parties may make exceptions to their rules to accommodate recalcitrant states and state parties,¹²³ and states and state parties may change their practices in light of national party guidelines.

Moreover, although the lack of a single “decider” may complicate efforts to change the nomination process, changes to the process do occur on an ongoing basis. Although there has been no national solution to the front-loading problem, both national parties now provide incentives to their state parties to move back their delegate selection events. The national Democratic Party offers states that hold their primaries or caucuses later in the nomination process a 15-20% increase in delegates,¹²⁴ while the national Republican Party allows states that hold later nomination contests to allocate delegates on a winner-take-all basis rather than the proportional representation rule required for states that go earlier in the process.¹²⁵ This appears to have had some effect. The peak year for front-loading was 2008, and since then we have seen the caucus and primary calendar moved back a bit. Similarly, to promote “regional” primaries, which may reduce candidate costs and better focus voter attention, the Democratic party offers states that hold their delegate selection events on the same day as two other neighboring states a “cluster” bonus of 15% more delegates.¹²⁶

Following the sharp criticisms voiced concerning the caucus system, particularly the low rate of participation in caucuses (relative to primaries) and the difficulties of access to the caucus process,¹²⁷ the Democratic party changed its rules for the 2020 nomination to encourage greater use of primaries, and most of the caucus states have followed suit. As of the fall of 2019, at least ten of the fourteen states that held caucuses in 2016 have

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¹²¹ KAMARCK, *supra* note 100, at 187.

¹²² See, e.g., MAYER & BUSCH, *supra* note 98, at 146.

¹²³ See *id.* at 142–46.

¹²⁴ Call for the 2020 Democratic National Convention, Art. I. C.2.a.

¹²⁵ *Rules of the Republican Party, Rule No. 16 (c)*, REPUBLICAN NAT’L COMM., https://s3.amazonaws.com/prod-static-ngop-pbl/docs/Rules_of_the_Republican+Party_FINAL_S14090314.pdf.

¹²⁶ Call for the 2020 Democratic National Convention, *supra* note 124, at Art. I.C.2.b.

¹²⁷ See, e.g., Sean J. Wright, *Time to End Presidential Caucuses*, 85 FORDHAM L. REV. 1127 (2016).

announced they will select their delegates to the 2020 convention by a primary,¹²⁸ so that the percentage of pledged delegates selected by caucus will drop from fourteen percent to less than five percent.¹²⁹ These changes have also involved considerable innovation by state parties and cooperation between the state parties and state governments. For example, in four states – Alaska, Hawaii, Kansas, and North Dakota – the state Democratic Party will be holding party-run (or “firehouse”) primaries. These will be conducted by party officials, and they will involve balloting in places and at times chosen by the party. Some of these party-run primaries will provide for unusual balloting mechanisms including ranked choice voting and early voting.¹³⁰

Even the venerable Iowa caucus, although still a caucus, is being reformed by Iowa Democrats. The state party initially sought to expand participation by enabling Democrats to phone in absentee votes, rating their presidential preferences in a ranked choice style, with this virtual caucus taking place over six days. The Democratic National Committee ultimately vetoed the virtual caucus plan, concluding that it was too vulnerable to hacking.¹³¹ The state party then came up with a new plan, which the national party approved, to create multiple “satellite” caucuses – which could be held in workplaces, nursing homes, out-of-state college campuses, and even overseas community gathering places and elsewhere – in addition to the precinct caucuses to accommodate people who cannot attend the traditional in-precinct caucuses.¹³²

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¹²⁸ See Geoffrey Skelley, *How Will Democrats' Move Away From Caucuses Affect the 2020 Race?*, FIVETHIRTYEIGHT (May 17, 2019), <https://fivethirtyeight.com/features/how-will-democrats-move-away-from-caucuses-affect-the-2020-race/>.

¹²⁹ See Nate Cohn, *Fewer States Will Have Caucuses in 2020. Will it Matter?*, N.Y. TIMES (April 12, 2019), <https://www.nytimes.com/2019/04/12/upshot/2020-election-fewer-caucuses-bernie.html>.

¹³⁰ See Skelley, *supra* note 128; *Kansas Democrats Settle on May Party-Run Primary*, FRONTLOADING HQ (May 2, 2019), <http://frontloading.blogspot.com/2019/05/>; *Alaska Democrats Plan on April 4 Party-Run Primary*, FRONTLOADING HQ (March 31, 2019), <http://frontloading.blogspot.com/2019/03/>; *Hawaii Democrats Aim for an April Party-Run Primary in Lieu of Caucuses*, FRONTLOADING HQ (March 26, 2019).

