

## “TOO PLAIN FOR ARGUMENT?” THE UNCERTAIN CONGRESSIONAL POWER TO REQUIRE PARTIES TO CHOOSE PRESIDENTIAL NOMINEES THROUGH DIRECT AND EQUAL PRIMARIES

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### INTRODUCTION

After the 2008 presidential election season concludes, no doubt there will be calls to change the presidential nomination system, especially on the Democratic Party side. Already before the current season began, Congress explored legislation to prevent the “frontloading” of the primary process through the creation of a series of rotating regional primaries.<sup>1</sup> The close contest for the Democratic Party nomination this winter and spring revealed additional issues beyond the timing question. Critics have argued that the caucus system used in some states is unfair and poorly administered,<sup>2</sup> that the unequal weighting of votes for purposes of delegate selection violates

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<sup>1</sup> See *Regional Presidential Primary and Caucus Act of 2007: Hearing on S. 1905 Before the S. Comm., on Rules & Admin., 110th Cong. (2007)*, available at <http://rules.senate.gov/hearings/2007/091907TranscriptCorrected.pdf> (link) [hereinafter *Hearing on S. 1905*]. I testified at that hearing on the constitutionality of S.1905. My testimony is posted at <http://rules.senate.gov/hearings/2007/HasenTestimony091907.pdf> (link).

<sup>2</sup> See Tova Andrea Wang, *The Nevada Caucus Dustup: The Nevada Caucus, Part III*, The Century Foundation Blog, Jan. 22, 2008, <http://www.tcf.org/list.asp?type=NC&pubid=1783> (link); TOVA ANDREA WANG, THE CENTURY FOUNDATION, HAS AMERICA OUTGROWN THE CAUCUS? SOME THOUGHTS ON RESHAPING THE NOMINATION CONTEST (2007), available at <http://www.tcf.org/publications/electionreform/caucusbrief.pdf> (link); see also *infra* Part I.

Within the party nomination systems discussed in this Essay:

“Caucuses” . . . are meetings held simultaneously across the state in each neighborhood. Participants in each caucus select representatives, usually chosen according to the presidential candidates they support, to a higher level caucus or convention. A pyramidal process eventuates in a statewide convention of representatives whose selection is ultimately traceable to the preferences expressed at the original caucuses. The statewide convention selects the actual presidential nominating delegation.

DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW: CASES AND MATERIALS* 473 n.m (3d ed. 2004).

democratic principles,<sup>3</sup> and that the fate of the Democratic Party presidential nomination should not turn on the votes of unelected “superdelegates.”<sup>4</sup>

It is certainly possible that the parties themselves will change their nomination rules in response to these criticisms, as the parties have done in the past. But in the event the parties cannot agree on changes, Congress may consider legislation imposing changes to make the nomination rules comply more with the typical “one person, one vote” norms applicable to general elections. At the extreme, Congress might require presidential nominations to occur through state-by-state direct primaries conducted under one person, one vote principles. Here, I explore the question whether Congress has the power to impose such primaries on the parties and the states if the parties, states, or both object. I do not consider the wisdom of such legislation.

As I explain, the main argument that parties can advance against Congressional (or for that matter, state) imposition of a direct presidential primary is that it violates the First Amendment associational rights of political parties to determine their method for choosing their standard bearers.<sup>5</sup> This argument would appear to have much force given recent Supreme Court cases recognizing the parties’ rights to overrule the states on the open or closed nature of political primaries. On the other hand, the Court has also accepted as “too plain for argument” a governmental power to require parties to use direct primaries to choose their nominees to assure fairness of the process.<sup>6</sup> So resolution of the question is uncertain.

