

WAS THE PROCESS TO BLAME? WHY HILLARY CLINTON AND DONALD TRUMP WON THEIR PARTIES' PRESIDENTIAL NOMINATIONS

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Given the widespread dissatisfaction with both major-party nominees in 2016, it is natural to ask if the American presidential nomination process is to blame for producing two such candidates as Donald Trump and Hillary Clinton. But when the dynamics of these two nomination races are examined, there is little evidence that the outcomes would have been affected by any plausible changes in the process. Hillary Clinton did gain an advantage from the Democratic rule that awards automatic delegate status to elected and party officials, but she also won a clear majority of the votes cast by ordinary voters in presidential primaries and of the delegates selected through primaries and caucuses. And though there is evidence that the leadership of the Democratic National Committee favored her nomination and wanted to aid her candidacy, there is little that the committee actually did—or could do—to make such an outcome more likely. On the Republican side, Donald Trump did not win because the Republican process was, in effect, taken over by independents. Trump won a solid plurality of the votes cast by primary voters who identified as Republicans. A different set of delegate allocation rules and a large contingent of Republican superdelegates might have slowed Trump’s road to the nomination, but, given his dominance of the primaries, probably would not have changed the final result. The only rules changes that might have aided both Clinton’s and Trump’s opponents were if more states had used a caucus-convention system instead of a primary to select their national convention delegates. Both Bernie Sanders and Ted Cruz fared substantially better in caucuses than in primaries. But given ample evidence that caucuses have a significantly smaller and less representative turnout than primaries, it is unlikely that either party—or their rank-and-file members—would have endorsed a substantially greater use of caucuses.

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INTRODUCTION

The 2016 presidential election presented most Americans with a choice they would have preferred not to make. Offering cynical comments about American politicians has long been one of our national pastimes, yet there is ample evidence that in 2016, the faceoff between Donald Trump and Hillary Clinton provoked a level of dissatisfaction far higher than usual.

Consider, for example, the data in Table 1. Though the 2012 presidential election has generally not been portrayed as an epic battle between two political titans, fully 65% of the respondents in the National Election Pool exit poll said that they “strongly favor[ed]” the candidate for whom they voted.¹ In 2016, by contrast, just 41% of the voters strongly favored their candidate.² Another 32% said they liked their candidate “but with reservations,” and 25% would only say that they disliked his or her opponent even more.³

TABLE 1. STRENGTH OF SUPPORT FOR PREFERRED PRESIDENTIAL CANDIDATE (IN PERCENTAGES)⁴

	2012	2016
Strongly favor my candidate	65	41
Like my candidate but with reservations	23	32
Dislike the other candidates	10	25

Even more striking, because they cover a longer period of time, are the results in Table 2, which shows the favorability rating of every major-party presidential nominee since 1992, as measured just before Election Day.⁵ In every election before 2016, one candidate—and sometimes both—was viewed favorably by at least 50% of the

¹ *Infra* Table 1.

² *Infra* Table 1.

³ *Infra* Table 1.

⁴ Results come from the National Election Pool exit poll, as reported by NBC. See *Decision 2012: Presidential Election Results*, NBC NEWS, <http://elections.nbcnews.com/ns/politics/2012/all/president/#exitPoll> (last visited Aug. 7, 2018); *Decision 2016: Presidential Results*, NBC NEWS, <https://www.nbcnews.com/politics/2016-election/president> (last visited Aug. 7, 2018).

⁵ *Infra* Table 2.

American adult population.⁶ There is no precedent for what happened in 2016, when solid majorities held unfavorable opinions of *both* candidates. Only 38% of the public gave a favorable rating to Donald Trump, as against 60% unfavorable.⁷ The numbers for Hillary Clinton, the more popular candidate, were only slightly less dismal: 41% favorable, 55% unfavorable.⁸

TABLE 2. FAVORABILITY RATINGS OF MAJOR-PARTY PRESIDENTIAL NOMINEES ON THE EVE OF THE ELECTION, 1992–2016
(IN PERCENTAGES)⁹

Year	Democratic Candidates		Republican Candidates	
	Favorable	Unfavorable	Favorable	Unfavorable
2016	41	55	38	60
2012	55	42	46	47
2008	62	34	50	44
2004	52	43	51	46
2000	56	39	55	39
1996	56	39	50	42
1992	51	44	46	50

So the most important question we ought to be asking about the 2016 election is how and why the effective range of choice for most Americans was limited to these two particular individuals. Why, that is to say, did the major American parties decide to nominate perhaps the two most unpopular politicians in America to be their presidential standard-bearers? This Article will not provide a comprehensive answer to this question. But it will address one category of explanations, a category that is central to any serious thinking we might do about the future of presidential nominations. The set of explanations to which I refer are those that would blame—or credit—Clinton and Trump’s nominations to the nomination process itself: the rules and procedures that govern the selection and behavior of national convention delegates.

⁶ See *infra* Table 2.

⁷ *Infra* Table 2.

⁸ *Infra* Table 2.

⁹ For polling data, see *The iPoll Databank*, ROPER CTR., <https://ropercenter.cornell.edu/CFIDE/cf/action/home/index.cfm> (last visited July 19, 2018) (collecting data from Gallup Organization polls conducted on Nov. 1–2, 1992; Nov. 3–4, 1996; Nov. 4–5, 2000; Oct. 29–31, 2004; Oct. 31–Nov. 2, 2008; Nov. 1–4, 2012; and the ABC News/Washington Post poll conducted on Nov. 2–5, 2016).

The notion that the various features and characteristics of the nomination process have important effects on the types of people we nominate is, of course, not a new idea. As James Ceaser showed almost four decades ago, American thinking about presidential selection has always assumed that the process we use to nominate and elect our presidents would encourage some types of behavior among presidential aspirants and discourage other types and thus have important consequences for the specific abilities our presidents are likely to possess, the kinds of executive leadership they are likely to exercise, and, perhaps most importantly, the kinds of people we are likely to nominate.¹⁰

Skipping over most of the 200 or so years that Professor Ceaser covers so ably in his book, we also know that, starting in 1968, the Democratic Party created a succession of so-called party reform commissions. The first and most influential of these commissions, the McGovern-Fraser Commission, seems to have proceeded on the assumption that its members were motivated entirely by the desire to apply universal principles of right and justice to the nomination process. But it has long been clear to most analysts that the Commission's new rules were designed to make it more likely that the Democrats would nominate certain types of candidates—such as George McGovern—and less likely that other types of candidates would prevail—such as Hubert Humphrey.¹¹ Subsequent commissions—the Hunt Commission is perhaps the best example—were often driven by the conviction that “reforming the reforms” would help the Democrats avoid the kind of one-sided losses they had suffered in 1972 and 1980.¹² Not until after the 1984 election (also a one-sided loss) did the Democrats finally decide that, whatever it was that ailed the party's presidential tickets, it would not be cured by further changes in the party rules. Or, as one of the party's academic advisors memorably summed up this view, “The general consensus is that the party has got to stop mucking around with the nominating process.”¹³

¹⁰ See JAMES W. CEASER, *PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT* (1979).

¹¹ See DAVID E. PRICE, *BRINGING BACK THE PARTIES* 201–05 (1984) (discussing how the McGovern-Fraser reforms reduced the power of party elites). See generally BYRON E. SHAFER, *QUIET REVOLUTION: THE STRUGGLE FOR THE DEMOCRATIC PARTY AND THE SHAPING OF POST-REFORM POLITICS* (1983) (discussing how the McGovern-Fraser Commission helped bring about a change in the nature of the Democratic Party's leadership).

¹² JAMES W. CEASER, *REFORMING THE REFORMS: A CRITICAL ANALYSIS OF THE PRESIDENTIAL SELECTION PROCESS* (1982).

¹³ Rhodes Cook, *Many Democrats Cool to Redoing Party Rules*, 1985 CQ WKLY. 1687 (quoting Thomas E. Mann).

In more recent years, the Democrats' love affair with rules reform appears to have been picked up by the Republicans, who have flirted with—and occasionally adopted—various kinds of rules changes in almost every election cycle since 1996.¹⁴

Given the general dissatisfaction with both Trump and Clinton, it is hard not to analyze the 2016 nominations from this same perspective. Was the process to blame for the choice voters faced? Would a change in the rules have produced a different outcome?

