

## REFORMING THE CONTESTED CONVENTION: RETHINKING THE PRESIDENTIAL NOMINATION PROCESS

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*The presidential nomination process used by the Democratic and Republican Parties is an ill-considered, unstable pastiche of competing components that generally operate in fundamentally different manners. The process is comprised of three main elements: the selection of delegates to the national convention (generally through state and district party conventions or other intraparty processes), the determination of the presidential candidates for whom those delegates will vote (generally through state-by-state primaries and caucuses), and the national convention itself.*

*The ritual of holding primary elections and caucuses across the nation creates the widespread public expectation that the results of those proceedings—the will of the voters—will determine who wins each party's nomination. Yet, the national convention need not nominate the presidential candidate who received the most votes nationwide, won the most delegates, or prevailed in the most primaries or caucuses. The system gives delegates substantial power over both the rules of the convention and the choice of nominee that, were it ever used, could lead to the collapse of a party. And the mere existence of this power leads to suspicion of the party establishment, intraparty intrigue and discord, and uncertainty throughout the primary process, which are unhealthy for both the party and the country.*

*The presidential nomination process could be substantially improved through a few minor tweaks that would reduce unnecessary uncertainty, bolster its democratic underpinnings, and improve the connections among its various components. First, certain fundamental rules governing national conventions should be determined well in advance of the presidential nominating process, before any primaries or caucuses are held or delegates selected, and not be subject to change or suspension at the convention itself. Second, parties should enhance the democratic moorings*

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*of their national conventions by requiring presidential candidates to win a greater number of presidential preference votes to be placed into nomination. Third, state parties should tie the various components of the presidential nomination process more closely together by adopting a blend of the Democratic and Republican Parties' current approaches. When a candidate is allotted national convention delegates based on the results of a presidential preference vote, the candidate should have a voice in selecting those delegates, and those delegates in turn should be bound to vote for that candidate, at least during the first round of voting at the national convention.*

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#### INTRODUCTION

Throughout early 2016, as Donald Trump amassed a commanding lead in the Republican presidential nomination process, many members of the Republican “establishment” tried to stop him from winning the nomination.<sup>1</sup> By April of that year, it had become mathematically impossible for any candidate other than Trump to win a majority of bound delegates to the Republican National Convention through presidential primaries and caucuses. Senator Ted Cruz and Governor John Kasich nevertheless remained in the race to try to prevent Trump from reaching a majority.<sup>2</sup> Cruz also lobbied delegates to Republican state conventions to

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1. See, e.g., Alexander Burns & Jonathan Martin, *Facing Long Odds, G.O.P. Leaders Map Strategy to Derail Trump*, N.Y. TIMES, Mar. 20, 2016, at A1; Hilary Brueck, *An Island Full of Millionaires Wants to Stop Donald Trump Cold*, FORTUNE (Mar. 8, 2016, 8:45 AM), <http://fortune.com/2016/03/08/aei-world-forum-trump/> [https://perma.cc/9A5K-4VXN].

2. See James Hohmann, *The Front-Runners Got Their Mojo Back in New York*, WASH. POST, Apr. 21, 2016, at A15; Sahil Kapur, *Cruz's Path to the Nomination Narrows After New York Walloping*, BLOOMBERG POL. (Apr. 20, 2016, 5:00 AM), <http://www.bloomberg.com/politics/articles/2016-04-20/ted-cruz-s-path-to-the-nomination-narrows-after-new-york-walloping> [https://perma.cc/SME4-E9LU].

select national convention delegates who supported him, even in states where he had lost the primaries to Trump.<sup>3</sup>

Cruz and Kasich sought to force a contested convention at which they could claim the Republican Party's nomination for President, despite failing to win the most bound delegates to the national convention, the national popular vote in the presidential primaries and caucuses, or a plurality of primaries and caucuses on a state-by-state basis.<sup>4</sup> Even after Trump secured an absolute majority of bound delegates to the national convention, some opponents continued their efforts to derail his nomination by attempting to change the convention's rules as it was convening—after all of the primaries were complete, votes cast, and delegates selected.<sup>5</sup> One delegate to the Republican National Convention sued, successfully, to avoid having to vote for Trump.<sup>6</sup>

The Democratic primaries did not run much more smoothly. Former Secretary of State Hillary Clinton's main opponent was Senator Bernie Sanders, a self-identified socialist who declared himself to be a Democrat for the sole purpose of seeking the party's nomination for President<sup>7</sup> and left the party immediately after losing.<sup>8</sup> Months before the first primary was held, Clinton had secured the support of hundreds of "superdelegates,"<sup>9</sup> giving her a substantial advantage and causing Sanders's supporters to

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3. See Seema Mehta & Melanie Mason, *Dual Strategies in 2 States for Cruz*, L.A. TIMES, May 1, 2016, at A15; see also Dan Nowicki & Yvonne Wingett Sanchez, *Trump Campaignirate over Delegate Defeat in Arizona*, ARIZ. REPUBLIC, May 1, 2016, at A6; Jenna Portnoy, *Cruz Picks Up 10 Delegates to Trump's 3 at State GOP Convention*, WASH. POST, May 1, 2016, at C5.

4. See *Election 2016—Republican Delegate Count*, REALCLEARPOLITICS, [http://www.realclearpolitics.com/epolls/2016/president/republican\\_delegate\\_count.html](http://www.realclearpolitics.com/epolls/2016/president/republican_delegate_count.html) (last visited Nov. 19, 2016) [<https://perma.cc/HBW2-WEN4>].

5. See Scott Detrow, "Never Trump" Campaign Launches Last-Ditch Effort to Stop Nomination, NPR (July 13, 2016, 4:35 PM), <http://www.npr.org/2016/07/13/485895835/opposition-forces-prepare-last-ditch-effort-to-thwart-donald-trump> [<https://perma.cc/9MEU-EMHR>]; Alexandra Jaffe, *Campaign to Dump Trump at Republican Convention Emerges*, NBC NEWS (June 17, 2016, 5:57 PM), <http://www.nbcnews.com/politics/2016-election/campaign-dump-trump-republican-convention-emerges-n594766> [<https://perma.cc/24NY-VT6D>].

6. See *Correll v. Herring*, No. 3:16CV467, 2016 U.S. Dist. LEXIS 89781 (E.D. Va. July 11, 2016).

7. See Stephanie McCrummen, *The Most Radical Thing He's Ever Done*, WASH. POST, Feb. 6, 2016, at A1; see also Gabrielle Levy, *Sanders: Yes, I'm a Democrat of Convenience*, U.S. NEWS & WORLD REP. (Mar. 15, 2016, 2:24 PM), <http://www.usnews.com/news/articles/2016-03-15/sanders-yes-im-a-democrat-of-convenience> [<https://perma.cc/F4X5-6EGF>].

8. See Peter Nicholas, *The Democratic Convention: Sen. Sanders to Serve Term as Independent*, WALL ST. J., July 27, 2016, at A5.

9. See Charles M. Blow, Opinion, *The (Un)Democratic Party*, N.Y. TIMES, Apr. 4, 2016, at A19; Gabriel DeBenedetti, *Leaked Memo Shows Clinton Campaign Still Sweating Bush*, POLITICO (Oct. 28, 2015, 7:57 AM), <http://www.politico.com/story/2015/10/leaked-memo-hillary-clinton-still-concerned-jeb-bush-215230> [<https://perma.cc/D5MZ-8YSZ>]. A "superdelegate" is a current or former Democratic Party official or officeholder who is automatically deemed a delegate to the Democratic National Convention by virtue of his or her position and is not bound, pledged, or otherwise required to vote for any particular candidate. See *infra* note 34 and accompanying text.

argue that the system was unfairly rigged against them.<sup>10</sup> Indeed, as the Democratic National Convention was starting, the chair of the Democratic National Committee (DNC), Debbie Wasserman Schultz, was forced to resign after an email leak confirmed that she and several other senior leaders had manipulated the entire process to aid Clinton's nomination.<sup>11</sup>

These controversies reveal the internal contradictions and risks of disruption that permeate the presidential nominating process. The process is an uncomfortable, ill-considered pastiche of two distinct components that typically operate in fundamentally different manners<sup>12</sup>: selecting delegates to the national convention (generally done through state and district party conventions or other intraparty processes) and determining the presidential candidate for whom those delegates will vote (generally done through state-by-state primaries and caucuses).<sup>13</sup> These competing processes coalesce in the third critical component of the system: the national party convention.