The second argument that the parties or the states may raise against Congress is that Congress lacks the power under the Constitution to set the rules for presidential elections.<sup>7</sup> Such an argument reads Congressional

<sup>3</sup> In Texas, for example, heavily Democratic districts are weighted more heavily in delegate selection than districts with more Republicans, and about a third of the delegates are awarded through caucuses rather than primaries. In 1988, for example, Michael Dukakis won the state with 33 percent of the vote in the Texas primary compared to Jesse Jackson’s 25 percent, but they split Texas delegates almost evenly. R.G. Ratcliffe, *Texas Delegate System Makes Candidates Choose Their Battles*, HOUSTON CHRON., Feb. 10, 2008, at A1, available at <http://www.chron.com/dispatch/story.mpl/metropolitan/5528612.html> (link).

<sup>4</sup> See Jennifer Parker, *Obama or Clinton: Will Party Elite or Voters Decide?*, ABC News, Feb. 8, 2008, <http://www.abcnews.go.com/Politics/Vote2008/Story?id=4261986&page=1> (link) (recounting controversy over “superdelegates”); see also *id.* (defining “superdelegates” as “state party leaders, national party leaders and former Democratic presidents—who get to act as free agents at the party’s convention able to back any candidate they wish.”). Indeed, some superdelegates, mostly state party chairs, have more power than others, because they can appoint up to five additional superdelegates to the convention. See Stephen Ohlemacher, *Some Superdelegates More Super Than Rest*, ASSOCIATED PRESS, Apr. 4, 2008, available at <http://ap.google.com/article/ALeqM5iUzNyFcNiwI9wJ5hiwqFnxejeZJwD8VQTKGG2> (link).

<sup>5</sup> See *infra* Part II.

<sup>6</sup> See *infra* notes 29–37 and accompanying text.

<sup>7</sup> See *infra* Part III.

power under Article II of the Constitution narrowly,<sup>8</sup> limited to setting the *time* for choosing presidential electors. Though the textual argument under Article II has some force, both Court precedent and policy suggest that the courts could well accept Congressional power to impose at least some regulations on the primary process, such as regulations setting the timing of primaries or caucuses. It is not clear whether congressional power would extend as far as to the imposition of a direct presidential primary against the parties' and states' wishes.

Part I of this Essay briefly reviews complaints from the 2008 election season about the presidential nominating process. Part II considers the party autonomy argument against congressional legislation imposing a direct presidential primary. Part III considers the Congressional power argument. This Essay concludes by noting that even if Congress may lack the power, the threat of congressional action could spur the parties to reform themselves.

#### I. COMPLAINTS ABOUT THE 2008 PRESIDENTIAL NOMINATION PROCESS AND POSSIBLE LEGISLATIVE REMEDIES

Each state may make its own rules setting forth who may vote in party primaries, and these rules are subject to constitutional objections by the political parties.<sup>9</sup> Major party presidential candidates are chosen at presidential conventions, whose delegates are chosen through primaries or caucuses conducted in each state.<sup>10</sup> State political parties, generally following the rules of the national political parties (the Democratic National Committee (DNC) and the Republican National Committee (RNC)), set out specific plans for the choosing of delegates for presidential campaigns.

Controversies over the 2008 presidential nominating process began with a dispute over the timing of state contests. The two major political parties set out rules limiting when states could set their primaries or caucuses.<sup>11</sup> The Democrats gave a prime position to the Iowa caucus and New

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<sup>8</sup> See U.S. CONST. art. II, § 1 (vesting with each state's legislature the power to set the rules for choosing presidential electors).

<sup>9</sup> See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572–73 (2000) (link).

<sup>10</sup> For an overview of the presidential primary process and the development of the direct primary for choosing nominees of the major political parties, see ALAN WARE, *THE AMERICAN DIRECT PRIMARY: PARTY INSTITUTIONALIZATION AND TRANSFORMATION IN THE NORTH* (2003). I focus here only on the two major political parties, the Democratic and Republican parties. My analysis may not apply to minor political parties.