I

THE DEMOCRATS

Let me start with Hillary Clinton and the Democrats. There are an enormous number of specific rules governing the presidential nomination process, some set down by the national parties and others left to the discretion of state parties and state legislatures; the federal government and courts also occasionally stick their hands into the mix.¹⁵ But based on the large existing literature on the nomination process, the controversies that developed during the 2016 nomination contest, and my own research on the 2016 elections, I have selected three specific rules and controversies for close examination: (1) the superdelegate rule, (2) the various decisions and interventions made by the Democratic National Committee (DNC), and (3) the states' decisions to use a primary or a caucus for selecting their national convention delegates.

A. Superdelegates

The easiest issue to dispose of is the claim that Hillary Clinton derived a large, unfair advantage because of all the support she received from the Democratic superdelegates.¹⁶ When the Democratic

¹⁴ See, e.g., ELAINE C. KAMARCK, *PRIMARY POLITICS: HOW PRESIDENTIAL CANDIDATES HAVE SHAPED THE MODERN NOMINATION SYSTEM* 184–85 (2009) (discussing how the 2008 Republican convention gave the Republican National Committee new powers to modify party rules in between national conventions); BARBARA NORRANDER, *THE IMPERFECT PRIMARY: ODDITIES, BIASES, AND STRENGTHS OF U.S. PRESIDENTIAL NOMINATION POLITICS* 98–100 (2010) (discussing how the 2000 Republican convention almost adopted a plan that would have organized the primary and caucus calendar by grouping the states by population size); Andrew E. Busch, *New Features of the 2000 Presidential Nominating Process: Republican Reforms, Front-Loading's Second Wind, and Early Voting*, in *IN PURSUIT OF THE WHITE HOUSE 2000: HOW WE CHOOSE OUR PRESIDENTIAL NOMINEES* 57, 59–67 (William G. Mayer ed., 2000) (discussing the Republican reforms enacted in 1996).

¹⁵ See WILLIAM G. MAYER & ANDREW E. BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* 125–52 (2004) (describing these sources of authority).

¹⁶ See, e.g., Amanda Girard, *5 Times Debbie Wasserman Schultz Violated DNC Rules and Stacked the Deck in Favor of Clinton*, U.S. UNCUT (Dec. 20, 2015), <http://usuncut.com/>

Party rewrote its delegate selection rules in the aftermath of its bitter 1968 convention, one conspicuous consequence was a sharp decline in the number of Democratic Party leaders, such as governors and senators, who served as convention delegates.¹⁷ In reaction to this development, the party decided in 1982 to give automatic delegate status to certain types of elected officials and party leaders.¹⁸ These ex officio delegates are referred to in party rules as unpledged party leaders and elected officials but, in press accounts and politico-speak, are usually called superdelegates.¹⁹ Superdelegates are not chosen in the primaries and caucuses, and at least up through the 2016 election cycle, they were not bound by the primary or caucus results in their home states and districts.²⁰ Since 1996, superdelegate status has been accorded to all members of the DNC, all Democratic members of the U.S. House and Senate, all Democratic governors, and a handful of other “distinguished party leaders.”²¹ This meant that there were 712 superdelegates in 2016, or about 15% of the convention total.²²

politics/debbie-wasserman-schultz-hillary-clinton [https://web.archive.org/web/20170220115049/http://usuncut.com/politics/debbie-wasserman-schultz-hillary-clinton/] (suggesting this interpretation of events); Branko Marcetic, *The Secret History of Superdelegates*, IN THESE TIMES (May 16, 2016), http://inthesetimes.com/features/superdelegates_bernie_sanders_hillary_clinton.html (same).

¹⁷ William G. Mayer, *Superdelegates: Reforming the Reforms Revisited*, in REFORMING THE PRESIDENTIAL NOMINATION PROCESS 85, 88 (Steven S. Smith & Melanie J. Springer eds., 2009).

¹⁸ *Id.* at 90–92.

¹⁹ For a fuller discussion of the why and wherefores of superdelegates, see *id.* at 85–104.

²⁰ Several days before the start of the 2016 Democratic National Convention, the convention rules committee approved a compromise resolution creating a “unity commission” that would, among other things, recommend that “[m]embers of Congress, Governors, and distinguished party leaders remain unpledged and free to support their nominee of choice,” but that all remaining superdelegates “be required to cast their vote . . . for candidates in proportion to the vote received for each candidate in their state.” David Weigel, *Democrats Vote to Bind Most Superdelegates to State Primary Results*, WASH. POST (July 23, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/07/23/democrats-vote-to-bind-most-superdelegates-to-state-primary-results/?noredirect=on&utm_term=.fdc0650788d6. There is no guarantee, however, that the 2016 convention’s recommendation will actually be part of the rules for the 2020 nomination race. The 1988 convention rules committee voted to sharply reduce the number of superdelegates, only to have that recommendation ignored by the Democratic National Committee (DNC). See Rhodes Cook, *Changes Will Affect ‘92 Process: Pressed by Jackson Demands, Dukakis Yields on Party Rules*, 1998 CQ WKLY. 1799 (discussing the decision to reduce the number of superdelegates); Andrew Rosenthal, *Democrats Vote to Rescind Part of Dukakis-Jackson Pact*, N.Y. TIMES, Sept. 29, 1989, at A12 (reporting on the rescission of the 1988 agreement).

²¹ Mayer, *supra* note 17, at 86, 93.

²² William G. Mayer, *The Nominations: The Road to a Much-Disliked General Election*, in THE ELECTIONS OF 2016, at 29, 36 (Michael Nelson ed., 2018).

Since Clinton had a long history of dutiful service to the Democratic Party and Bernie Sanders had only joined the party after deciding to seek its presidential nomination, it soon became clear that the superdelegates overwhelmingly sided with Clinton and thus gave her a large lead in the delegate count before a single primary or caucus had taken place. As of November 2015, according to a count by the Associated Press, 359 superdelegates were publicly committed to Clinton; just eight said they would vote for Sanders.²³

But the superdelegate numbers do not explain why Clinton won the 2016 Democratic nomination. She won because most ordinary, rank-and-file Democrats supported her candidacy and expressed that preference in the primaries and caucuses. In the end, she won twenty-nine of the fifty-one state primaries and caucuses held in 2016, including victories in each of the nine most populous states.²⁴ In the primaries, which were used to select 86% of the non-superdelegates to the 2016 Democratic convention, Clinton won 56% of the vote to Sanders's 43%.²⁵ Had there been no superdelegate provision in the Democratic Party rules, Clinton would still have won a solid majority of the convention delegates. The consensus of the various delegate counts is that Clinton won 2205 non-superdelegates to just 1846 for Sanders, giving her a 54% to 46% advantage.²⁶

Did the superdelegates provide Clinton with an important psychological boost, suggesting to potential Sanders supporters that their candidate's task was hopeless and thus pushing undecided voters to

²³ See Domenico Montanaro, *Clinton Has a 45-to-1 'Superdelegate' Advantage over Sanders*, NPR (Nov. 13, 2015, 7:05 AM), <http://www.npr.org/2015/11/13/455812702/clinton-had-45-to-1-superdelegate-advantage-over-sanders> (discussing the results of the AP survey). This is the last count of superdelegate commitments I have been able to find prior to the start of the 2016 primary and caucus season.

²⁴ For a full listing of the 2016 Democratic presidential primary results, see Mayer, *supra* note 22, at 42–43. The numbers given here do not include the Nebraska and Washington primaries, both of which Clinton won, because they were non-binding. Both states used caucuses to select their convention delegates.

²⁵ *Id.* Again, these numbers exclude Nebraska and Washington, as well as primaries and caucuses held by such non-state entities such as Guam, Puerto Rico, and Democrats Abroad.