The ritual of holding primary elections and caucuses across the nation creates the widespread public expectation that the results of those proceedings—the will of the voters—will determine who wins each party's nomination.<sup>14</sup> These public expectations are undoubtedly fueled in part by a lack of understanding of how the presidential nomination system works, due both to its complexity and the infrequency with which it is implemented.<sup>15</sup>

The national convention, however, need not nominate the person who received the most primary or caucus votes nationwide, won the most delegates, or prevailed in the most primaries or caucuses. Indeed, the convention may decide to nominate someone who did not even run in the primaries and caucuses at all.<sup>16</sup> The process by which many delegates to the national convention are selected, the virtually plenary discretion those delegates have over the rules of the national convention, the highly circumscribed ways in which most delegates are bound by the results of

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10. David Weigel, *Superdelegates Emerge as Democrats' Polarizing Force*, WASH. POST, June 8, 2016, at A9; see, e.g., Editorial, *Superdelegates, Clarify Your Role*, N.Y. TIMES, Feb. 20, 2016, at A18.

11. Jonathan Martin & Alan Rappeport, *Leaks Bring Down a Democratic Leader*, N.Y. TIMES, July 25, 2016, at A1.

12. See Zachary M. Bluestone, Note, *The Unscripted Evolution of Presidential Nominations: From Founding-Era Idealism to the Dominance of Party Primaries*, 39 HARV. J.L. & PUB. POL'Y 963, 998 (2016).

13. See *infra* Part I.

14. See, e.g., Blow, *supra* note 9, at A19.

15. Cf. Michael T. Morley, *Dismantling the Unitary Electoral System?: Uncooperative Federalism in State and Local Elections*, 110 NW. U. L. REV. ONLINE (forthcoming 2016) (manuscript at 19–20), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2742719](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2742719) (explaining how erroneous public assumptions and perceptions can give rise to conventions) [<https://perma.cc/WA7L-NQQH>].

16. This possibility is typically referred to as the “white knight” scenario. During the 2016 Republican presidential nomination process, some commentators urged national convention delegates to nominate Paul Ryan or Mitt Romney, even though neither had run in the primaries or caucuses. See Alexander Burns, *Who Could Save the G.O.P.?: Republicans Weigh Some Ideas*, N.Y. TIMES (Apr. 13, 2016), <http://www.nytimes.com/2016/04/14/us/politics/republican-nomination.html> [<https://perma.cc/MUY7-JBBN>].

primaries, and the appointment of superdelegates who are not bound to vote for a particular candidate all conspire to create a system in which party elites may act as a check on the popular will and have the power to determine who receives the nomination.<sup>17</sup> When it appears that the system may operate in this manner, however, public pressure and expectations seek to force the party to abide by the popular will.<sup>18</sup>

In short, the system gives delegates substantial power over both the rules of the convention and the choice of nominee<sup>19</sup> that, were it ever used, could lead to the collapse of a party. The mere existence of this power, moreover, leads to suspicion of the party establishment, intrigue and internal discord by factions seeking to defeat the candidate who won the most popular support in the primaries and caucuses, and uncertainty and instability throughout the primary process that is unhealthy for both the national party and the country.<sup>20</sup>

The system's structure also reveals deep ambivalence over who actually constitutes "the party." "The party" may be understood broadly as including anyone who chooses to participate in that entity's presidential preference primaries or caucuses; in this sense, a party can include people who have never supported that party's candidates before and even members of a competing political party (in states with open primaries). During the 2016 election cycle, many independents tended to support Donald Trump, leading him to perform much better in open primaries than primaries with more restrictive participation standards.<sup>21</sup>

Alternatively, "the party" can refer to party officials and officeholders, major contributors, and activists who loyally volunteer to assist campaigns for offices at all levels of government.<sup>22</sup> Such people have personally

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17. See *infra* Part I.

18. Donald Trump memorably predicted, "I think you'd have riots," if he fell 100 delegates short of a majority and was ultimately denied the nomination. See Mark Z. Barabak, *3 Ways the GOP May Pick Its No. 1*, ORLANDO SENTINEL, Mar. 26, 2016, at A6. A Bloomberg Politics survey revealed that 63 percent of Republican primary voters thought that "the person with the most delegates deserves the party's nomination, even if he arrives short of a majority." *Id.*

19. See Ross Douthat, Opinion, *The Party Still Decides*, N.Y. TIMES, Mar. 13, 2016, at SR9.

20. See, e.g., Ed O'Keefe, As "Never Trump" Forces Make a Last Stand, *Compelling Scenarios Emerge*, WASH. POST, July 14, 2016, at A6; see also Ed O'Keefe, *Anti-Trump Delegates Vow Trouble*, WASH. POST, July 17, 2016, at A2.

21. See Janet Hook & Reid J. Epstein, *Cruz, Sanders Get Big Wins*, WALL ST. J., Apr. 6, 2016, at A1.

22. Even the so-called "party establishment," of course, does not necessarily act as a monolith. V.O. Key Jr. explains that party leadership is comprised of the party-in-government, or the officeholders who belong to the party, and party organization, referring to the party activists who engage in campaigning and fundraising. V.O. KEY, JR., *POLITICS, PARTIES, & PRESSURE GROUPS* 163–65 (5th ed. 1964). "[B]oth sides of intraparty disputes usually include a varied mix of like-minded leaders from both the party organization and party-in-government, cooperating together against rivals along ideological lines." Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 170 (2005) (emphasis omitted). Deep schisms can also exist between party officials and front-line activists. See Hans Noel, *Ideological Factions in the Republican and Democratic Parties*, 667 ANNALS 166, 177–81 (2016).

invested in the organization and can perhaps lay greater claim to its long-term stability, reputation, and interests. In the 2016 primaries, these people tended to support so-called “establishment” candidates such as Governor Jeb Bush, Senator Marco Rubio, Kasich, and Clinton.<sup>23</sup> The extent to which party elites should be able to overrule the will of others who participate in presidential preference primaries and caucuses lies at the heart of most disputes underlying the nomination process.<sup>24</sup>

This Article contends that the structure of the presidential nomination system and the rules governing it introduce unnecessary instability and unpredictability into an already contentious system. It offers basic proposals for reform that are consistent with nearly any conception of what a political party is and what the goals of the nomination process should be.

Part I begins by describing the presidential nominating process, exploring each of its three main components: the selection of delegates to the national convention (typically at state and district party conventions or through other intraparty processes), the determination of the presidential candidate for whom those delegates will vote (typically through state-level primaries and caucuses), and the actual selection of the party’s presidential nominee at the national convention. This part further explains how the rules of the national convention determine key aspects of the overall presidential nomination process. The most critical rules specify the requirements that a candidate must satisfy to be eligible for nomination at the national convention, the number of votes a candidate must receive at the convention to win the nomination, whether delegates must follow state laws and state party rules binding them to vote for particular candidates based on the results of their respective states’ primaries and caucuses, and whether the convention rules may be suspended altogether. These rules, however, are not definitively

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23. See Noel, *supra* note 22, at 171.

24. See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 236 (1986) (Scalia, J., dissenting) (discussing the state’s interest in “protect[ing] the general party membership against . . . minority control” by the party’s officeholders and candidates).

The system also is poorly tailored to facilitating the selection of a nominee based on any particular criteria. That is, there is no consensus as to whether a party should seek to nominate the person who best embodies the party’s principles, the person who is most likely to win the general election (which, from a public choice perspective, often means the person most likely to appeal to the “median voter”), or someone who reflects some optimal tradeoff between these competing considerations. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 127–28 (1957). As a result, the primaries and caucuses conducted in each state often work at cross-purposes with each other, and the national convention cannot effectively pursue any of those objectives. States with closed primaries and caucuses privilege the views of party stalwarts. See *Democratic Party of the U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981) (explaining that a national political party has a First Amendment right to hold closed presidential preference primary elections because the “inclusion of persons unaffiliated with [the] political party may seriously distort [the party’s] collective decisions”). The outcomes of those contests are then diluted or nullified by other states’ open primaries, which encourage anyone—even members of other parties—to participate. See *Tashjian*, 479 U.S. at 221–25 (holding that a party has a First Amendment right to open its primary to independent voters, in part because their inclusion can help the party select a nominee who will appeal to the public); Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 815 (2001).

determined until the convention itself, when the delegates vote to adopt the proposal of the convention's rules committee.

Part II argues that this system is fundamentally unstable, unfair, and politically undesirable. The legal and practical effects of primaries and caucuses are not determined until the very end of the process, after they have concluded. And those effects are determined by national convention delegates selected largely through state and district conventions, who may oppose the candidates who won their respective states' primaries and caucuses. The various components of the presidential nomination process thus do not fit smoothly together but instead foster uncertainty, intraparty intrigue, public distrust in the process, and the ever-present possibility that the results of primaries and caucuses will be undermined or ignored, such as through the nomination of a candidate who did not even participate in them.