<sup>11</sup> See Democratic National Committee, Delegate Section Rules for the 2008 Democratic National Convention as adopted Aug. 19, 2006, R. 11.A, available at [http://s3.amazonaws.com/apache.3cdn.net/3e5b3bfa1c1718d07f\\_6rm6bhyc4.pdf](http://s3.amazonaws.com/apache.3cdn.net/3e5b3bfa1c1718d07f_6rm6bhyc4.pdf) (link); Republican National Committee, Rules of the Republican Party as adopted Aug. 30, 2006, R. 15(b)(1)(i) (setting forth the timing of the Republican primaries and caucuses and barring any primary before February 5, 2008), available at <http://www.gop.com/About/Rules11-20.htm> (link); see also Republican National Committee, *supra* note 11, at R. 16(a)(1) (imposing penalties for states or state parties that violate the timing rule).

Hampshire primary, and then provided that Nevada and South Carolina would have the next opportunity to run contests.<sup>12</sup> Michigan and Florida violated those rules by setting their contests too early, and the DNC threatened not to seat delegates produced from this procedure. The question of seating the Michigan and Florida delegations at the 2008 Democratic National Convention remains in flux as of this writing.<sup>13</sup>

Beyond timing questions, much of the controversy over the 2008 presidential nominating process has focused on problems with the casting and allocation of delegates on the Democratic side. The focus has been there because the contest between Senators Clinton and Obama for the Democratic nomination has been so close. The closeness has increased attention both to election administration issues as well as to the rules in place for allocating delegates to the convention, rules that often deviate from one person, one vote norms applicable in general elections. In early February 2008, I summarized some of the controversies as follows:

In the Iowa Democratic caucuses last month, Democrats had no right to cast a secret ballot. In tonight's Super Tuesday primary, Republican Party rules dictate that the state of Georgia will send more delegates (72) than Illinois (70) to the party's presidential nominating convention. Illinois has a larger population than Georgia, but Georgia has more reliable Republican voters. In the Democratic Nevada caucuses, rural votes counted more than urban ones, and while Hillary Clinton got more popular votes in the state than Barack Obama, it appears Obama will capture 13 of Nevada's Democratic delegates compared to Clinton's 12. Orthodox Jews complained that they couldn't vote in the Saturday morning Nevada caucuses. In California tonight, if neither Clinton nor Obama gets more than 62 percent of the vote in a congressional district, the two are likely to split the district-based delegates evenly. On the Republican side in the California primary, Romney and McCain are targeting the few Republican voters in heavily Democratic districts, because some of California's Republican delegates are awarded based on the winner of each congressional district, not the statewide winner. And when the primaries are over, under the Democratic Party rules, "superdelegates" such as governors—who have not been chosen by voters—could hold the balance of power between Clinton and

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The New Hampshire primary violated Republican Party Rule 15(b)(1)(i), and the applicable penalty is a cost of half of New Hampshire's delegates. Presumptive Republican nominee John McCain is now advocating a change allowing all of New Hampshire's delegates to be seated. See John Distaso, *I'll Be Back, He Tells Crowd*, THE UNION LEADER (Manchester, N.H.), Mar. 13, 2008, at A1, available at <http://www.unionleader.com/article.aspx?headline=McCain+says+he's+ready+for+the+call&articleId=b3890dec-0543-49ef-bd8b-6460e118e8f5> (link). Because the Iowa caucus did not formally select convention delegates, it was not subject to a sanction under Republican Party Rule 15. See ABC News, Political Radar, *RNC Strips Early States of Half Their Delegates*, <http://blogs.abcnews.com/politicalradar/2007/11/rnc-strips-earl.html> (Nov. 8, 2007, 17:58 EST) (link).

<sup>12</sup> See Democratic National Committee, *supra* note 11, at Rule 11.A.

<sup>13</sup> See Ken Thomas, *Dean: Dems Will Seat Fla. Delegates*, ASSOCIATED PRESS, Apr. 2, 2008, available at <http://ap.google.com/article/ALeqM5igrYLRrHG3P6Ils2E7pSH0bxhvgD8VPSOI00> (link).