¹³¹ See Brianne Pfannensteil & Barbara Rodriguez, *DNC Recommends Scrapping Iowa's Virtual Caucuses. Iowa Democratic Party Chair Insists Iowa Will Still Be First*, DES MOINES REGISTER (Aug. 30, 2019), <https://www.desmoinesregister.com/story/news/elections/presidential/caucus/2019/08/30/iowa-caucus-dnc-reject-virtual-plan-cyber-security-threat-2020-president-election-nevada-democratic/2163632001/>.

¹³² See Brianne Pfannensteil, *DNC Approves Iowa's Plan to Hold 'Satellite' Caucuses in Nursing Homes, College Campuses, and More in 2020*, DES MOINES REGISTER (Sept. 20, 2019), <https://www.desmoinesregister.com/story/news/elections/presidential/caucus/2019/09/20/dnc-approves-iowa-caucuses-satellite-location-plan-2020-democrats-democratic-party/2387347001/>.

On the Republican side, the state parties have also been changing their rules, albeit with the focus of not of expanding participation but of reducing the potential for opposition to the renomination of President Trump. Several state parties have eliminated the use of primaries or caucuses for selecting delegates or allocating them among candidates, or if the primary or caucus process is still used for choosing delegates among competing candidates raising the threshold of votes a candidate must receive in order to be allocated delegates, or by cancelling outright ¹³³

Overall, what is most striking when examining the actions of the national and state parties and the state legislatures in preparing for the 2020 nominations is the degree of cooperation among the various actors in writing and rewriting the rules for the selection of convention delegates. New state-run primaries,¹³⁴ changed primary dates,¹³⁵ authorization to cancel primaries,¹³⁶ the creation of party-run primaries,¹³⁷ and the expansion of participation in the caucus process in Iowa and Nevada,¹³⁸ have all gone forward without major litigation. Although the course of changing the presidential nominating system is slow, messy, uneven, and uncertain, reforms do occur, even without a single “decider.” Indeed, the process provides room for state-level and state- and party-specific innovations that reflect distinctive state and party preferences and also respond to and shape national trends.

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¹³³ See, e.g., *Alaska Republicans Scrap Presidential Preference Vote at 2020 Caucuses*, FRONTLOADING HQ (Sept. 23, 2019), <http://frontloading.blogspot.com/2019/01/invisibleprimary-visible-republicans.html>; *New Arizona Budget Contains a Presidential Primary Opt-Out for State Parties*, FRONTLOADING HQ (June 6, 2019), <http://frontloading.blogspot.com/2019/06/>; *North Carolina Republicans Have Tweaked Their Delegate Allocation Formula, but . . .*, FRONTLOADING HQ (May 16, 2019), <http://frontloading.blogspot.com/2019/05/>; *Massachusetts GOP Rules Change Adds an Element of Winner-Take-All to 2020 Delegate Allocation*, FRONTLOADING HQ (May 7, 2019), <http://frontloading.blogspot.com/2019/05/massachusetts-gop-rules-change-adds.html>.

¹³⁴ *On to the Governor: Maine House Passes Super Tuesday Presidential Primary Bill*, FRONTLOADING HQ (June 4, 2019), <http://frontloading.blogspot.com/2019/06/>; *Washington State Democrats Opt for Presidential Primary Over Caucuses*, FRONTLOADING HQ (April 8, 2019), [http://frontloading.blogspot.com/2019/06/\(April 8, 2019\).](http://frontloading.blogspot.com/2019/06/(April%208,%202019).)

¹³⁵ *Utah Presidential Primary Shifts to Super Tuesday*, FRONTLOADING HQ (April 1, 2019), <http://frontloading.blogspot.com/2019/04/>.

¹³⁶ See, e.g., *New Arizona Budget Contains a Presidential Primary Opt-Out for State Parties*, *supra* note 133.

¹³⁷ See, e.g., *Washington State Democrats Opt for Presidential Primary Over Caucuses*, *supra* note 134.

¹³⁸ See, e.g., Pfannensteil, *DNC Approves Iowa’s Plan to Hold ‘Satellite’ Caucuses in Nursing Homes, College Campuses, and More in 2020*, *supra* note 132; *Nevada Delegates Release Draft Delegate Selection Plan*, FRONTLOADING HQ (March 21, 2019), <http://frontloading.blogspot.com/2019/03/nevada-democrats-release-draft-delegate.html>.

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Unlike the presidential election process – with its entrenched Electoral College -- the Constitution itself imposes no constraints on changing the presidential nomination process. Moreover, the multiple potential actors empowered by constitutional law to address the nomination process provide multiple avenues for seeking change. The real obstacles to reforming the process are not constitutional but normative and political – deciding what would be a better process, and figuring out how to work the political system to get such a process adopted.