This part offers three main recommendations to political parties to enhance the stability, predictability, and perceived fairness of the presidential nominating process. First, certain fundamental rules governing national conventions should be determined well in advance of the presidential nominating process, before any primaries or caucuses are held or delegates selected, and not be subject to change or suspension at the convention itself. Second, parties can enhance the democratic moorings of their national conventions by amending their rules (which, as discussed above, should be established well in advance of the nomination process) to specify that a candidate cannot appear on the ballot at the national convention unless he or she has won a substantial number of primaries and caucuses. National conventions should not have the power to completely disregard the millions of votes cast in primaries and caucuses, effectively nullifying that component of the process, by nominating someone who fared poorly or did not even participate in those contests.

Third, and perhaps most controversially, the components of the nomination process should be tied more closely together by blending the current approaches of the Democratic and Republican Parties. Each party should adopt a system in which, as the Democratic rules provide, candidates may reject individuals seeking to serve as national convention delegates pledged or bound to them. Each party likewise should adopt the current Republican requirement that delegates allocated to a presidential candidate based on the results of a primary or caucus are bound to vote for that person, at least in the first round or two of voting at the national convention.

This Article does not defend the existing convention-based framework for nominating presidential candidates. Nor does it contend that its suggested reforms will perfect that system or resolve the enduring controversy over the proper allocation of power among party elites, the party's rank and file, and people whose only connection to a party may be voting in its presidential primary. Rather, this Article adopts a more practical perspective. Recognizing that the current system is the product of numerous conflicting imperatives and promotes the interests of various stakeholders, this Article accepts the system's structure as a given and suggests ways to minimize the possibility that intraparty conflict will

needlessly cripple a party's nominee and undermine the fairness of a presidential election as a whole.<sup>25</sup>

### I. THE PRESIDENTIAL NOMINATION PROCESS

The Democratic Party of the United States and the Republican Party of the United States are responsible for nominating candidates for President and structuring their respective nomination processes. The national Democratic Party is governed by its Charter;<sup>26</sup> the national Republican Party is governed by its Rules.<sup>27</sup> The Democratic Charter and Republican Rules each establish a national committee to manage the party's affairs between conventions and issue the call to the national convention.<sup>28</sup>

The call to the 2016 Democratic National Convention recognizes four types of delegates to the national convention: at-large delegates, district delegates, pledged election official delegates (PLEOs), and unpledged delegates ("superdelegates"), each of whom has an equal vote.<sup>29</sup> The call allocates at-large delegates and district delegates (collectively referred to as "base delegates") among the states based on a formula that takes into account each state's number of votes in the Electoral College, as well as the total number of ballots cast within that state for the Democratic candidate for President in the past three elections.<sup>30</sup> These base delegates become pledged to particular presidential candidates based on the outcome of the state's presidential primary or caucus.<sup>31</sup>

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25. Due to the limited scope of this Article, I must reserve an analysis of the proper role of judicial review in the presidential nomination process for future work.

26. DEMOCRATIC NAT'L COMM., *Charter of the Democratic Party of the United States*, in THE CHARTER & THE BYLAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES 1 (2015) [hereinafter *Democratic Charter*], [http://s3.amazonaws.com/uploads.democrats.org/Downloads/DNC\\_Charter\\_Bylaws\\_9.17.15.pdf](http://s3.amazonaws.com/uploads.democrats.org/Downloads/DNC_Charter_Bylaws_9.17.15.pdf) [https://perma.cc/3TJT-75MU].

27. REPUBLICAN NAT'L COMM., RULES OF THE REPUBLICAN PARTY (2016) [hereinafter REPUBLICAN RULES], <https://s3.amazonaws.com/prod-static-ngop-pbl/docs/2016-Republican-Rules-FINAL.pdf> [https://perma.cc/F9M5-S9GY].

28. DEMOCRATIC NAT'L COMM., *Bylaws*, in THE CHARTER & THE BYLAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES 11, art. II, § 1(a)–(c) (2015), [http://s3.amazonaws.com/uploads.democrats.org/Downloads/DNC\\_Charter\\_Bylaws\\_9.17.15.pdf](http://s3.amazonaws.com/uploads.democrats.org/Downloads/DNC_Charter_Bylaws_9.17.15.pdf) [https://perma.cc/3TJT-75MU]; *Democratic Charter*, *supra* note 26, art. III, § 1; REPUBLICAN RULES, *supra* note 27, rr. 1(a), 13. These documents also state that, if the national party rules, national convention rules, or actions of the national convention conflict with a state law, the party will disregard that conflicting law. *Democratic Charter*, *supra* note 26, art. II, § 2; *see also* REPUBLICAN RULES, *supra* note 27, rr. 14(c), 16(b), 16(d)(3)–(5). *See generally* Cousins v. Wigoda, 419 U.S. 477 (1975) (recognizing that national party rules governing the presidential nomination process trump conflicting state laws).

29. DEMOCRATIC NAT'L COMM., CALL FOR THE 2016 DEMOCRATIC NATIONAL CONVENTION art. I (2014) [hereinafter DEMOCRATIC CONVENTION CALL], <http://ndp.org/wp-content/uploads/2015/09/2016-Call-for-Convention-5.22.15.pdf> [https://perma.cc/98W9-2JDN].

30. *Id.* art. I(B). Each state's allocation of base delegates is increased by up to 35 percent depending on when its presidential nomination events are scheduled to occur. *Id.* art. I(C)(2). The term "state" is used broadly here to include the District of Columbia, as well as U.S. territories and possessions. The call assigns jurisdictions that do not participate in the general election for President set numbers of base delegates in addition to the 3,200 divided among the states and District of Columbia. *Id.* art. I(E).

31. *See infra* Part I.A.



Each state also receives PLEO slots equaling 15 percent of its total allotment of base delegates for state, local, and party officials.<sup>32</sup> PLEOs also become pledged to particular presidential candidates based on the results of the state's primary or caucus "on the same basis as the state's at-large delegates."<sup>33</sup> Finally superdelegates automatically qualify as delegates to the national convention by virtue of their current or former positions and are not bound to particular candidates. DNC members; Democratic federal elected officials and governors; and former Democratic Presidents, congressional leaders, and DNC chairs are all superdelegates.<sup>34</sup> A total of 4,763 voting delegate slots were authorized for the 2016 Democratic National Convention: 2,650 district delegates, 910 at-large delegates, 491 PLEOs (making a total of 4,051 pledged delegates), and 712 additional unpledged superdelegates.<sup>35</sup>

The call to the Republican Convention contained a set of temporary rules that governed the nomination process until the convention convened and adopted them as standing rules.<sup>36</sup> The temporary rules recognize three categories of delegates: at-large delegates, district delegates, and party-leader delegates.<sup>37</sup> Each state receives ten at-large delegates,<sup>38</sup> plus up to six bonus at-large delegates based on the number of its state and federal Republican officeholders,<sup>39</sup> and additional bonus at-large delegates if the state voted for the Republican candidate for President in the previous election.<sup>40</sup>

Each state also is allotted three district delegates for each of its congressional districts.<sup>41</sup> Finally, each state receives three party-leader slots designated for particular people: the state party chair, the Republican National Committee (RNC) committeeman, and the RNC committeewoman.<sup>42</sup> Delegates are generally bound to particular presidential candidates based on the results of their state's presidential

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32. DEMOCRATIC CONVENTION CALL, *supra* note 29, art. I(D); DEMOCRATIC NAT'L COMM., DELEGATE SELECTION RULES r. 8(D) (2014) [hereinafter DEMOCRATIC DELEGATE SELECTION RULES], [http://www.demrulz.org/wp-content/files/Proposed\\_Draft\\_-\\_2016\\_Delegate\\_Selection\\_Rules\\_8\\_23\\_14.pdf](http://www.demrulz.org/wp-content/files/Proposed_Draft_-_2016_Delegate_Selection_Rules_8_23_14.pdf) [https://perma.cc/5CEX-K2ET].

33. DEMOCRATIC DELEGATE SELECTION RULES, *supra* note 32, r. 9(B)(2).

34. DEMOCRATIC CONVENTION CALL, *supra* note 29, art. I(J); *Democratic Charter*, *supra* note 26, art. II, § 4(h).

35. DEMOCRATIC CONVENTION CALL, *supra* note 29, app. B.

36. REPUBLICAN NAT'L COMM., CALL OF THE 2016 REPUBLICAN NATIONAL CONVENTION r. 42 (2015) [hereinafter REPUBLICAN CONVENTION CALL], [https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/Call%20of%20the%202016%20Convention\\_1448920406.pdf](https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/Call%20of%20the%202016%20Convention_1448920406.pdf) [https://perma.cc/EKP5-4AXU]. Those temporary rules also are included in the Rules of the Republican Party. *See* REPUBLICAN RULES, *supra* note 27, r. 42.