Obama in a brokered summer convention.<sup>14</sup>

The controversies did not end on Super Tuesday. Voting on the Democratic Party side in Texas was among the most controversial of elections. Under the Texas Democratic Party rules, two thirds of the state’s presidential delegates are chosen through a primary while one third are chosen through a caucus held immediately at the conclusion of voting—with the caucus open only to those who voted in the primary.<sup>15</sup> An estimated 1.1 million Texas Democrats participated in the caucuses, more than 10 times the previous record for caucus participation in Texas.<sup>16</sup> Among the complaints were long lines, unclear rules, inadequate ballot materials, and, in a few cases, physical confrontations.<sup>17</sup> Though Clinton received more votes in the Democratic primary, Obama received more votes in the caucuses and appears to be entitled to more delegates from Texas than Clinton.<sup>18</sup>

Perhaps 2008 is aberrational because of the exceedingly close contest. But even if some of the problems from the 2008 nomination season are not likely to recur in 2012, a close election season could come again in a future election, and that potential has already spurred calls for reform.<sup>19</sup> It may be that the parties will reform controversial practices themselves, and that would be the best option to deal with these controversies. But if the parties do not, the states or Congress may try to step in.

Congress may be better situated to make changes than the states, as it can assess the nomination process nationally and impose a solution that avoids interstate competition issues. One Senate committee has already considered legislation to create a rotating regional primary system to end the frontloading problem.<sup>20</sup> But I also expect there will be more far-reaching proposals, such as those requiring that the parties choose their presidential nominees through primaries, perhaps conducted under a one

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<sup>14</sup> Richard L. Hasen, *Whatever Happened to “One Person, One Vote”? Why the Crazy Caucus and Primary Rules are Legal*, SLATE, Feb. 5, 2008, <http://www.slate.com/id/2183751/> (link).

<sup>15</sup> See Ratcliffe, *supra* note 3.

<sup>16</sup> See Karen Brooks and Emily Ramshaw, *Caucuses Cause for Contention: Record Turnout puts Spotlight on System that Some Say Needs Fixing*, DALLAS MORNING NEWS, March 6, 2008, at 1A, available at [http://www.dallasnews.com/sharedcontent/dws/news/politics/national/stories/DN-conventions\\_06pol.ART0.State.Edition2.460528c.html](http://www.dallasnews.com/sharedcontent/dws/news/politics/national/stories/DN-conventions_06pol.ART0.State.Edition2.460528c.html) (link).

<sup>17</sup> See *id.*; see also Marty Schladen, *Democratic Caucus Disputes Move to Next Phase*, GALVESTON COUNTY DAILY NEWS, Mar. 13, 2008, <http://galvestondailynews.com/story.lasso?ewcd=6379689919a8b7f8> (link); Editorial, *Clumsy Democratic Dance: Convolved Caucus Process Requires Quick Reform*, DALLAS MORNING NEWS, Mar. 12, 2008, at 10A, available at <http://www.dallasnews.com/sharedcontent/dws/dn/opinion/editorials/stories/031208dnedicaucuses.481cb2c7.html> (link).

<sup>18</sup> CNN Political Ticker, *Caucus Win Gives Obama More Texas Delegates than Clinton*, Mar. 11, 2008, <http://politicalticker.blogs.cnn.com/2008/03/11/caucus-win-gives-obama-more-texas-delegates-than-clinton/> (link).

<sup>19</sup> See, e.g., Editorial, *supra* note 17.