²⁶ See Richard E. Berg-Andersson, *Election 2016: Presidential Primaries, Caucuses, and Conventions*, THE GREEN PAPERS, www.thegreenpapers.com/P16/ (last visited July 23, 2018); *2016 Democratic Presidential Nomination*, 270TOWIN, www.270towin.com/2016-democratic-nomination (last visited July 23, 2018); *Election 2016 – Democratic Delegate Count*, REALCLEARPOLITICS, www.realclearpolitics.com/epolls/2016/president/democratic_delegate_count.html (last visited July 23, 2018); *Election 2016: Democratic Party*, CNN *Delegate Estimate*, CNN, www.cnn.com/election/primaries/parties/democrat (last visited July 23, 2018); *Who's Winning the Presidential Delegate Count?*, BLOOMBERG, www.bloomberg.com/politics/graphics/2016-delegate-tracker (last updated July 25, 2016).

jump on the Clinton bandwagon? That was certainly the belief of some pro-Sanders commentators:

Since its launch, a specter has haunted Bernie Sanders' run for the Democratic nomination. . . . [I]t has been the so-called superdelegates—the 712 Democratic Party insiders who are free to vote at the nominating convention for the candidate of their choosing. The corporate media's early inclusion of the superdelegates in the delegate count created the impression of an inevitable Clinton nomination. . . . By February 20, when only three states had held nominating contests, such reporting had conferred on the Clinton campaign an aura of insurmountability, leading some voters to question whether their votes truly mattered.²⁷

There is, however, little hard evidence to support this claim. A recent book by Marty Cohen and his collaborators argues that the support of party leaders can be a significant advantage to candidates in presidential nomination races.²⁸ But the key variable in the Cohen-Karol-Noel-Zaller model is *endorsements*.²⁹ There is no requirement that the endorsers become delegates, automatically or otherwise.³⁰ Their model was developed based upon data including the Democratic nomination contest of 1980 and the Republican contests of 1980, 1988, 1996, and 2000—all of which were held in the absence of any superdelegate provision.³¹

Most recent Democratic nomination contests have been notably unkind to candidates who had the most superdelegate support before the start of the primary and caucus season. In 2004, a survey conducted by CBS News in the week before the Iowa caucuses found that Howard Dean had the support of 137 superdelegates, as compared to just 74 for Richard Gephardt, his nearest competitor.³² In third place, with 64 superdelegates, was John Kerry; but it was Kerry who won the nomination.³³ Similarly, Hillary Clinton started the 2008 primaries with a solid lead among superdelegates, but the nomination went to Barack Obama.³⁴

²⁷ Marcetic, *supra* note 16.

²⁸ MARTY COHEN ET AL., *THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM* (2008).

²⁹ *See id.* at 174–75 (detailing the use of public endorsements as a measure of the support a candidate enjoys from party insiders).

³⁰ *See id.* at 180 (noting that endorsers can include local officeholders and nonpolitical celebrities).

³¹ *See id.* at 174–77.

³² Joel Arak, *Dean Leads 'Superdelegate' Count*, CBS NEWS (Jan. 17, 2004, 1:59 PM), <http://www.cbsnews.com/news/dean-leads-superdelegate-count/>.

³³ *Id.*

³⁴ For a detailed count of superdelegate commitments at two early points in the 2008 race, see Megan Thee, *Leading Among the Unpledged*, N.Y. TIMES, Jan. 24, 2008, at A21;

B. *Actions by the Democratic National Committee*

Article Five, Section 4 of the Democratic Party Charter requires that in the “preparation and conduct of the presidential nomination process,” the chairperson of the DNC must “exercise impartiality and evenhandedness as between the presidential candidates and campaigns.”³⁵ The Charter also charges the chair with making sure that “the national officers and staff” of the DNC maintain “impartiality and evenhandedness.”³⁶ The 2016 nomination race was barely underway, however, when Bernie Sanders, the other early candidates, and many other Democrats accused DNC chair Debbie Wasserman Schultz of blatantly favoring the candidacy of Hillary Clinton. These complaints reached a crescendo in the days immediately before the Democratic convention, when Wikileaks released the text of some 20,000 emails sent by a small number of top DNC officials.³⁷ Over the next few days, the Internet was filled with stories carrying such headlines as “Leaked DNC Emails Confirm Democrats Rigged Primary” and “DNC Undermined Democracy.”³⁸ The furor attracted such attention—at a time when the party was struggling to unite for the general election—that Wasserman Schultz was finally compelled to resign.³⁹

Now that the immediate controversy has passed and fewer axes want grinding, a dispassionate reading of these emails would affirm, I believe, two major conclusions. First, the DNC chairperson and her staff were not impartial. They were clearly rooting for Hillary Clinton

Megan Thee, *Superdelegates for Clinton (Undecided’s No. 1)*, N.Y. TIMES, Nov. 8, 2007, at A28. The former set of numbers, based on a survey conducted during the week after the New Hampshire primary, showed Clinton with the support of 202 superdelegates to 96 for Barack Obama, and 33 for John Edwards. Thee, *Leading Among the Unpledged*, *supra* at A21.

³⁵ DEMOCRATIC NAT’L COMM., *THE CHARTER & THE BYLAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES* art. 5, § 4, at 6 (2018), https://s3.amazonaws.com/uploads.democrats.org/DNC_Charter_Bylaws_3.12.18.pdf.

³⁶ *Id.*

³⁷ See Andrea Peterson, *Wikileaks Posts Nearly 20,000 Hacked DNC Emails Online*, WASH. POST: THE SWITCH (July 22, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/07/22/wikileaks-posts-nearly-20000-hacked-dnc-emails-online/?utm_term=.7fc330fb1df5 (reporting on the release of the emails).

³⁸ See Tyler Durden, *Leaked DNC Emails Confirm Democrats Rigged Primary, Reveal Extensive Media Collusion*, ZEROHEDGE (July 24, 2016), <http://www.zerohedge.com/news/2016-07-23/leaked-dnc-emails-confirm-democrats-rigged-primary-reveal-extensive-media-collusion> (describing the emails as revealing a DNC plot to weaken Sanders’s candidacy in favor of Clinton’s); Michael Sainato, Opinion, *Wikileaks Proves Primary Was Rigged: DNC Undermined Democracy*, OBSERVER (July 22, 2016, 2:00 PM), www.observer.com/2016/07/wikileaks-proves-primary-was-rigged-dnc-undermined-democracy (describing the DNC as “exhibit[ing] resentful disdain” toward Sanders in the emails).

³⁹ Jonathan Martin & Alan Rappeport, *Leaks Bring Down a Democratic Leader*, N.Y. TIMES, July 25, 2016, at A1.

and trying in various ways to aid her candidacy. Second, with perhaps one important exception, nothing that the DNC did affected the outcome of the race. Under the rules of the contemporary nomination process, the national committees really cannot do much to influence the results.⁴⁰

Many left-wing commentators were particularly outraged by an email in which the DNC's chief financial officer suggested that they "get someone to ask" Sanders whether he believed in God.⁴¹ "I think I read he is an atheist. This could make several points difference with my peeps [in the upcoming Kentucky and West Virginia primaries]. My Southern Baptist peeps would draw a big difference between a Jew and an atheist."⁴² Planting an article designed to hurt one of the candidates clearly cannot be construed as an act of impartiality. It is equally revealing that no one at the DNC who received this email seems to have responded by saying that the suggestion was improper or a violation of the Democratic Charter. Similarly non-neutral was another email in which the DNC's national press secretary proposed "pushing a narrative that Sanders 'never ever had his act together, that his campaign was a mess.'"⁴³ But impartial or not, the bottom line is that *neither suggestion was ever acted upon*. I am also skeptical that either story would have made much difference even if it had made its way into the major media.

Other emails make clear that by the spring of 2016—almost all of the offending emails were sent in late April or May—many DNC officials disliked Sanders and wished he would end his campaign.⁴⁴ In late April, Wasserman Schultz complained that Sanders had "no understanding of what we do."⁴⁵ In mid-May, she called Sanders's campaign manager a "damn liar."⁴⁶ The DNC's communications director reputedly mocked Sanders for believing that Clinton had agreed to an additional debate in advance of the California primary (the actual email is

⁴⁰ I have not, of course, read all 20,000 emails. The following analysis is based on the commentary the emails provoked in contemporary media. A nice summary of the more controversial emails has been provided by Aaron Blake, *Here Are the Latest, Most Damaging Things in the DNC's Leaked Emails*, WASH. POST (July 25, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/07/24/here-are-the-latest-most-damaging-things-in-the-dncs-leaked-emails/?utm_term=.3bf74e92c884.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See id.*

⁴⁴ *See id.* (noting that the emails made "clear that there was plenty of cheerleading for the race to simply be over—for Sanders to throw in the towel so that Clinton could be named the presumptive nominee").

⁴⁵ *Id.*

⁴⁶ *See id.* (referencing his "scummy" defense of the conduct of Sanders supporters at the Nevada state Democratic convention).

a bit ambiguous).⁴⁷ Given all the criticisms that Sanders and his campaign staff had directed at the DNC, this animus is hardly surprising. In any event, until the emails were released in late July, none of these comments were ever made public; they were thus incapable of affecting the primaries and caucuses.