37. REPUBLICAN CONVENTION CALL, *supra* note 36, r. 14(a).

38. *Id.* r. 14(a)(1). Jurisdictions that are not states receive set numbers of at-large delegates, in addition to three party-leader delegates, but no district delegates. *Id.* r. 14(a)(4).

39. *Id.* r. 14(a)(6)–(7).

40. *Id.* r. 14(a)(5).

41. *Id.* r. 14(a)(3).

42. *Id.* r. 14(a)(2).

preference vote.<sup>43</sup> Based on these formulas, the RNC authorized 2,472 delegates to the 2016 national convention: 560 at-large delegates, 1,305 district delegates, and 168 party leaders.<sup>44</sup>

The parties' presidential nomination processes are similar to each other. Each is comprised of three components: (1) a method for determining how many national convention delegates will vote for each presidential candidate (typically through statewide presidential preference votes, such as primaries and caucuses), (2) a method for selecting delegates to the national convention (typically through state and district party conventions or other intraparty processes), and (3) the selection of a presidential nominee at the national convention itself.

#### *A. Determining How National Convention Delegates Will Vote*

Most state parties determine how their delegates to the national convention will vote in the first, and sometimes later, rounds of voting by holding a presidential preference vote, which may be conducted through a primary election, caucuses throughout the state, or (rarely) a state party convention.<sup>45</sup> The Democratic Party requires state parties to allocate their national convention delegates among presidential candidates based on the results of some sort of presidential preference vote.<sup>46</sup> The rules of the Republican Party, in contrast, specify that if a state party chooses to hold a

43. See *infra* Part I.A; see also Memorandum from RNC Counsel's Office to Republican Nat'l Comm. Members (Jan. 29, 2016), <https://www.scribd.com/doc/298879643/Counsel-s-Office-Memo-re-RNC-Member-Binding> [<https://perma.cc/86YC-X7B6>].

44. REPUBLICAN CONVENTION CALL, *supra* note 36, at 47–58.

45. The District of Columbia Republican Party was the only entity in the 2016 election cycle that chose to hold a presidential preference vote at a "state" convention (at which it also selected its national convention delegates). D.C. REPUBLICAN PARTY, DISTRICT OF COLUMBIA REPUBLICAN PRESIDENTIAL CONVENTION AND DELEGATE SELECTION PLAN FOR THE 2016 REPUBLICAN NATIONAL CONVENTION §§ II(1), IV(1), V(1) (2015), <http://dcgop.com/2016/wp-content/uploads/DCGOP-2016-Convention-Plan-i-FINAL-1.pdf> [<https://perma.cc/4FXZ-KMR9>].

The Republican state parties of Colorado, North Dakota, and Wyoming did not hold presidential preference votes. North Dakota held a statewide convention to select its national convention delegates, who were not bound to any presidential candidates. See *infra* Part I.B; see also N.D. REPUBLICAN PARTY, STATE COMMITTEE RULES rr. 11, 20 (2016), <https://www.ndgop.org/wp-content/uploads/2016/04/NDGOP-State-Party-and-Convention-Rules-April-2016.pdf> [<https://perma.cc/6HCJ-SP7W>].

Colorado's delegates were not bound to a particular candidate unless they chose to file pledge forms promising to support that candidate in the first round of voting at the national convention. COLO. REPUBLICAN STATE CENT. COMM., BYLAWS OF THE COLORADO REPUBLICAN STATE CENTRAL COMMITTEE art. XIII, § A(1)(a), (5)(c) (2015), <http://cologop.org/wp-content/uploads/2015/11/CRC-Bylaws-9-26-15.pdf> [<https://perma.cc/V3AR-B2EQ>]. Wyoming selected some of its delegates at a statewide convention and others at county conventions. See WYO. REPUBLICAN PARTY, BYLAWS OF THE WYOMING REPUBLICAN PARTY art. IV, § 7(1)(b) (2016), <https://d3n8a8pro7vhmx.cloudfront.net/wyogop/pages/44/attachments/original/1474042400/2016.bylaws.pdf?1474042400> [<https://perma.cc/8YFL-9WYT>]; *id.* art. VI, §§ 4(1)(d), 8(1), 8(4). Candidates for national delegate in Wyoming were required to pledge themselves to a particular presidential candidate or declare themselves uncommitted. *Id.* art. VI, § 8(11).

46. See DEMOCRATIC DELEGATE SELECTION RULES, *supra* note 32, rr. 10(C), 13(A)–(B).

statewide presidential preference vote through any of those methods, the results must be used to bind that state's delegates to the national convention in some way (although the state may choose whether delegates are allotted to candidates on a winner-take-all or proportionate basis).<sup>47</sup> States that choose not to hold statewide presidential preference votes, in contrast, are not required to bind their delegates.<sup>48</sup>

State law generally governs the conduct of a state's presidential preference vote, but if the law conflicts with the rules of a state or national party, that party often can compel compliance with its rules,<sup>49</sup> subject to certain ill-defined constitutional<sup>50</sup> and other limits.<sup>51</sup> In states that hold their presidential preference votes through primary elections, candidates can qualify to appear on a party's primary ballot in different ways.<sup>52</sup> Some states automatically grant ballot access to anyone who is "generally advocated or recognized in national news media throughout the United States" as a candidate for President.<sup>53</sup> Some allow, either in addition or in the alternative, the chair of each major state party to submit a list of presidential candidates for inclusion.<sup>54</sup> Most states permit candidates to

47. REPUBLICAN RULES, *supra* note 27, r. 16(a)(1).

48. *Id.*; *see supra* note 45.

49. *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975) (holding that a national party convention had the First Amendment right to refuse to seat delegates who were elected pursuant to state law, on the grounds their election violated party rules); *see also* *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 229–30 (1989) (holding that a state cannot regulate the "organization and composition of official governing bodies" of a political party); *Democratic Party of the U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 126 (1981) (holding that a state law may not bind national convention delegates to vote in accordance with the results of a presidential preference primary conducted in violation of the national party's rules).

50. *Smith v. Allwright*, 321 U.S. 649, 663–64 (1944) (holding that the Equal Protection Clause prohibits a state Democratic Party from excluding African-Americans from its primary elections, because the state's involvement in conducting primaries makes the party "an agency of the State in so far as it determines the participants in a primary election"); *cf.* *Cal. Democratic Party v. Jones*, 530 U.S. 567, 573 (2000) (appearing to limit constitutional constraints on political parties to the prohibition of intentional de jure racial discrimination).

51. *Eu*, 489 U.S. at 231 (holding that "a state may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest" and "impose restrictions that promote the integrity of primary elections"); *see, e.g., Morse v. Republican Party*, 517 U.S. 186, 228–29 (1996) (holding that a state party's decision to impose a fee for voting in a presidential preference primary was subject to the preclearance requirements of section 5 of the Voting Rights Act, rather than a constitutionally protected decision under the First Amendment); *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974) ("[T]he State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election or by party convention."); *cf. Marchioro v. Chaney*, 442 U.S. 191, 197 n.12 (1979) (declining to address whether a state may both prescribe the composition of a state party's central committee and require it to perform certain election-related tasks for the party, such as selecting its national convention delegates and presidential electors).

52. *See generally Election 2016—Republican Delegate Count, supra* note 4.

53. MASS. GEN. LAWS ch. 53, § 70E (2013); *accord* MD. CODE ANN., ELEC. LAW § 8-502 (West 2013); NEB. REV. STAT. § 32-614 (2013); TENN. CODE ANN. § 2-5-205 (2013); WIS. STAT. § 8.12 (2013).