<sup>20</sup> See *Hearing on S. 1905*, *supra* note 1.

person, one vote standard. Under such a proposal, parties would still be able to allocate delegates however they see fit for other party purposes, such as approving the party platform. But the presidential selection choice would have to reflect the results of party primaries, weighing each state's primary voters' votes equally.<sup>21</sup> The remainder of this short Essay considers the constitutionality of such legislation.<sup>22</sup>

## II. PARTY AUTONOMY OBJECTIONS TO MANDATORY DIRECT AND EQUAL PRIMARIES FOR PRESIDENTIAL NOMINEES

Political parties objecting to proposed legislation establishing mandatory one person, one vote primaries in each state for choosing presidential party nominees would argue that such legislation violates the parties' First Amendment right of freedom of association. This is not the place to canvass all of the law related to regulation of the major political parties, which for some purposes are treated as state actors and for other purposes as private associations entitled to protection from government interference.<sup>23</sup> Here I focus specifically on whether such a mandatory primary system would violate the First Amendment.

Parties certainly can draw upon Supreme Court caselaw establishing that the First Amendment bars states from requiring that primaries be "open" or "closed" to nonparty members.<sup>24</sup> Moreover, the Court has held

<sup>21</sup> Parties would remain free to decide whether or not to have open or closed primaries. In an open primary, independents (or sometimes even voters from other parties) are allowed to vote in the primary. In closed primaries, only party members may vote.

<sup>22</sup> There are less radical measures that Congress might impose. For example, it might do away with caucuses but not impose a one person, one vote requirement on primaries. Or, Congress might use the carrot of federal primary financing to entice states to adhere to a certain schedule or set of rules. Cf. John Nichols, *The Mad-Money Primary Race*, THE NATION, Jan. 21, 2008, <http://www.thenation.com/doc/20080121/nichols> (link) ("Congress could promise federal grants to cover all expenses incurred by states that run primaries on a schedule proposed by the commission and accepted by the national parties. That incentive might also encourage states to do away with antidemocratic caucuses . . ."). Regardless of the specific measures imposed by Congress, the more control left to the states and parties by congressional legislation, the more likely the courts would view the proposed legislation as constitutional. See *infra* Part III.

<sup>23</sup> For a review, see LOWENSTEIN & HASEN, *supra* note 2, at ch. 9.

<sup>24</sup> See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (link) (holding a Connecticut law barring the Republican party from allowing independent voters to vote in party primaries unconstitutional); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (link) (holding a California law requiring political parties to allow any registered voters, regardless of political party, to vote in party primaries unconstitutional); cf. *Wash. State Grange v. Wash. State Republican Party*, 128 S.Ct. 1184 (2008) (link) (holding that a nonpartisan primary allowing candidates to state a "party preference" on the ballot is not facially unconstitutional).

Technically the Court has not considered the constitutionality of imposing an "open" primary against a party's consent. *Jones* concerned a "blanket" primary. 530 U.S. at 569. In open primaries, voters can vote for candidates of any party. See *id.* at 577–78 n.8. However, if a voter chooses to vote for one party's candidate for one office then that voter must also vote among that party's candidates for all other offices contested in that election. *Id.* at 576 n.6. The voter cannot vote for a candidate of one party for

that while a state can hold an open or closed primary as it wishes to choose delegates to the presidential nominating convention, the state cannot force the national political parties to seat those delegates at the convention.<sup>25</sup>

In addition, lower courts have rejected challenges to party rules on grounds they violate the usual rules we apply to democratic elections, such as the one person, one vote standard.<sup>26</sup> In *Bachur v. Democratic National Party*, the Fourth Circuit rejected a challenge to a DNC rule requiring proportional representation of women among delegates.<sup>27</sup> In so holding, the court reasoned that because primary votes are so removed from the ultimate choice of presidential party nominee, and because delegates perform a number of internal party functions besides choosing a nominee, rules applicable to general elections need not apply:

Bachur’s vote for delegates is some steps removed from a vote for an actual candidate for public office. Delegates for practical purposes constitute the National Party—they make its rules, adopt its platform, provide for its governance, as well as nominate candidates. However, standing between the individual voter and the eventual nomination of a candidate may be numerous party rules and procedures so that the will of the majority of the electorate expressing a presidential preference and the selection of delegates may be only partially translated into the actual nomination.<sup>28</sup>