One possible exception to this generalization, the one thing the DNC did that at least had the potential to change the outcome of the 2016 Democratic race, was the way it chose to organize and structure the candidate debates. In previous nomination races, the DNC had sponsored or sanctioned a limited number of debates, but made no effort to prevent other entities—media organizations, interest groups, state parties—from holding additional debates.⁴⁸ In the 2008 election cycle, for example, the DNC had organized just six debates (one of which was later canceled),⁴⁹ but a total of twenty-five debates were eventually held.⁵⁰ This time around, however, the DNC made a more aggressive attempt to rein in the number of debates. In May 2015, the DNC announced that it was sanctioning six debates, but also asked

⁴⁷ See *id.* In response to a statement by the Sanders campaign that Clinton had agreed to another debate, one DNC official responded, “lol” (laughing out loud). *Id.* In my judgment, this can be read either as a derisive comment on the naiveté of the Sanders campaign or as a cynical characterization of the Clinton campaign. It was probably a bit of both.

⁴⁸ See Maggie Haberman, *Two D.N.C. Officials Call for Adding More Debates*, N.Y. TIMES (Sept. 9, 2015, 9:22 PM), <https://www.nytimes.com/politics/first-draft/2015/09/09/two-d-n-c-officials-call-for-adding-more-debates/> (noting that in past election cycles, Democratic candidates took part “in many unsanctioned debates, without fear of exclusion from the sanctioned ones”).

⁴⁹ Press Release, Democratic Nat’l Comm., DNC Announces Dates, Media Sponsors and Locations for Sanctioned Debates (May 16, 2007), <http://p2008.org/primdeb08/dnc040507pr.html> (detailing the DNC sanctioned debates).

⁵⁰ It is surprisingly difficult to get an exact count of the number of candidate debates held in past presidential nomination races, partly because some debates are aimed at a specialized audience and therefore attract little media attention and partly because of the difficulty of defining just what constitutes a “debate.” Most sources apparently try to distinguish “debates,” where the candidates appear on the same stage at the same time and are thus capable of interacting with one another, from “forums,” where the candidates appear separately at the same venue and thus have a much more limited ability to respond to or challenge one another’s answers. But some events resolutely defy easy categorization. How, for example, should one classify the “mashup debate” that Yahoo produced in mid-September 2007? The candidates were interviewed separately but asked the same questions, and their answers were then intercut so that a viewer could compare how each candidate had dealt with that question. See Sarah Lai Stirland, *Yahoo’s Presidential ‘Mashup Debate’ Won’t Support Mashups*, WIRED (Sept. 12, 2007, 2:00 AM), <https://www.wired.com/2007/09/yahoos-presidential-mashup-debate-wont-support-mashups/> (describing the debate). The bottom line, in any event, is that most sources say the Democratic candidates had twenty-five or twenty-six debates in 2007–2008. See, e.g., Alex Seitz-Wald, *Liberal Group Latest to Call for More Democratic Debates*, MSNBC (June 8, 2015, 11:34 AM), <http://www.msnbc.com/msnbc/liberal-group-latest-call-more-democratic-debates> (reporting the latter figure).

both candidates and media organizations to sign an “exclusivity pledge”: “Any candidate or debate sponsor wishing to participate in DNC debates, must agree to participate exclusively in the DNC-sanctioned process. Any violation would result in forfeiture of the ability to participate in the remainder of the debate process.”⁵¹ The Clinton and Sanders campaigns later agreed to add three more debates to the schedule, but the final total of nine Democratic debates fell well short of the number the party had held in 2008 or the number the Republicans held in 2008 and 2012.

The DNC’s action was highly controversial. When Wasserman Schultz spoke at a New Hampshire Democratic Party convention in September 2015, she was “repeatedly interrupted” by chants of “we want debates.”⁵² Martin O’Malley was especially harsh in his criticisms, telling the attendees at the summer meeting of the DNC, “This sort of rigged process has never been attempted before. . . . We are the Democratic Party, not the undemocratic party.”⁵³ Other major party figures who called for more debates included former DNC chair Howard Dean, House Minority Leader Nancy Pelosi, and two vice chairs of the DNC.⁵⁴

In addition to the limited number, two other features of the Democratic debates attracted criticism. First, the debates that did take place often seemed scheduled so as to attract the smallest possible viewing audience. Two were held on Saturday evenings, including one that aired six days before Christmas; another took place on a Sunday

⁵¹ Jose A. DelReal, *Here’s What We Know About the Democratic Primary Debates*, WASH. POST (May 5, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/05/05/heres-what-we-know-about-the-democratic-primary-debates/?utm_term=.47cf34028154 (quoting Press Release, Democratic Nat’l Comm., DNC to Sanction Six Presidential Primary Debates (May 5, 2015), <https://www.democrats.org/post/dnc-to-sanction-six-presidential-primary-debates>).

⁵² Chris Cillizza, *Democrats Have a Growing Debate Problem on Their Hands*, WASH. POST (Sept. 21, 2015), https://www.washingtonpost.com/politics/democrats-have-a-growing-debate-problem-on-their-hands/2015/09/20/e3d8194c-5fc9-11e5-b38e-06883aacba64_story.html?noredirect=on&utm_term=.3a14e9de40f0.

⁵³ Philip Rucker et al., *Democratic Challengers Launch Attacks Against Clinton, Party Leadership*, WASH. POST (Aug. 28, 2015), https://www.washingtonpost.com/politics/democratic-challengers-launch-attacks-against-clinton-party-leadership/2015/08/28/722bclc6-4d9b-11e5-84df-923b3ef1a64b_story.html?utm_term=.d056c5a9359f.

⁵⁴ See Haberman, *supra* note 48; Greg Sargent, *Does the Sanders Surge Pose a Serious Threat to Hillary? Howard Dean Weighs In*, WASH. POST: THE PLUM LINE (Sept. 8, 2015), https://www.washingtonpost.com/blogs/plum-line/wp/2015/09/08/does-the-sanders-surge-pose-a-serious-threat-to-hillary-howard-dean-weighs-in/?noredirect=on&utm_term=.07979f0bb2b3; Theodore Schleifer, *Pelosi Joins Calls to Add More Democratic Primary Debates*, CNN (Sept. 18, 2015, 10:40 PM), <http://www.cnn.com/2015/09/18/politics/nancy-pelosi-democrats-debates-2016/>.

in the middle of a three-day weekend.⁵⁵ Second, the first four debates gave Clinton and Sanders far more speaking time than the three other announced candidates.⁵⁶ As detailed in Table 3, the first debate gave Clinton thirty-one minutes of airtime and twenty-eight minutes to Sanders, as compared to just under eighteen minutes for Martin O'Malley, fifteen minutes for Jim Webb, and nine minutes for Lincoln Chafee.⁵⁷ This greatly limited the ability of these second-tier candidates to make their case to a wider audience and thus, perhaps, break into the top tier.

TABLE 3. CANDIDATE SPEAKING TIMES IN THE FIRST FOUR DEMOCRATIC PRESIDENTIAL DEBATES (IN MINUTES)⁵⁸

<i>Candidates</i>	<i>First</i>	<i>Second</i>	<i>Third</i>	<i>Fourth</i>
Hillary Clinton	31:05	28:15	38:14	27:31
Bernie Sanders	28:05	24:35	30:20	30:12
Martin O'Malley	17:56	17:38	24:20	14:29
Jim Webb	15:35			
Lincoln Chafee	9:11			

Suppose that there had been more Democratic debates in 2016, with a larger viewing audience and a more even distribution of speaking times. What then? It is difficult to answer such a question in a rigorous way. From a historical perspective, the potential for a large impact was certainly there. Unlike general elections, where most candidate debates have had little measurable effect on the final result, key moments in nomination debates have often made a significant difference in the state of a contested race. Prominent examples include George H.W. Bush's failure to allow the other candidates into the

⁵⁵ See Brendan Bordelon, *Why Democrats Buried Their Debates at Times No One Will Watch*, NAT'L REV. (Nov. 13, 2015, 4:29 PM), <https://www.nationalreview.com/2015/11/democratic-debates-timing-rigged-dnc-hillary-clinton/> (questioning the reason for this scheduling).

⁵⁶ See *infra* Table 3.

⁵⁷ *Infra* Table 3.