54. *See, e.g., FLA. STAT. § 103.101(2)* (2014); GA. CODE ANN. § 21-2-193 (2013); MASS. GEN. LAWS ch. 53, § 70E. In states that rely exclusively on this method, the state party leadership has virtually unreviewable discretion over whether a candidate may appear on the

qualify for the presidential preference primary ballot by submitting petitions signed by a few hundred or thousand party members from that state.<sup>55</sup> Several jurisdictions allow candidates to simply pay a filing fee.<sup>56</sup>

Jurisdictions also vary greatly in terms of who may participate in a party's presidential preference vote.<sup>57</sup> Some states hold open primaries in which each voter chooses the party primary in which they will vote and need not formally join the party to do so.<sup>58</sup> In semiopen primaries, each person has similar flexibility to choose the party primary in which they wish to participate, but the act of requesting a party's ballot is treated as registering with, affiliating with, or promising to support that party.<sup>59</sup> Other states hold closed primaries, in which only people who had previously joined the party may vote,<sup>60</sup> or semiclosed primaries, in which both party members and independent voters may participate.<sup>61</sup> Caucuses exhibit comparable variations.<sup>62</sup>

Generally, the results of a state's presidential preference vote determine the number of delegates from that state who will be pledged or bound to each presidential candidate at the national convention.<sup>63</sup> The Democratic Party's "Delegate Selection Rules" require each state party to allocate delegates proportionately among all presidential candidates who receive at

presidential preference primary ballot, giving the institutional party establishment tremendous influence over the shape and course of the primary. *See* *Duke v. Massey*, 87 F.3d 1226, 1234 (11th Cir. 1996) (holding that David Duke was not entitled to appear on the ballot in Georgia's presidential preference primary because the state party leadership decided to exclude him).

55. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-242(A)-(C) (2013); 10 ILL. COMP. STAT. § 5/7-11 (2013).

56. *See, e.g.*, IDAHO CODE § 34-732 (2008); W. VA. CODE § 3-5-8(a)(1) (2013).

57. Some states establish the eligibility requirements for participating in presidential preference votes in their laws. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-467(B); FLA. STAT. § 101.021. Others expressly provide that each state party's rules shall determine eligibility or take precedence over state laws concerning eligibility. *See, e.g.*, ALA. CODE §§ 17-13-7(a), -101 (2013); ARK. CODE ANN § 7-7-307(a) (2011). Even when state law determines the type of primary that will be used, state parties have a First Amendment right to insist that nonmembers be excluded. *See* *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574-75 (2000); *Democratic Party of the U.S. v. Wisconsin ex rel. La Folette*, 450 U.S. 107, 125-26 (1981). Conversely, a party may demand that the state allow independents to participate in its primary. *See* *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 225 (1986). The First Amendment does not grant parties a comparable right, however, to demand that members of other parties be allowed to participate in their presidential preference votes. *See* *Clingman v. Beaver*, 544 U.S. 581, 587 (2005). In some states, whether as a matter of state law or the parties' rules, both parties hold the same type of primary; in others, each party holds a different type of primary.

58. *See, e.g.*, MO. REV. STAT. § 115.397 (2014); S.C. CODE ANN. § 7-13-1010 (2013); *see also* GA. CODE ANN. § 21-2-224(a).

59. *See, e.g.*, TENN. CODE ANN. § 2-7-115(b) (2013).

60. *See, e.g.*, FLA. STAT. § 101.021; N.M. STAT. ANN. § 1-12-7(C) (2013).

61. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-467(B); MASS. GEN. LAWS ch. 53, § 37 (2013).

62. *See, e.g.*, IDAHO CODE § 34-732 (2008); KAN. STAT. ANN. §§ 25-3301(a)-(c), -3304 (2013).

63. Some states allow voters to select "no preference" in the presidential preference vote, which would result in delegates being unbound to any particular candidate. *See, e.g.*, MASS. GEN. LAWS ch. 53, § 70E.

least 15 percent of the vote.<sup>64</sup> At-large delegates and PLEOs must be allocated based on the statewide vote totals,<sup>65</sup> while each congressional district's delegates are allocated based on the results within that district.<sup>66</sup>

The Republican Rules allow for much greater variation among Republican state parties.<sup>67</sup> Many state parties allocate all of their delegates based solely on the results of the statewide vote. Some use a winner-take-all system, in which the presidential candidate who receives the most votes on a statewide basis receives all of that state's delegates.<sup>68</sup> Others allocate delegates proportionately among the candidates based on the results of the statewide vote,<sup>69</sup> often only among candidates who receive at least a certain percentage of the vote, ranging from 10 to 20 percent.<sup>70</sup>

Several Republican state parties have adopted a hybrid approach: the modified winner-take-all format. In such states, a candidate who wins more than a certain percentage of the statewide vote (typically, a majority) receives all of that state's delegates; if no candidate reaches that threshold, delegates are awarded proportionally.<sup>71</sup> Nearly two dozen state parties apply their winner-take-all, proportional, or modified winner-take-all systems separately to all of their delegates;<sup>72</sup> at-large and party leader delegates are allocated based on statewide vote tallies, while district delegates are allocated based on the results within their respective congressional districts.<sup>73</sup>

64. DEMOCRATIC DELEGATE SELECTION RULES, *supra* note 32, rr. 10(C), 13(B), (E).

65. *Id.* r. 13(E).

66. *Id.* r. 13(B).

67. *See generally* REPUBLICAN NAT'L COMM., 2016 PRESIDENTIAL NOMINATING PROCESS (2016), [https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/2016%20PRESIDENTIAL%20NOMINATING%20PROCESS%20BOOK\\_1443803140.pdf](https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/2016%20PRESIDENTIAL%20NOMINATING%20PROCESS%20BOOK_1443803140.pdf) [<https://perma.cc/Y64D-9GZG>].

68. *See, e.g.*, N.J. REPUBLICAN STATE COMM., RULES GOVERNING THE SELECTION AND ALLOCATION OF DELEGATES TO THE REPUBLICAN NATIONAL CONVENTION r. 5 (2016), <http://www.state.nj.us/state/elections/2016-results/2016-delegate-selection-plan-republican.pdf> [<https://perma.cc/S4AJ-ME9T>]; REPUBLICAN STATE CENT. & EXEC. COMM. OF OHIO, REPUBLICAN STATE CENTRAL AND EXECUTIVE COMMITTEE OF OHIO PERMANENT RULES art. X, § 1(d) (2015), <https://www.scribd.com/doc/305765837/Ohio-Republican-Party-Rules-9-18-15> [<https://perma.cc/XWS5-54YG>].

69. *See, e.g.*, REPUBLICAN STATE CENT. COMM. OF IOWA, BYLAWS art. VIII, § 1 (2015), <https://www.iowagop.org/wp-content/uploads/2015/07/RPI-Bylaws-Updated-2015.pdf> [<https://perma.cc/JF82-RAA3>].

70. *See, e.g.*, KY. REPUBLICAN STATE COMM., OFFICIAL RULES OF THE REPUBLICAN PARTY OF KENTUCKY r. 8.04 (2011), <http://rpk.org/wp-content/uploads/2013/10/Official-Republican-Party-of-Kentucky-Rules.pdf> [<https://perma.cc/GF73-DCB2>].

71. *See, e.g.*, MICH. REPUBLICAN STATE COMM., RULES FOR SELECTION OF DELEGATES AND ALTERNATES TO THE 2016 COUNTY, STATE, AND NATIONAL CONVENTIONS r. 19(C) (2014), [http://www.migop.org/assets/files/Rules\\_for\\_the\\_Selection\\_of\\_Delegates\\_and\\_Alternates.pdf](http://www.migop.org/assets/files/Rules_for_the_Selection_of_Delegates_and_Alternates.pdf) [<https://perma.cc/NG5K-JP9H>].

72. *See, e.g.*, WASH. STATE REPUBLICAN PARTY, RULES FOR PRECINCT CAUCUSES AND FOR ELECTION OF DELEGATES TO THE STATE CONVENTION AND NATIONAL CONVENTIONS r. 37(A)–(B) (2015), [http://seattlegop.org/2016\\_WSRP\\_rules.pdf](http://seattlegop.org/2016_WSRP_rules.pdf) [<https://perma.cc/A7X8-E3M7>].

73. The Republican Rules specify that state parties that hold presidential preference votes before March 15, except for Iowa, New Hampshire, South Carolina, and Nevada, must use this system. REPUBLICAN RULES, *supra* note 27, r. 16(c)(1), (c)(3).

The parties also take very different approaches to what it means for a delegate to be allocated to a presidential candidate. The call to the Democratic Convention specifies that delegates are merely “pledged” to particular candidates and does not provide a mechanism for enforcing those pledges at the convention.<sup>74</sup> Again, much more variation exists among Republican state parties.<sup>75</sup> In most states, a bound delegate is required to vote for the specified candidate only in the first round of balloting at the national convention.<sup>76</sup> In many other states, binding extends only to the first two rounds of voting.<sup>77</sup> A few state parties require their delegates to vote for candidates throughout all rounds of balloting, unless released by that candidate, or certain other contingencies occur.<sup>78</sup> Binding applies only to voting directly on the party’s nomination for President; it does not extend to other matters that may impact the nomination indirectly, such as the rules of the convention, platform issues, or credentialing disputes.