Given these precedents, one might think that Congress would have a hard time convincing the courts that such legislation is indeed constitutional. However, dicta from three Supreme Court cases, one as recently as this term, gives hope to those who support the constitutionality of such a law. The dicta originated in *American Party of Texas v. White* in which the Court upheld a Texas requirement that minor parties choose their nominees by convention rather than through a primary.<sup>29</sup> The Court wrote: “It is too plain for argument . . . that the 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 party convention.”<sup>30</sup>

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one office and also vote for a candidate of another party for another office. *Id.* In other words, “the voter is limited to one party’s ballot.” *Id.* at 577–78 n.8 In the blanket primary discussed in *Jones*, voters could vote for candidates of any party for any office; they did not have to choose among candidates of the same party for all offices contested in that election. *Id.* at 576 n.6, 577–78 n.8.

<sup>25</sup> See *Democratic Party of the U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107 (1981) (link); see also *Cousins v. Wigoda*, 419 U.S. 477, 489–91 (1975) (link).

<sup>26</sup> See, e.g., *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 581–87 (D.C. Cir. 1975).

<sup>27</sup> *Bachur v. Democratic National Party*, 836 F.2d 837, 842–43 (4th Cir. 1987) (upholding Democratic party gender delegate rules).

<sup>28</sup> *Id.* at 841–42.

<sup>29</sup> 415 U.S. 767, 781 (1974) (link). *White* relied upon another case the Court decided the same day, *Storer v. Brown*, 415 U.S. 724 (1974) (link), which did not itself contain this statement.

<sup>30</sup> *White*, 415 U.S. at 781.

The “too plain for argument” language appears in two other Supreme Court cases as well, and it has now taken an interesting turn that could boost the chances of the congressional legislation this Essay considers.<sup>31</sup> In *California Democratic Party v. Jones*,<sup>32</sup> the Court cited the *White* language in noting that “[s]tates have a major role to play in structuring and monitoring the election process, including primaries.”<sup>33</sup> Then this term, in *New York State Board of Elections v. Lopez Torres*, Justice Scalia, speaking for seven Justices, explained that “when the State gives the party a role in the election process”:<sup>34</sup>

the State *acquires a legitimate governmental interest in assuring the fairness of the party’s nominating process*, enabling it to prescribe what that process must be. We have, for example, considered it to be “too plain for argument” that a State may prescribe party use of primaries or conventions to select nominees who appear on the general-election ballot.<sup>35</sup>

Significantly, the “too plain for argument” language appears to have shifted in meaning from *White* to *Lopez Torres*. In *White*, the concern seemed to be about the state’s power to require a primary or convention for each party (as the state chose) so as to assure a rational winnowing out of candidates.<sup>36</sup> By *Lopez Torres*, however, the Court appears to have embraced a “fairness” rationale for the use of primaries.<sup>37</sup>

The fairness rationale set out in *Lopez Torres* lends considerable support to the idea of a requirement of primaries conducted on a one person, one vote basis. Congress could decide that the usual democratic norm of one person, one vote is important enough to apply to all stages of the presidential electoral process. If even local government elections must comply with the one person, one vote rule,<sup>38</sup> why not the first stage of the presidential nominating process, which affects the entire nation?

The importance of the fairness rationale in *Lopez Torres* could be overstated, however. The discussion there was dicta not dispositive to the case’s outcome. And though the dicta may seem “too plain for argument” when not examined closely, the proposition that the government can overrule the parties in their choice of standard bearer may make for a difficult argument upon close examination.

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<sup>31</sup> Justice Scalia also quoted *White* in his dissent in *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 237 (1986) (link).

<sup>32</sup> 530 U.S. 567, 572 (2000) (link).