⁵⁸ Note: Webb and Chafee withdrew from the race in mid-October 2015 and therefore did not participate in the second, third, and fourth debates. For speaking times, see *First Democratic Debate 2015: Highlights and Analysis*, N.Y. TIMES (Oct. 13, 2015), <https://www.nytimes.com/live/first-democratic-debate-cnn-election-2016> (detailing times for first debate); Jesse Rifkin, *Who Spoke the Most?*, POLITICO (Nov. 14, 2015, 11:01 PM), <https://www.politico.com/blogs/live-from-des-moines/2015/11/how-long-did-they-speak-215885> (second debate); Javier Zarracina & Sarah Frostenson, *The 3rd Democratic Debate, in Charts*, VOX (Dec. 20, 2015, 11:10 AM), www.vox.com/2015/12/20/10628906/dem-debate-charts (third debate); Libby Nelson, *One Chart That Shows Bernie Sanders Dominated the Democratic Debate*, VOX (Jan. 17, 2016, 11:39 PM), <https://www.vox.com/2016/1/17/10784706/sanders-speaking-time-democratic-debate> (fourth debate).

Nashua debate in 1980, Walter Mondale's "Where's the Beef?" riposte to Gary Hart in 1984, and Marco Rubio's inability to explain why he was qualified to be President in 2016. In a less dramatic way, debates held during the 2012 Republican contest were largely responsible for boosting first Herman Cain and then Newt Gingrich into a lead in the national polls, then allowing Gingrich to recover from poor showings in Iowa and New Hampshire and win the South Carolina primary.

A larger number of debates and a more even division of speaking times would no doubt have given Sanders and the three other candidates a better chance to dethrone the front-runner—which is almost certainly why Wasserman Schultz scheduled so few of them. It might also have tempted some other candidates to throw their hats in the ring. But would any of these actual or would-be aspirants have taken advantage of the opportunity? Based on their performances in the debates in which they did participate, O'Malley, Webb, and Chafee seem unlikely to have galvanized the viewing audience and thus made themselves serious contenders for the Democratic nomination. And, as Donald Trump would learn in the fall, Clinton herself was a reasonably good debater. So a good guess is that an expanded debate schedule would probably not have had much effect on the final outcome. That said, I think Wasserman Schultz did her party, and, ultimately, her candidate no favors by intervening in the process in such a heavy-handed way.

One final question is worth asking here: Should the Democratic Charter have a rule requiring the national committee to "exercise impartiality and evenhandedness" between the presidential candidates?⁵⁹ In a case like 2016, where one candidate had worked within and for the party since the early 1970s and the other major candidate had joined the party just a few months earlier, is it really so bad if the national committee expresses an open preference for the long-time party member? There is, I would argue, nothing inherently wrong in having an official party committee or organization endorse and then provide assistance to a particular candidate. This sort of thing happens all the time at the state and local levels.⁶⁰ The national congressional campaign committees regularly help incumbent senators and representatives fend off challengers in their party's primaries. On the other hand, there is a strong prudential argument that if the Democrats hope to present a united front in the general election, the supporters

⁵⁹ DEMOCRATIC NAT'L COMM., *supra* note 35.

⁶⁰ See MALCOLM E. JEWELL & SARAH M. MOREHOUSE, *POLITICAL PARTIES AND ELECTIONS IN AMERICAN STATES* 106–18 (4th ed. 2001) (discussing pre-primary endorsements).

of the losing candidates will be more likely to back the winner if they feel that they have been treated fairly. As I have shown elsewhere, through most of its history, party unity, at least at the presidential level, has been a particular problem for the Democratic Party.⁶¹ In an attempt to cope with this difficulty, the Democrats have adopted a number of rules that are specifically designed to conciliate minority political factions. The party's insistence on proportional delegate allocation rules is one such attempt.⁶²

In any event, as long as the impartiality rule is in the Democratic Charter, the DNC should abide by it.

C. *Primaries Versus Caucuses*

The one rule I have found that clearly would have made a difference in the 2016 Democratic nomination race—and, as we will see, in the Republican race as well⁶³—is whether a state chooses to use a primary or a caucus-convention system to select its national convention delegates. As shown in Table 4, Clinton won 74% of the Democratic primaries, but only 14% of the caucuses.⁶⁴ Since all Democratic primaries and caucuses are required by the party's national rules to award delegates on a proportional basis,⁶⁵ the divergence in delegate numbers between the two systems is not as sharp as it initially seems, but it is still sizable. Clinton won 57% of the non-superdelegates in primary states, versus just 35% in caucus states.⁶⁶

⁶¹ See WILLIAM G. MAYER, *THE DIVIDED DEMOCRATS: IDEOLOGICAL UNITY, PARTY REFORM, AND PRESIDENTIAL ELECTIONS* (1996) (discussing the greater ideological divisions within the Democratic Party and the consequences this has for party governance).

⁶² See *id.* at 13–15 (describing the party's rationale for using this form of delegate allocation).

⁶³ See *infra* Section II.D.

⁶⁴ See *infra* Table 4.

⁶⁵ DEMOCRATIC NAT'L COMM., *DELEGATE SELECTION MATERIALS FOR THE 2016 DEMOCRATIC NATIONAL CONVENTION* R. 13 (2014), https://demrulz.org/wp-content/files/12.15.14_2016_Delegate_Selection_Documents_Mailing_-_Rules_Call_Regs_Model_Plan_Checklist_12.15.14.pdf (detailing this requirement).

⁶⁶ See *infra* Table 4.

TABLE 4. DIFFERENCES BETWEEN PRIMARY AND CAUCUS RESULTS
IN THE 2016 DEMOCRATIC NOMINATION RACE⁶⁷

<i>Contests Won</i>	<i>Number</i>		<i>Percentage</i>	
	<i>Clinton</i>	<i>Sanders</i>	<i>Clinton</i>	<i>Sanders</i>
Primaries	29	10	74	26
Caucuses	2	12	14	86
<hr/>				
<i>Delegates Won</i>	<i>Clinton</i>	<i>Sanders</i>	<i>Clinton</i>	<i>Sanders</i>
Primaries	1957	1460	57	43
Caucuses	188	347	35	65

In light of these results, any general trend among the states to shift from primaries to caucuses would almost certainly have benefited Sanders.⁶⁸ But that shift would have had to be *very* large to have given Sanders a plausible chance of winning the nomination. In 2016, only about 14% of the ordinary delegates—the non-superdelegates—were selected through a caucus-convention system.⁶⁹ Assuming there were no superdelegates and that Sanders continued to win 65% of the delegates from caucus states and 43% of the primary-state delegates,⁷⁰ the proportion of delegates selected via caucuses would have had to increase to 32% in order for Sanders to win a majority of the national convention delegates. The relative use of caucuses, that is to say, would have had to more than double. If the superdelegates are factored in and we assume that they continued to support Clinton in the same disproportionate numbers, Sanders would have won only if 67% of the delegates had been selected via caucuses. Not since the early 1900s have caucus-convention systems been used to select 67% of the national convention delegates.⁷¹

⁶⁷ Computed by the author. See Mayer, *supra* note 22, at 42–43 (listing the full results of the Democratic race); REALCLEARPOLITICS, *supra* note 26 (listing the number of delegates won in each primary and caucus). These results do not include the results of the elections in Guam, the Virgin Islands, American Samoa, Northern Marianas, Democrats Abroad, or Puerto Rico.

⁶⁸ See *supra* Table 4 (showing Sanders's superior performance in caucuses relative to primaries).

⁶⁹ See *supra* Table 4 (calculated by dividing total number of delegates won in the caucuses by the total number of delegates won in both the caucuses and the primaries).

⁷⁰ The latter assumption may not be realistic. Had caucuses been a more prominent part of the 2016 nomination process, the Clinton campaign might have devoted more attention to them.

⁷¹ Presidential primaries first became an important component of the process for selecting national convention delegates in 1912. For detailed accounts of their use before the McGovern-Fraser reforms in the early 1970s, see PAUL T. DAVID, RALPH M. GOLDMAN & RICHARD C. BAIN, *THE POLITICS OF NATIONAL PARTY CONVENTIONS* 224–25 (1960); JAMES W. DAVIS, *SPRINGBOARD TO THE WHITE HOUSE: PRESIDENTIAL*

II THE REPUBLICANS

Would a change in the rules have prevented Donald Trump's nomination? Here I have selected four rules-related issues for close examination: (1) rules that permit or encourage Independents and Democrats to participate in Republican primaries, (2) the lack of a large superdelegate contingent in the Republican nomination process, (3) the mix of delegate allocation rules used in Republican primaries and caucuses, and (4) the states' decisions to use a primary or a caucus for selecting their national convention delegates.