Some state rules do not specify how binding is enforced. Others provide that, if a delegate votes contrary to his or her binding at the national convention, the chair of that state’s delegation must announce and report that vote as if it had been cast for the required candidate.<sup>79</sup> The Republican Rules also act as a backstop to enforce state-level binding requirements. They require convention officers to treat delegate votes cast contrary to binding requirements in the applicable state party rules or statutes as if they had been cast for the proper candidate.<sup>80</sup>

### *B. Determining Who Will Serve as National Convention Delegates*

The second main component of the presidential nomination process is the selection of delegates each state party will send to its national convention.

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74. See DEMOCRATIC CONVENTION CALL, *supra* note 29, art. VIII, § F(3)(e); *cf. id.* art. VIII, § F(3)(c). As discussed in the next section, the rules indirectly attempt to ensure that delegates vote consistently with their pledges by giving presidential candidates a limited right to approve the identity of delegates seeking to be pledged to him or her. See *infra* Part I.B.

75. See Reid J. Epstein et al., *Republican Convention’s Delegate Math Explained*, WALL ST. J. (May 5, 2016, 10:05 AM), <http://graphics.wsj.com/elections/2016/rmc-convention-delegates/> [<https://perma.cc/UDE3-ET9P>]; Jessica Taylor, *Here’s a Round-by-Round Guide to a Contested GOP Convention*, NPR (Apr. 21, 2016, 6:00 AM), <http://www.npr.org/2016/04/21/474581419/heres-a-round-by-round-guide-to-a-contested-gop-convention> [<https://perma.cc/42U9-U7CJ>].

76. See, e.g., ARIZ. REV. STAT. ANN. § 16-243(B) (2013); IDAHO CODE § 34-736 (2008).

77. See, e.g., REPUBLICAN PARTY OF TEX., GENERAL RULES FOR ALL CONVENTIONS AND MEETINGS r. 38, § 10(b) (2016), <https://www.texasgop.org/wp-content/uploads/2016/07/2016-Rules-7.14.15.pdf> [<https://perma.cc/9HXW-HSDW>].

78. See, e.g., ALA. REPUBLICAN EXEC. COMM., 2016 PRESIDENTIAL PREFERENCE PRIMARY RESOLUTION para. 9 (2016), <http://algop.org/wp-content/uploads/2012/01/2016-Presidential-Preference-Primary-Resolution.pdf> [<https://perma.cc/M88S-DBK3>].

79. See, e.g., *id.*

80. REPUBLICAN RULES, *supra* note 27, r. 16(a)(2); see also *id.* rr. 37(b), 40(d). In a conflict between a state party rule and a state law concerning binding, the state party rule would govern. See *Correll v. Herring*, No. 3:16-CV-467, 2016 U.S. Dist. LEXIS 89781 (E.D. Va. July 11, 2016); see also *Ray v. Blair*, 343 U.S. 214 (1952).

This stage typically occurs within a state after the results of its presidential preference vote are known. Both national parties' rules require that at-large delegates be selected on a statewide basis, while district delegates must be selected on a district-by-district basis.<sup>81</sup>

The Democratic Party requires that the district delegates to be pledged to each presidential candidate be chosen either through a primary election or a districtwide caucus or convention comprised of Democrats who have signed "statements of support" for that candidate.<sup>82</sup> Most state Democratic parties opt for caucuses or conventions. The main difference between these formats is that district caucuses are fairly open, while the participants at district conventions typically must be chosen at county or municipal conventions, caucuses, or meetings.<sup>83</sup> Statewide delegates and PLEOs typically are selected either by the state party executive committee or at a special meeting of the district delegates, but they also may be chosen at a state convention.<sup>84</sup>

Most Republican state parties select their at-large and district delegates at state and district party conventions, respectively.<sup>85</sup> The state and district conventions may be held on the same day, in which case attendees from each district select their district delegates first, then reconvene to vote collectively on at-large delegates.<sup>86</sup>

The Democratic Party allows presidential candidates to exercise much greater control than the Republican Party over the identities of delegates to be pledged to them. Anyone wishing to run to serve as a delegate to the Democratic National Convention—regardless of how a state selects its delegates—must pledge his or her support to a particular presidential candidate or declare themselves uncommitted.<sup>87</sup> Each presidential

81. DEMOCRATIC DELEGATE SELECTION RULES, *supra* note 32, r. 8(C); REPUBLICAN RULES, *supra* note 27, r. 16(d)(9). The Democratic rules allow district delegates to be allocated among, and chosen within, political subdivisions smaller than congressional districts. DEMOCRATIC DELEGATE SELECTION RULES, *supra* note 32, r. 8(C).

82. DEMOCRATIC DELEGATE SELECTION RULES, *supra* note 32, r. 12(G); *see also infra* notes 97–98 and accompanying text.

83. DEMOCRATIC DELEGATE SELECTION RULES, *supra* note 32, r. 12(G)–(H).

84. *Id.* rr. 9(C), 10(B).

85. *See, e.g., id.* rr. 10(C), 13(A)–(B). Both at-large and district delegates to the Republican National Convention may be chosen by state and district party conventions, the state party committee, a primary election, or some other procedure already in use in that state (pursuant to a grandfather clause). REPUBLICAN RULES, *supra* note 27, r. 16(d)(1).

86. As noted earlier, both parties allow at least some national convention delegates to be both chosen and bound to particular presidential candidates through presidential preference votes (i.e., primaries). *Cf. supra* Part I.A. In the Democratic Party, only district delegates may be selected through primaries. DEMOCRATIC DELEGATE SELECTION RULES, *supra* note 32, r. 10(B); *see id.* r. 9(C). In the Republican Party, both statewide and district delegates may be chosen through primaries. REPUBLICAN RULES, *supra* note 27, r. 16(d)(1).

In these states, the name of each person seeking to become a delegate to the party's national convention appears on the party's primary ballots, along with the name of the presidential candidate to whom that potential delegate wishes to be pledged or bound (although some states allow a candidate for delegate to specify that he or she is "uncommitted" or holds "no preference"). *See* N.J. REPUBLICAN STATE COMM., *supra* note 68, r. 5(B)(1)–(2).

87. DEMOCRATIC DELEGATE SELECTION RULES, *supra* note 32, r. 12(B).

candidate then reviews the list of national convention delegate candidates from that state seeking to be bound to him or her and may reject anyone they wish, so long as certain minimum numbers of delegate candidates remain.<sup>88</sup>

Very few Republican state parties formally give presidential candidates influence over the selection of potential national convention delegates seeking to be bound to them. Presidential campaigns sometimes engage in extensive whip operations at state and district conventions to ensure the election of national convention delegates who support them.<sup>89</sup> Additionally, in some jurisdictions, the ballots at the state and district conventions will indicate the candidates for delegate whom each Republican presidential candidate has endorsed.<sup>90</sup>

### C. The National Convention

During the late summer of each presidential election year, the Democratic Party and Republican Party each hold a national convention where they select their respective nominees for President. Both parties' conventions have a rules committee, to determine the convention's rules, and a credentials committee, to resolve disputes concerning whether certain delegates were properly chosen.<sup>91</sup> These committees have tremendous power over the course of the convention and are typically the focus of most efforts to manipulate a convention's results.

Each Democratic Convention committee is comprised of 162 "base" members, allocated among the states according to the same formula used to apportion base delegates, as well as an additional twenty-five PLEOs.<sup>92</sup> The DNC's Executive Committee selects the PLEOs,<sup>93</sup> chair, and vice chair for each committee,<sup>94</sup> giving the institutional party substantial influence over the committees' activities. Each state's committee slots are allocated among the presidential candidates according to either that state's presidential preference primary results or the distribution of that state's at-large delegates.<sup>95</sup> A presidential candidate may submit one or more names for each slot allotted to him or her;<sup>96</sup> the national convention delegates from that state are required to select committee members from among those names.<sup>97</sup> Thus, presidential candidates can effectively dictate the membership of each committee; the committee members they nominate need not even be convention delegates.<sup>98</sup>

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88. *Id.* r. 12(D)–(E).

89. *See, e.g., supra* note 3 and accompanying text.

90. *See, e.g.,* D.C. REPUBLICAN PARTY, *supra* note 45, § VII.

91. DEMOCRATIC CONVENTION CALL, *supra* note 29, art. VII; REPUBLICAN RULES, *supra* note 27, r. 41(a).

92. DEMOCRATIC CONVENTION CALL, *supra* note 29, art. VII(A)(1)–(2).

93. *Id.* art. VII(B)(2).