<sup>33</sup> *Id.*

<sup>34</sup> 128 S.Ct. 791, 797 (2008).

<sup>35</sup> *Id.* at 798 (citations omitted and emphasis added). The Court then noted that the power “is not without limits,” and cited to its holding in *Jones* barring a state from requiring a party to allow non-members to vote in its party primaries. *Id.*

<sup>36</sup> See *White*, 415 U.S. at 781–88.

<sup>37</sup> See *Lopez Torres*, 128 S.Ct. at 797–98.

<sup>38</sup> See *Avery v. Midland County*, 390 U.S. 474, 478–81 (1968) (link).

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Even if one accepts *White*, *Jones*, and *Lopez Torres* as authority for states to require direct, equal primaries on fairness grounds, it is not clear that Congress has the same power to do so in presidential elections. It is to this issue that I now turn.<sup>39</sup> Though Article I, Section 4 of the Constitution gives Congress the power to regulate the time, place and manner of congressional elections,<sup>40</sup> Article II gives Congress only the power to set the time for choosing presidential electors, leaving the “manner” for choosing electors in the hands of state legislatures.<sup>41</sup> Based primarily upon this textual difference, some have argued that Congress lacks the power to impose rules related to the presidential nominating process.<sup>42</sup>

The textual argument may not carry the day. No doubt, Congress’s power to regulate presidential elections is not coextensive with its power to regulate Congressional elections. For example, Congress could not pass a law barring states from using a “winner-take-all” system for choosing presidential electors.<sup>43</sup> But Article II of the Constitution does grant Congress the power to set a uniform national date for the general election for president, and that power to set the time for the general election should extend (under the Necessary and Proper Clause) to the power to set the time for the nomination of presidential candidates as well.<sup>44</sup> It is a harder question whether it extends to the power to set the form of the presidential primaries over the objections of the states.

Justice Scalia, relying on the Necessary and Proper Clause, concluded that Congress had the power at least to set the time for primaries in a 1981 article written before he joined the bench: “Since . . . Congress has explicit authority under Article II . . . to [determine the time for choosing electors], Congress must have at least the authority to specify the *dates* of primaries and even of state and national nominating conventions.”<sup>45</sup> Justice Scalia also relied upon the Supreme Court precedent of *United States v. Classic*,<sup>46</sup>

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<sup>39</sup> The next few paragraphs draw upon my testimony to the Senate Committee on Rules and Administration, *supra* note 1.

<sup>40</sup> U.S. CONST. art. I, § 4.

<sup>41</sup> See U.S. CONST. art. II, § 1.

<sup>42</sup> The most sustained argument along these lines in the context of anti-frontloading legislation is William G. Mayer and Andrew W. Busch, *Can the Federal Government Reform the Presidential Nomination Process?*, 3 ELECTION L.J. 613 (2004).

<sup>43</sup> See Dan T. Coenen and Edward J. Larson, *Congressional Power over Presidential Elections: Lessons From the Past and Reforms for the Future*, 43 WILLIAM & MARY L. REV. 851, 903–04 (2002).

<sup>44</sup> Antonin Scalia, *The Legal Framework for Reform*, 4 COMMONSENSE 40, 47 (1981).

<sup>45</sup> *Id.* (original emphasis). He added the caveat that he was not addressing factors “such as states’ powers and the parties’ First Amendment rights” that may limit the exercise of this authority. *Id.*

<sup>46</sup> 313 U.S. 299, 317 (1941) (link).

which used similar reasoning under Article I to hold that Congress could regulate Congressional primaries as well as general elections for Congress.<sup>47</sup>