A. Independent and Democratic Participation in Republican Primaries

When Republicans first realized that their 2016 presidential nomination would go to a man who had only recently joined the party and had an uncertain commitment to many cherished Republican principles, one of their first instincts was to suspect that their party nomination process had been hijacked by outsiders. In general, state laws rather than party rules regulate who can vote in Republican presidential primaries, and state laws are, on the whole, rather permissive on the subject.⁷² Relatively few states mandate that only registered Republicans can participate in Republican primaries.⁷³ Some allow independent voters—i.e., those who are not registered with any party—to vote in either party's primary;⁷⁴ many others do not have party registration at all. Thus, the possibility certainly exists that Trump won the Republican nomination largely by attracting votes from Independents and Democrats.

However plausible this theory might sound, there is no empirical evidence to support it. The 2016 presidential primary exit polls, conducted by Edison Research for the National Election Pool, falsify this

PRIMARIES: HOW THEY ARE FOUGHT AND WON 24–37 (1967). According to David, Goldman, and Bain, at least fourteen states have held presidential primaries in every presidential election year since 1912. DAVID, GOLDMAN & BAIN, *supra*, at 224–25. Between 1952 and 1968, both parties selected, on average, 45% of their convention delegates by primary, and the other 55% via a caucus-convention system. See Michael G. Hagen & William G. Mayer, *The Modern Politics of Presidential Selection: How Changing the Rules Really Did Change the Game*, in IN PURSUIT OF THE WHITE HOUSE 2000: HOW WE CHOOSE OUR PRESIDENTIAL NOMINEES 1, 11 (William G. Mayer ed., 2000).

⁷² See JEWELL & MOREHOUSE, *supra* note 60, at 100, 102–06 (discussing various state rules regarding primary participation); William G. Mayer, *Primary Elections*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 12011–14 (Neil J. Smelser & Paul B. Baltes eds., 2001) (same).

⁷³ See JEWELL & MOREHOUSE, *supra* note 60, at 103.

⁷⁴ See *id.*

theory in two distinct ways.⁷⁵ First, as shown in Table 5, the 2016 Republican primary electorate did not include an unusually large influx of Independents and Democrats.⁷⁶ While the Republican primaries drew a record number of voters to the polls, these voters were, in partisan terms, indistinguishable from those who had voted in past Republican nomination races. Aggregating across twenty-four Republican primaries (i.e., almost all of those held before Ted Cruz and John Kasich suspended their campaigns), 69% of the voters thought of themselves as Republicans, 26% said they were Independents, and only 5% identified with the Democratic Party.⁷⁷

TABLE 5. PARTISAN COMPOSITION OF THE REPUBLICAN PRIMARY ELECTORATE, 1988–2016 (IN PERCENTAGES)⁷⁸

<i>Year</i>	<i>Republican</i>	<i>Independent</i>	<i>Democratic</i>	<i>(Number of Primaries)</i>
1988	70	25	5	(16)
1992	71	24	3	(16)
1996	74	20	4	(20)
2000	67	23	7	(17)
2008	76	20	3	(24)
2016	69	26	5	(24)

Second, there was very little relationship between a voter's party identification and his or her willingness to vote for Trump. In fact, as shown in Table 6, Trump ran slightly better among self-identified Republicans than among Independents, winning 42% of the former group as against 38% of the latter.⁷⁹ The number of Democratic respondents in most exit polls was so small that the distribution of their votes has not been reported. Since they accounted for only 5% of the Republican primary votes, however, they could hardly have affected the outcome of many primaries even if they had voted overwhelmingly for Trump.⁸⁰

⁷⁵ See *infra* Table 5.

⁷⁶ See *infra* Table 5.

⁷⁷ *Infra* Table 5.

⁷⁸ Based on data from CBS/New York Times (1988); Voter News Service (1992, 1996, and 2000); National Election Pool (2008 and 2016). The 1988–2000 results are derived from the raw data, archived at the Roper Center. The 2008 and 2016 figures are my own calculations based on the exit poll reports provided at cnn.com.

⁷⁹ *Infra* Table 6.

⁸⁰ See *supra* Table 5.

TABLE 6. VOTE BY PARTISANSHIP IN THE 2016 REPUBLICAN PRIMARIES (IN PERCENTAGES)⁸¹

<i>Candidate</i>	<i>Republicans</i>	<i>Independents</i>
Donald Trump	42	38
Ted Cruz	29	24
John Kasich	12	18
Marco Rubio	12	13

This finding is worth underlining because a very different pattern occurred in the 2016 Democratic primaries. One reason Bernie Sanders lost to Hillary Clinton is that he was never able to convince many Democrats that he was really “one of them.” While Sanders won 62% of the votes cast by Independents, he attracted only 33% of the votes cast by the far more numerous Democratic identifiers.⁸² But Republican voters apparently never held it against Trump that he had spent most of the previous fifteen years registered as either a Democrat or an Independent.

B. Superdelegates

Whether or not Republican Party rules make any allowance for superdelegates is a matter of interpretation. Since 2004, there has been a provision in the rules that gives automatic delegate status to “the national committeeman, the national committeewoman and the chairman of the state Republican Party of each state and American Samoa, the District of Columbia, Guam, Northern Marianas Islands, Puerto Rico, and the Virgin Islands.”⁸³ Unlike the Democrats, however, Republican state parties and state legislatures are allowed to bind these delegates to vote in accordance with the results of the primary or caucuses.⁸⁴ And, so far as I can tell from a reading of the various state rules and regulations (which are often not terribly clear), virtually all states do in fact bind these party officials.⁸⁵ The only

⁸¹ Figures shown are based on the combined results of twenty-four exit polls conducted in conjunction with almost all of the 2016 Republican primaries held between February 9 and May 3 (New Hampshire through Indiana), weighted by state turnout.

⁸² Mayer, *supra* note 22, at 44–45.

⁸³ The quotation here is from the rules that applied to the 2016 nomination process, though they were actually adopted at the 2012 convention. See REPUBLICAN NAT’L COMM., THE RULES OF THE REPUBLICAN PARTY R. 14(a)(2) (2016), https://prod-cdn-static.gop.com/media/documents/2016-Republican-Rules-Reformatted2018_1533138132.pdf.

⁸⁴ *Id.* at R. 16; see also Mayer, *supra* note 17, at 97.

⁸⁵ Based on an examination of Republican state delegate selection plans, as reported at *Presidential Primaries 2016: Republican Delegate Binding and Voter Eligibility*, THE

places where the Republican “superdelegates” were free agents in 2016 were Colorado, North Dakota, and Wyoming and the territories of American Samoa, Guam, and the Virgin Islands.⁸⁶ This means that of the 2472 delegates to the 2016 Republican National Convention, only twenty-one, or 0.8% of the total, were unpledged party leaders.⁸⁷

Suppose, however, that the Republicans had adopted a rule something like the one the Democrats have used since 1984, where about one-sixth of the national convention was comprised of unpledged elected officials and party leaders.⁸⁸ Would this large contingent of Republican superdelegates have prevented Trump’s nomination? The answer depends, of course, on how they would have decided to employ their votes. In the early stages of the Republican race, it was widely known that Trump had virtually no support among Republican elected officials. By the end of February 2016, after Trump had won three of the first four Republican primaries and caucuses, he had been endorsed by just one U.S. senator, four members of the House of Representatives, and two governors. By the end of March, after Trump had won fifteen more primaries and two more caucuses, three additional representatives and one more governor had added their names to the list.⁸⁹

But what would have happened as it became clear that Trump would win the vast majority of Republican primaries and amass far more votes and delegates than any of his rivals? At least within the Democratic Party, superdelegates have never shown the willingness to reject the verdict of the rank-and-file voters and caucus attendees.

The acid-test case for superdelegate independence was the Democratic nomination race of 2008. As of early February 2008, when Hillary Clinton still held a comfortable lead in the national polls and had just scored a come-from-behind win in the New Hampshire primary, the then-New York senator had a two-to-one lead over Barack Obama in superdelegate commitments.⁹⁰ According to a count conducted by the *New York Times*, 204 superdelegates had publicly

GREEN PAPERS, <https://www.thegreenpapers.com/P16/R-DSVE.phtml> (last updated Mar. 23, 2018, 12:34 AM).

⁸⁶ *Id.*

⁸⁷ See *id.*; *The Math Behind the Republican Delegate Allocation—2016*, GREEN PAPERS, <https://www.thegreenpapers.com/P16/R-Alloc.phtml> (last updated Mar. 23, 2018, 12:34 AM) (listing three party leader delegates for each state).