94. *Id.* art. VII(F)(1).

95. *Id.* art. VII(C)(1).

96. *Id.* art. VII(D)(2).

97. *Id.* art. VII(B)(1), (D)(2).

98. *Id.* art. VII(A)(3).



For the Republicans, each committee is comprised of two delegates from each state.<sup>99</sup> The chair of the RNC appoints the committees' chairs and cochairs.<sup>100</sup> Each state's national convention delegates decide among themselves which of them will serve on a committee.<sup>101</sup>

Shortly before a national convention opens, the credentials committee prepares a proposed report, identifying everyone who should be recognized as a delegate to the convention and containing resolutions addressing any challenges to delegates' elections or credentials.<sup>102</sup> The secretary of the convention also prepares a temporary roll of convention delegates, listing the people who will be permitted to vote until the credentials committee report is approved as the permanent roll of the convention.<sup>103</sup> The rules committee likewise convenes shortly before the convention to craft temporary rules to govern the convention until the delegates adopt permanent rules.<sup>104</sup>

When the convention begins, the credentials committee report is brought to the convention floor. Delegates on the temporary roll vote on the report,<sup>105</sup> except a delegate may not vote if the report resolves a challenge to his own appointment.<sup>106</sup> When the report is adopted, the delegates it identifies are deemed the permanent roll of the convention, entitled to vote on all subsequent matters. Control of the credentials committee is important because, in a tight race, its recommended decisions can swing the majority from one presidential candidate to another.

The rules committee report, containing the temporary rules of the convention, is then presented to the floor. The delegates vote on whether to adopt them as permanent rules.<sup>107</sup> A convention's rules determine numerous key aspects of the nomination process.

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99. REPUBLICAN RULES, *supra* note 27, r. 41(a).

100. *Id.*

101. *Id.*

102. DEMOCRATIC CONVENTION CALL, *supra* note 29, art. VII(I)(1); *id.* app. A, § 10; REPUBLICAN RULES, *supra* note 27, r. 27(a). Any challenges to Republican delegates must first be filed with the RNC's Committee on Contests. REPUBLICAN RULES, *supra* note 27, r. 25(c). The Republican National Convention's Credentials Committee is effectively an appellate body available to review the RNC's determinations. *Id.* r. 25(b).

103. DEMOCRATIC CONVENTION CALL, *supra* note 29, art. VIII(B); REPUBLICAN RULES, *supra* note 27, r. 22(a). In the Democratic Convention, the temporary roll reflects the Credentials Committee's recommended resolutions of any contests and determinations of which delegates should be seated. DEMOCRATIC CONVENTION CALL, *supra* note 29, art. VIII(B)(1). In the Republican Convention, the temporary roll contains the names of all delegates who the state parties have certified to the RNC were selected but does not reflect subsequent determinations about their eligibility or resolutions to other delegate-related contests or challenges by the RNC or the Credentials Committee. REPUBLICAN RULES, *supra* note 27, r. 22(a).

104. DEMOCRATIC CONVENTION CALL, *supra* note 29, art. VII(H)(1); *see* REPUBLICAN RULES, *supra* note 27, r. 27(a), 42.

105. DEMOCRATIC CONVENTION CALL, *supra* note 29, art. VIII(B)(2); *see* REPUBLICAN RULES, *supra* note 27, r. 22(a), 27(a).

106. DEMOCRATIC CONVENTION CALL, *supra* note 29, art. VIII(C)(1)(c); *see* REPUBLICAN RULES, *supra* note 27, r. 22(b).

107. DEMOCRATIC CONVENTION CALL, *supra* note 29, art. VIII(C)(1)(c)-(d); REPUBLICAN RULES, *supra* note 27, r. 42.

First, the rules set forth the requirements for a presidential candidate to have his or her name submitted to the delegates to be voted upon (“the Candidate Qualification Rule”). The rules of the 2016 Democratic Convention require a candidate to submit a petition signed by at least 300 delegates from at least six jurisdictions, with no more than fifty delegates from any jurisdiction.<sup>108</sup> If a delegate attempts to vote for a candidate who has not been properly placed into nomination, that vote is counted as “Present.”<sup>109</sup> The Republican Rules specify that a candidate may be placed in nomination if he or she “demonstrate[s] . . . support” from a majority of delegates from eight or more states, though that number is being reduced to five beginning with the 2020 convention.<sup>110</sup>

Second, each party’s rules specify the percentage of votes a candidate must receive to be deemed that party’s nominee for President (“the Nomination Rule”). The 2016 rules of both parties’ conventions require a candidate to receive the votes of a majority of convention delegates to win the nomination.<sup>111</sup>

Third, the rules discuss how, if at all, delegates’ pledges or binding will be enforced (“the Binding Rule”). The Democratic rules do not bind or otherwise compel delegates—including so-called “pledged” delegates—to vote for particular candidates. They provide that a delegate’s vote must be counted “without regard to any state law, party rule, resolution or instruction binding the delegation or any member thereof to vote for or against any candidate or proposition.”<sup>112</sup> The Democratic system seeks to avoid the need to bind delegates by ensuring that each candidate has the opportunity to approve delegates who wish to pledge themselves to him or her.<sup>113</sup> This procedure creates a strong likelihood that delegates allocated to particular candidates will voluntarily choose to vote for their respective candidates at the national convention.

The Republican Rules, in contrast, specify that a state’s delegates must be bound by any statewide presidential preference vote that occurs in a primary, caucus, or state convention, unless voters directly chose the delegates themselves in a primary.<sup>114</sup> The basis upon which delegates are bound to candidates (i.e., proportional allocation or winner take all) is determined by either state party rules or state law.<sup>115</sup> Likewise, the number of rounds of voting at the national convention in which the delegate must vote for a particular candidate, and the circumstances under which that

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108. DEMOCRATIC CONVENTION CALL, *supra* note 29, art. VIII(C)(6)(b).

109. *Id.* art. VIII(C)(7)(c).

110. REPUBLICAN RULES, *supra* note 27, r. 40(b).

111. DEMOCRATIC CONVENTION CALL, *supra* note 29, art. VIII(C)(7)(b); REPUBLICAN RULES, *supra* note 27, r. 40(d).

112. DEMOCRATIC CONVENTION CALL, *supra* note 29, art. VIII(F)(3)(e); *cf.* *Democratic Charter*, *supra* note 26, art. IX, § 10 (providing that delegates may not be compelled to vote in a manner contrary to the candidate preference they expressed at the time they were elected as delegates); DEMOCRATIC DELEGATE SELECTION RULES, *supra* note 32, r. 12(I) (stating the same).

113. DEMOCRATIC DELEGATE SELECTION RULES, *supra* note 32, r. 12(D)–(E).

114. REPUBLICAN RULES, *supra* note 27, r. 16(a)(1).

115. *See id.*; *see also supra* Part I.B.

delegate may be released from his or her binding, are determined by the state party or state statute as well.<sup>116</sup> Convention officials enforce this binding by announcing and recording each delegate's vote based on the candidate to whom that delegate is bound; they are prohibited from "recogniz[ing]" a delegate's vote if he or she votes contrary to his or her binding.<sup>117</sup>

Fourth, both parties expressly authorize motions to suspend the rules, meaning that delegates may vote to ignore whatever convention rules they wish ("the Suspension Rule").<sup>118</sup> These rules collectively are the fundamental cornerstones of the presidential nomination process yet are not even determined until the end of that process, at the outset of the national convention.

## II. REFORMING THE FUNDAMENTAL INSTABILITY OF THE NOMINATION PROCESS

The presidential nomination process is fundamentally unstable and dangerously indeterminate in ways that foster intraparty discord and undermine public confidence. First, the rules governing each party's national convention, which determine the legal effects and other consequences of states' presidential preference votes, are determined toward the very end of the nomination process. Those rules are decided at the national convention itself after all the primaries and caucuses have been conducted, votes cast, and delegates chosen. Second, those rules are determined by national convention delegates who, particularly in the Republican Party, may very well oppose the candidates who won their respective states' primaries and caucuses. Third, the overall structure of the system ultimately sends conflicting messages to the public about both the voters' role and the democratic nature of the process: votes are constitutionally protected and count in determining the nominee,<sup>119</sup> but they are only protected to the extent party elites decide they should.

Determining the rules and consequences of presidential preference votes after they already have been held raises serious fairness and due process implications.<sup>120</sup> Moreover, because the beneficiaries of various potential rules are definitively known at the time those rules are being considered, they are likely to be crafted almost exclusively for the political benefit of particular candidates rather than to promote procedural fairness or other values.<sup>121</sup>

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116. *See supra* notes 84–89 and accompanying text.