Other Supreme Court caselaw bolsters the conclusion that Congress has the power to set the time for presidential primaries and perhaps to do much more. In *Burroughs v. United States*,<sup>48</sup> the Court “squarely rejected”<sup>49</sup> the narrow textualist reading of Article II. The Court held that Congress had the power under Article II to regulate corrupt practices that could affect presidential elections. In *Buckley v. Valeo*,<sup>50</sup> the Court upheld Congress’s power to regulate campaign financing in both congressional and presidential elections. And in *Oregon v. Mitchell*,<sup>51</sup> the Court upheld Congress’s power to change the voting age for President to 18. Justice Black cast the decisive vote on the issue, concluding that “[i]t cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections.”<sup>52</sup>

Professors Mayer and Busch have criticized Justice Black’s opinion as a “travesty of legal reasoning,”<sup>53</sup> given the Constitution’s textual differentiation between Congressional power over congressional and presidential elections. But regardless of the merits of the legal analysis, the Justice’s opinion (like the majority opinions in *Burroughs*, *Classic*, and *Buckley*) remains good law unless overruled by the Court.

Indeed, a ruling striking down a congressionally imposed primary system as exceeding Congress’s Article II power would call into question a great many congressional laws that regulate presidential elections, from campaign finance, to election administration (including aspects of the National Voter Registration Act and Help America Vote Act), to the 18-year-old presidential voting age. That is not a step the Court would take lightly.

Nonetheless, a law establishing mandatory, equal, and direct primaries for President would go much closer to setting the rules for choosing presidential electors than these other laws do, and might infringe upon the rights expressly granted to the states in Article II. Such a law would pose a difficult question for the courts: whether Congress, in order to insure fairness and uniformity in the presidential nominating process, could go so far as to impose such a system over the objections of states interested in maintaining their current levels of control over party primaries or caucuses.

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<sup>47</sup> See Scalia, *supra* note 43, at 47; see also *Classic*, 313 U.S. at 317.

<sup>48</sup> 290 U.S. 534, 545 (1934) (link).

<sup>49</sup> James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 984 (1997).

<sup>50</sup> 424 U.S. 1 (1976) (link).

<sup>51</sup> 400 U.S. 112 (1970) (link).

<sup>52</sup> *Id.* at 124 (opn. of Black, J.). See also Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 YALE L. & POL’Y REV. 331, 373–77 (relying upon *Burroughs*, *Classic*, and *Mitchell* in support of argument for Congressional power to impose timing of presidential primary system upon the states).

<sup>53</sup> Mayer and Busch, *supra* note 42, at 617.

How might the Supreme Court resolve this conflict? Consistent with the *Lopez Torres* fairness dicta,<sup>54</sup> it could hold that Congress has the power to make certain changes to the presidential nomination system under its power to enforce the Fourteenth Amendment's equal protection clause,<sup>55</sup> and that this congressional power supersedes Article II when states act in ways that undermine political equality.<sup>56</sup> The one person, one vote cases are grounded in the Equal Protection Clause,<sup>57</sup> and a congressional determination that equality in presidential elections requires imposition of the same rule in presidential party nominating contests would merit serious consideration by the Court.

#### CONCLUSION

Concerns about the fairness and administrability of the 2008 presidential nominating process will no doubt spur serious discussions about reform. These discussions will take place in states and within each political party. Congress may also seek to play a role. Congress's constitutional power to act in this area, however, is uncertain, but that uncertainty may not be fatal. Indeed, congressional threats to legislate change could be the spur that gets the parties and the states to change their system to less controversial ones that conform more to the standards we apply to our general elections.

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<sup>54</sup> N.Y. State Bd. of Elections v. Lopez Torres, 128 S.Ct. 791, 797–98 (2008).

<sup>55</sup> For a consideration of Congress's power to act under its Fourteenth Amendment enforcement powers, see Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act after Tennessee v. Lane*, 66 OHIO ST. L.J. 177 (2005) (link).

<sup>56</sup> See Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535 (2001) (link) (discussing interaction of Article II and the Fourteenth Amendment).

<sup>57</sup> See *Avery*, 390 U.S. at 478–81.