⁸⁸ See Mayer, *supra* note 17, at 92–94 (providing background on the Democratic rule).

⁸⁹ See *Republicans and Their Declared Positions on Donald Trump*, BALLOTPEDIA, https://ballotpedia.org/Republicans_and_their_declared_positions_on_Donald_Trump (last visited May 15, 2018) (listing endorsements and endorsement dates).

⁹⁰ The battle for superdelegates that took place between Clinton and Obama in 2008 is analyzed in Mayer, *supra* note 17, at 101–03.

announced their support for Clinton, compared to just ninety-nine for Obama (most superdelegates were then undecided).⁹¹ After Obama won a slight plurality of the delegates on Super Tuesday and then won the next eleven primaries and caucuses, however, Clinton's superdelegate advantage gradually began to evaporate.⁹²

One reason the superdelegates failed to rally around Clinton was that, as it became clear that the contest for primary and caucus delegates would be exceedingly close, the two campaigns engaged in a public debate about the role of the superdelegates. Obama argued that superdelegates should follow the will of the people and that "it would be problematic for the political insiders to overturn the judgment of the voters."⁹³ Clinton, by contrast, claimed that "superdelegates are, by design, supposed to exercise independent judgment."⁹⁴ By all accounts, the Obama campaign got the better of this debate: most superdelegates were reluctant to play a role that would open them to charges of being undemocratic. By May 9, Obama had surged ahead of Clinton in the superdelegate count.⁹⁵ He clinched the Democratic nomination on June 3.

In a similar way, had a sizable cohort of unpledged Republican superdelegates existed in 2016, they likely would have come under enormous pressure to go along with the verdict registered in the party's primaries. There are, of course, some significant differences between these two races. By any reasonable standard, Trump in 2016 had far more negatives than Obama did in 2008, thus giving Republican superdelegates greater justification for rejecting the rank-and-file favorite. On the other hand, Trump dominated the 2016 Republican primaries much more decisively than Obama had in 2008.⁹⁶ If a major scandal such as Trump's infamous exchange with Billy Bush had emerged after the primaries but before the convention,

⁹¹ *Id.* at 103.

⁹² *See id.*

⁹³ Adam Nagourney & Carl Hulse, *Neck and Neck, Democrats Woo Superdelegates*, N.Y. TIMES (Mar. 16, 2008), <https://www.nytimes.com/2008/02/10/us/politics/10superdelegates.html>.

⁹⁴ *Id.*

⁹⁵ Mayer, *supra* note 17, at 103.

⁹⁶ In 2016, Trump won 33 of 38 primaries and received 45.6% of the total vote, as compared to 24.7% for Ted Cruz, his closest opponent. *See* Mayer, *supra* note 21, at 51–52. In 2008, Obama won just 21 of 39 primaries and barely beat Hillary Clinton in the total primary vote, 48.8% to 47.8%. *See State by State Summary: 2008 Presidential Primaries, Caucuses, and Conventions*, THE GREEN PAPERS, <https://www.thegreenpapers.com/P08/tally.phtml> (last updated July 29, 2009, 10:51 AM). The Democratic primary totals exclude the results from the Florida and Michigan primaries, which were held in January 2008 in violation of Democratic Party rules and were not therefore contested by either candidate. Indeed, Obama's name was not even listed on the Michigan primary ballot.

perhaps the superdelegates would have felt free to vote against Trump. Otherwise, I suspect they would have reluctantly gone along with Trump's nomination.

C. Delegate Allocation Rules

Delegate allocation rules are the rules that translate the votes cast in primaries and caucuses into actual delegates to the national convention. To simplify a very complex topic: Since 1992, Democratic Party rules have required all states and territories to award delegates on a proportional basis with a 15% threshold.⁹⁷ That is to say, any candidate who gets at least 15% of the vote wins a number of delegates in direct proportion to the percentage of the vote he or she received. In general, proportional allocation rules mean that losing candidates can nevertheless win a substantial number of delegates—which, of course, also means that winning candidates get fewer delegates from their wins.

As is true in most aspects of the presidential nomination process, Republican rules leave much more discretion in the hands of state legislatures and state parties. In 2016, the only Republican rule relating to delegate allocation said that any primary or caucus held before March 15 “shall provide for the allocation of delegates on a proportional basis.”⁹⁸ But there were several loopholes. The first four events in the delegate selection calendar—the Iowa caucuses, the New Hampshire primary, the South Carolina primary, and the Nevada caucuses—were specifically exempted from this rule.⁹⁹ And those states to which it did apply could establish thresholds as high as 20% and award all their delegates to any candidate who won 50% of the vote.¹⁰⁰

The result in 2016 was a remarkable hodgepodge of Republican delegate allocation rules that defies easy classification. Virtually all of the states that held their primaries before March 15th had a provision in their state rules awarding all of their delegates to any candidate

⁹⁷ See DEMOCRATIC NAT'L COMM., DELEGATE SELECTION RULES R. 13(b) (2014), http://www.demrulz.org/wp-content/files/Proposed_Draft-2016_Delegate_Selection_Rules_8_23_14.pdf.

⁹⁸ REPUBLICAN NAT'L COMM., *supra* note 83, at R. 16(c).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 16(c)(3)(i) (stating that states “may establish . . . [a] minimum threshold of the percentage of votes received by a candidate that must be reached, below which a candidate may receive no delegates, provided such threshold is no higher than twenty percent (20%)”); *id.* at 16(c)(3)(ii) (stating that states may establish a threshold for votes received, “above which the candidate may receive all the delegates, provided such threshold is no lower than fifty percent (50%)”).

who won 50% of the vote¹⁰¹—but since Trump never won 50% of the vote in any primary held during this period,¹⁰² most states did in the end use some form of proportional representation, usually with a 20% threshold.¹⁰³ But only two of the fourteen primaries held between March 15 and May 3 employed a proportional delegate allocation formula.¹⁰⁴ Four states used winner-take-all at the state level, six used winner-take-all at both the district and state level, and two others used a direct election primary, in which voters cast ballots for individual candidates for national convention delegate whose names were listed on the official ballot.¹⁰⁵

The consequence, as shown in Table 7, is that in the first twenty-nine Republican primaries held in 2016, Donald Trump won 41% of the primary vote, but 59% of the delegates.¹⁰⁶ Had the Republicans used the same rule as the Democratic Party, requiring all primaries to award delegates on a proportional basis with a 15% threshold, I estimate that Trump would have received about 48% of the delegates.¹⁰⁷

¹⁰¹ See *2016 Presidential Primaries at a Glance*, GREEN PAPERS, <https://www.thegreenpapers.com/P16/paag.phtml> (last updated Mar. 23, 2018, 12:34 AM) (listing primary dates); *Presidential Primaries 2016: Republican Delegate Binding and Voter Eligibility*, *supra* note 85 (demonstrating that the majority of states with primaries before March 15th use the winner-take-most system).

¹⁰² *2016 Presidential Primaries at a Glance*, *supra* note 101.

¹⁰³ See e.g., *2016 Presidential Primaries, Caucuses, and Conventions: Alabama Republican*, GREEN PAPERS, <http://www.thegreenpapers.com/P16/AL-R> (last updated Mar. 23, 2018, 12:34 AM); *2016 Presidential Primaries, Caucuses, and Conventions: Idaho Republican*, GREEN PAPERS, <http://www.thegreenpapers.com/P16/ID-R> (last updated Mar. 23, 2018, 12:34 AM); *2016 Presidential Primaries, Caucuses, and Conventions: Vermont Republican*, GREEN PAPERS, <http://www.thegreenpapers.com/P16/VT-R> (last updated Mar. 23, 2018, 12:34 AM).

¹⁰⁴ See *2016 Presidential Primaries at a Glance*, *supra* note 101 (listing primary dates); *Presidential Primaries 2016: Republican Delegate Binding and Voter Eligibility*, *supra* note 85 (identifying allocation rules).

¹⁰⁵ See *2016 Presidential Primaries at a Glance*, *supra* note 101 (listing primary dates); *Presidential Primaries 2016: Republican Delegate Binding and Voter Eligibility*, *supra* note 85 (identifying allocation rules).

¹⁰⁶ *Infra* Table 7.