117. REPUBLICAN RULES, *supra* note 27, r. 16(a)(2); *see also id.* rr. 37(b), 40(d).

118. DEMOCRATIC CONVENTION CALL, *supra* note 29, art. VIII(J); REPUBLICAN RULES, *supra* note 27, r. 32.

119. *See Smith v. Allwright*, 321 U.S. 649, 663–64 (1944) (holding that the Equal Protection Clause applies to primary elections).

120. *See, e.g., Griffin v. Burns*, 570 F.2d 1065, 1075–76 (1st Cir. 1978).

121. *Cf. Michael T. Morley, The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 100 (2016) (discussing the importance of developing laws governing elections under a Rawlsian "veil of ignorance").

Additionally, under the rules of the Republican Party in particular, the disconnect between the processes used for selecting delegates (typically, party conventions) and the processes used for allocating them to particular candidates (typically, primaries and caucuses) fosters intraparty discord. Candidates who fared poorly in primaries and caucuses and were not allocated many bound delegates may nevertheless continue pursuing their candidacies by seeking the election of supportive national convention delegates at state and district party conventions.<sup>122</sup>

State and district conventions operated by party officials and open only to party insiders are the least transparent and publicly accessible part of the presidential nomination process. Yet presidential candidates have a strong incentive to attempt to take advantage of them to undermine the results of primaries and caucuses.<sup>123</sup> The components of the presidential nomination process are thus at war with each other, fostering unnecessary and destabilizing uncertainty over whether, and the extent to which, the outcomes of ongoing primaries and caucuses matter. Rank-and-file party members, independents, and even members of other parties invited to participate in open primaries and caucuses justifiably may feel that party elites are using them to give a veneer of democratic legitimacy to the nomination process only to the extent it is perceived to be useful.

Much of the problem stems from the fact that the presidential nomination process was not rationally designed as a coherent whole but rather reflects a series of accumulated changes and reforms meant to address particular problems as they arose. Consequently, it fuses fundamentally different ways of nominating political candidates—primaries and caucuses on the one hand, party conventions on the other<sup>124</sup>—into a patchwork with poorly stitched seams that are likely to split under pressure. However, assuming that the system's overall structure is unlikely to radically change in the foreseeable future, political parties can enhance the fairness and stability of the presidential nomination process in the following ways.

#### A. *Entrenching Certain Convention Rules*

Most basically, certain fundamental rules governing national conventions should be determined well in advance of the presidential nomination process, before any votes are cast or delegates selected. Regardless of whether constitutional due process restrictions govern national conventions, fundamental fairness demands that the requirements for winning be established before an election is held, the votes are cast, and the specific candidates who will benefit from different possible standards are definitively known. Neither the public, the candidates, nor the party itself should have to worry about the national convention delegates changing the rules at the last minute to facilitate the election of a candidate who did not

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122. See, e.g., *supra* notes 2–3 and accompanying text.

123. See *supra* note 16.

124. See *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 205–06 (2008) (discussing differences between the perceived fairness of primaries and conventions).

fare well in the primaries or, potentially, did not even run in the primaries at all. The mere possibility of such machinations fosters uncertainty, intraparty intrigue, and the appearance of manipulation, which are unhealthy for the party and undermine confidence in the presidential election process.

In particular, the following rules should be determined in advance of a presidential nomination cycle and not subject to change at any point during that cycle, including at the national convention: the requirements a candidate must satisfy to be placed into nomination and receive votes from delegates at the national convention, whether state party rules and laws pledging or binding delegates to vote for certain candidates will be enforced and the manner in which they will be enforced, the percentage of votes at the national convention a candidate must receive to win the nomination, and a prohibition on suspending the rules of the convention.

This reform can be accomplished in two different ways. Most simply, a national convention in one presidential election cycle can be empowered to approve the rules for the following convention. Under this approach, each convention would be governed by the rules adopted at the preceding convention. This approach would cause the least disruption to the current system. Presently, when a national convention adopts a set of rules, they take effect on the first day of the convention and expire the day before the following convention starts.<sup>125</sup> This proposal would simply shift that timeline by four days; when a national convention adopts a set of rules, they should take effect the day after the convention ends, and expire the last day of the following convention. Alternatively, certain basic rules concerning the selection of presidential candidates at national conventions can be included in the organic documents of the national parties themselves, such as the Democratic Charter. Such rules would be placed above the fray of ordinary convention debate and would not be subject to change at the convention.

### *B. Reforming Convention Rules*

Political parties should do more to enhance the democratic underpinnings of the national conventions. Presently, if no candidate goes into the convention with a majority of delegates pledged or bound to vote for him or her, the convention's outcome becomes radically indeterminate. Once the convention proceeds past the first round of voting, most delegates become unbound, allowing them to vote for any candidate who is eligible to be nominated.

Currently, a candidate may appear on the convention ballot if he or she wins the presidential preference votes in only six states under the Democratic rules<sup>126</sup> and is supported by a majority of delegates from eight states under the Republican Rules,<sup>127</sup> and that number is set to drop to five

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125. See, e.g., REPUBLICAN RULES, *supra* note 27, r. 42.

126. DEMOCRATIC CONVENTION CALL, *supra* note 29, art. VIII(C)(6)(b).

127. REPUBLICAN RULES, *supra* note 27, r. 40(b)(1).

at the next Republican National Convention.<sup>128</sup> But the convention remains free to change or suspend the rules concerning both delegate binding and the requirements for candidates to be placed into nomination at the convention. Thus, delegates to the national convention have the power to nominate a presidential candidate who did poorly in the primaries and caucuses or did not participate in them at all.

Parties can enhance the stability and democratic underpinnings of their national conventions by amending their rules to specify that a candidate is not eligible to receive the nomination unless he or she won substantial public support in presidential preference votes (generally, primaries and caucuses). The simplest way of implementing this change is to specify that a candidate must have received the plurality of the vote in a significant number of presidential preference contests—perhaps a figure between twelve and fifteen—to be eligible for nomination.

The notion that a person can secure a party's nomination for President of the United States while losing up to forty-two primaries and caucuses undermines the democratic legitimacy of the nomination system and threatens to rend the connection between primaries/caucuses and the outcome of the national convention. Of course, alternate ways of measuring public support can be devised instead. For example, a candidate can be required to win a certain percentage of the total popular vote across all primaries and caucuses or a certain number of bound and pledged delegates (perhaps 20 percent of the total delegates) to be placed into nomination.

Even if a party's primaries and caucuses are not intended to be absolutely determinative of that party's presidential nomination process, the very act of allowing tens of millions of people to participate in them suggests that their outcomes should at least have a substantial impact on determining the party's nominee. Limiting the field of potential nominees to those who have won widespread support through the primaries and caucuses helps achieve this delicate balance. And once parties have settled on a revised rule, it should be locked in well in advance of a presidential nomination process—as suggested in the previous recommendation—rather than being left open to revision at the outset of a convention.<sup>129</sup>

### *C. Selection of National Convention Delegates*

Finally, the components of the nomination process should be tied more closely together by blending the current approaches of the Democratic and Republican Parties. Each party should adopt a system in which, as the Democratic rules provide, the candidate(s) who prevail in a presidential preference vote have the right to veto any delegates who may be pledged or bound to them under state party rules or state law.<sup>130</sup> Each party should

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128. *Id.* r. 40(b)(2).

129. The parties also should amend their convention rules to provide that delegates may not vote to suspend the rules. *See supra* Part II.A.

130. DEMOCRATIC DELEGATE SELECTION RULES, *supra* note 32, r. 12(B), (D)–(E).

likewise adopt the Republican Party's requirement that national convention delegates allocated to a particular presidential candidate based on the results of a presidential preference vote be bound to vote for that candidate to the extent required by state party rules or state law.<sup>131</sup> Votes cast contrary to a candidate's binding should be treated as if they had been cast properly. These measures not only would reduce the friction between competing components of the presidential nomination process but would also ensure that the tens of millions of votes cast in primaries and caucuses are not effectively nullified through backroom convention machinations.

#### CONCLUSION

The 2016 election cycle revealed numerous fundamental flaws at the heart of the presidential nomination process that came close to undermining both major parties' conventions. Establishing certain key rules concerning the presidential nomination process in advance, requiring presidential candidates to receive a greater level of public support in primaries and caucuses to be eligible to receive the nomination, and more closely tying the selection of national convention delegates to the results of presidential preference votes would strengthen the nomination system, improve its legitimacy, and reduce the possibility of intraparty schisms.

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131. REPUBLICAN RULES, *supra* note 27, r. 16(a).