¹⁰⁷ See DEMOCRATIC NAT'L COMM., *supra* note 97, at R. 8(D); *infra* Table 7. My estimate, it should be noted, departs slightly from the Democratic rule in that it assumes that all of a state's delegates are awarded on an at-large (i.e., statewide) basis. In actuality, Democratic rules require that 75% of a state's "base delegation"—its non-superdelegates—be elected at the congressional district level, with the remaining 25% elected at-large. So the delegates in each district are awarded proportionally based on the preference vote *in that district*, and the at-large delegates are then divided proportionally based on the statewide vote.

TABLE 7. EFFECT OF PROPORTIONAL REPRESENTATION ON DELEGATE ALLOCATIONS IN THE 2016 REPUBLICAN NOMINATION RACE¹⁰⁸

Candidate	Percentage of Primary Vote	Actual Delegate Totals		Under Proportional Representation with 15% Threshold	
		Number	Percentage	Number	Percentage
Donald Trump	41	916	59	747	48
Ted Cruz	27	355	23	482	31
John Kasich	14	134	9	149	10
Marco Rubio	13	87	6	183	12

In short, had the Republicans made greater use of proportional allocation rules, Trump would have taken longer to achieve a majority of the Republican convention delegates. Perhaps this might have kept Cruz or Kasich in the race a bit longer or given a bit more hope to their supporters. But it seems unlikely to have changed the final outcome. Under proportional representation—or virtually any conceivable delegate allocation rule—Trump would have had a large lead over all the other candidates. That’s what happens when one candidate wins twenty-four of the first twenty-nine primaries.

D. Primaries Versus Caucuses

As in the 2016 Democratic race, there was a sharp divergence in the results of Republican primaries and Republican caucuses. Trump, as I have noted, dominated the primaries.¹⁰⁹ Even if we exclude the nine primaries held after May 3, when Trump was the only active candidate, the New York real estate tycoon won twenty-four primaries to just four for Cruz and one for Kasich.¹¹⁰ But Trump won only three of the eleven caucuses for which first-round preference votes are avail-

¹⁰⁸ Computed by the author. My estimate was computed as follows: In each state holding a primary, the vote for any candidates receiving less than 15% of the vote was dropped. The vote for all remaining candidates—those receiving at least 15% of the vote—was then recalculated as the percentage of the total vote received by just those candidates. Each candidate then received a number of delegates equal to the number of delegates in that state multiplied by his or her percentage of the vote. For example, if a state had 50 delegates and a candidate received 40% of the vote received by candidates exceeding the 15% threshold, he or she would be awarded 20 delegates (50 x .40).

¹⁰⁹ See *supra* note 96.

¹¹⁰ Mayer, *supra* note 22, at 51–52.

able.¹¹¹ Cruz was the winner in six caucuses and Rubio in the remaining two.¹¹²

Since the greater use of caucuses is the only variable I have examined in this Article that gives some sign of changing the outcomes of the major-party nomination races, I should say a few words about any recommendation that the parties try to encourage states to switch from primaries to caucuses. Simply put, I advise strongly against it. My past research on caucuses has documented three major problems with this delegate selection method.¹¹³

First, caucuses have a far lower participation rate than primaries. In the Democratic nomination race of 1988, for example, the average turnout in primaries was 30%; the average turnout in caucuses was 3%.¹¹⁴ Second, because of their low turnout, caucuses are far less representative of ordinary, rank-and-file party members than primaries.¹¹⁵ In particular, caucus attendees are far more ideologically extreme than primary voters, general election voters, or party identifiers—more liberal in the Democratic Party and more conservative in the Republican Party.¹¹⁶

Third, though caucuses were once viewed as a vehicle for allowing party organizations and party “regulars” to exercise a somewhat tighter control over the presidential nomination process, the candidates who have fared better in caucuses have tended to be “cause” and fringe candidates and those with little support among party leaders.¹¹⁷ In the 1988 Democratic race, Jesse Jackson ran far better in caucuses than in primaries; Michael Dukakis had the reverse pattern.¹¹⁸ In the 1988 Republican contest, Pat Robertson won 30% of the vote in the average first-round caucuses, as against 12% in the average primary.¹¹⁹ George H.W. Bush and Robert Dole both fared substantially better in Republican primaries.¹²⁰ That Bernie Sanders

¹¹¹ *Id.* at 53. Since the Republican rules do not in most cases mandate proportional representation of minority preference, there is no requirement that Republican caucuses hold a preference vote. In 2016, preference votes are unavailable for the North Dakota and Colorado caucuses.

¹¹² *Id.*

¹¹³ See William G. Mayer, *Caucuses: How They Work, What Difference They Make*, in *IN PURSUIT OF THE WHITE HOUSE: HOW WE CHOOSE OUR PRESIDENTIAL NOMINEES* 105 (William G. Mayer ed., 1996).

¹¹⁴ *Id.* at 126–27.

¹¹⁵ *Id.* at 129–36.

¹¹⁶ See *id.* at 133–38.

¹¹⁷ *Id.* at 141–44.

¹¹⁸ See *id.* at 142.

¹¹⁹ *Id.* at 144.

¹²⁰ *Id.*

won so many caucuses in 2016 is, of course, further demonstration of this point.¹²¹

However negatively one views the outcomes of the 2016 nomination races, we should not blow up the nomination process in response.

CONCLUSION

Two points are worth making in conclusion. First, a methodological point: It is often difficult to say just what effect any particular change in the rules would have had on the outcome of a contested nomination race. We can usually make some reasonable estimates of what we might call the direct or “first-order effects” of a rules change. Increasing the number of debates would have given the other candidates a better chance to dethrone the front-runner. Having a large contingent of Republican superdelegates would have placed one more obstacle in the path of Donald Trump. But would any of the Democratic candidates have taken advantage of the debates? Would the Republican superdelegates have been willing to reject the clear favorite of the Republican primary voters? Hillary Clinton ran substantially worse in caucuses than in primaries—but would this pattern have persisted if caucuses played a more prominent role in the nomination process? These sorts of questions are usually more difficult to answer.

Second, and more relevant to the question posed in the title of this Article, with the possible exception of a large increase in the number of caucuses, I find no reason to think that a change in the party rules would have changed the outcome of either presidential nomination race in 2016. Political scientists and party reformers have a tendency to focus on issues of process and procedure. But what comes out of any process, no matter how well designed, depends on the people who operate and work within that process. No process can provide complete protection against human error, bias, and misjudgment.

And that, in my opinion, is the best explanation for why we were faced last fall with a choice between Hillary Clinton and Donald Trump. On the Democratic side, Clinton was the beneficiary of a number of special circumstances: a relatively small field of potential opponents, a huge lead in the early nomination polls which scared off many Democrats who might otherwise have entered the race, and the fact that many in her party, having nominated a black man for President in 2008, believed that now it was a woman’s turn. Above all, Democrats substantially overestimated Clinton’s popularity with the rest of the electorate and failed to appreciate just how seriously her

¹²¹ See *supra* Section I.C for a discussion of Sanders’s success in the caucuses.

reputation had been tarnished by her use of a private email server and various other scandals.¹²²

Even more than Clinton, Trump's nomination was the product of a perfect storm of unusual occurrences and conditions. The large field of announced Republican candidates made it difficult for any one of Trump's rivals to get enough money and press coverage to emerge from the pack. The other Republican candidates and their campaign strategists significantly underestimated Trump's appeal and staying power until it was too late; as a result, they spent most of their time and money attacking each other, while largely ignoring the front-runner.¹²³ Republicans in general have long had a certain contempt for the work of government and, thus, a special fondness for successful businesspeople and nonpoliticians.¹²⁴ The party's (and the country's) experience under the presidency of George W. Bush had substantially delegitimized Trump's critics within the Republican "establishment."¹²⁵ Finally, the media gave Trump an astounding amount of coverage—six times more than his nearest Republican competitor and far more than he would have received had the media made a more responsible assessment of their duties.¹²⁶

Perhaps we'll all do a better job in 2020. In the meantime, we have to live with the consequences.

¹²² Mayer, *supra* note 22, at 32–33.

¹²³ *Id.* at 39–40.

¹²⁴ See William G. Mayer, *Why Trump—and How Far Can He Go?*, 13 FORUM 541, 542–47 (2015).

¹²⁵ See *id.* at 547–51 (discussing illegal immigration as one example of this trend).

¹²⁶ Nicholas Confessore & Karen Yourish, *\$2 Billion Worth of Free Media for Donald Trump*, N.Y. TIMES (Mar. 15, 2016), <https://www.nytimes.com/2016/03/16/upshot/measuring-donald-trumps-mammoth-advantage-in-free-media.html> (listing data compiled by mediaQuant).