

The State of the Primaries 2016  
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The 2016 primary season was an exciting one to follow. While sub-presidential primaries were generally uncompetitive, the presidential primaries offered plenty of entertainment. One benefit of the relatively long and competitive presidential primaries is increased attention to process. This chapter will examine the 2016 nominating process in order to shed light on the current state of the party primaries. With both parties experiencing increased intraparty factionalism and bitter nominating contests this year, one continued refrain has been the need of the parties to exert more control over presidential nominations. While we know what the outcome of this process *should* be – electable, establishment-friendly candidates – there is little agreement about the rules that would lead to this outcome. Further, it is not clear that the parties and rulemaking structures are currently well adapted to suit party needs. In this chapter, I will discuss primary rules broadly, as well as rule changes between 2012 and 2016 in order to grasp the strategies, successes, and failures of the parties in controlling the pace and outcome of their primaries.

#### Party Registration

One notable feature of the 2016 primaries was a renewed focus on party registration and rules with regards to closed primaries. Much scholarly and media attention has been paid to a continuum of primary rules – closed primaries, semi-closed primaries, semi-open primaries, and closed primaries. In the most general of terms, closed primaries restrict participation in primaries to those who are registered members of the parties, semi-closed primaries allow undecided voters as well as registered partisans to participate, semi-open primaries permit any voter to participate

under the condition that they publicly state a preference, and open primaries allow all voters to participate while keeping their party choice a secret. These definitions are ambiguous in some cases, and have led to confusion among scholars, public officials, and voters alike. One example comes from Michigan, which updated their primary laws in 2011 (Public Act 163 of 2011) to require voters in presidential primaries to make a *written* declaration of party membership before being allowed to vote in a primary. Some listings of primary systems classified this as a closed system, asserting that the written declaration amounted to a party membership requirement. Moreover, the state itself referred to the contest as a closed primary, but repeatedly asserted that no actual party membership was required to participate (State of Michigan 2012). This is a contradiction in terms of the classification given here, and demonstrates one difficulty in studying primary rules of this sort. The Michigan example also highlights another confusing aspect of primary classification. Presidential primaries and sub-presidential primaries can have different rules regarding participation within a state. For example, the written declaration in Michigan only applied to presidential primaries, not the later statewide primary. Many other states conduct closed caucuses for presidential nomination and open (or semi-open) primaries for other races.

A second feature of party registration relates to the administration of closed primaries. The 2016 election shone new light on this problem vis-à-vis the pseudo-independent candidacy of Bernie Sanders. In an interview, he himself admitted the necessity of running as a Democrat in order to overcome the institutional hurdles of an independent candidacy (Bump 2016). While Sanders was able to clear the necessary hurdles to enter the Democratic primaries as an independent, many of his independently-registered supporters found themselves having a tougher time casting their ballots in closed primary states. Part of this difficulty deals not with the simple state

classification but with deadlines for changing one's party affiliation. For registered independents who supported Sanders, they would be required to reaffiliate with the Democratic party before some set deadline in order to participate in the Democratic primary. This hurdle is specific to registered voters, because those who are not registered to vote may register for the first time (and declare a party affiliation) at a date which is often different from the party re-affiliation deadline (the standard voter registration deadline). The most glaring example of this rule is in New York, which cuts off re-affiliation 25 days before the preceding general election (for the 2016 primaries, this was October 9, 2015 - 25 days before the November 3, 2015 general election and 193 days before the presidential primary (New York Consolidated Laws, Election Law - ELN § 5-304)). As an interesting aside – news sources reported that two of Donald Trump's children, Eric and Ivanka, missed this deadline to reaffiliate, and were unable to vote for their father in the New York primary. New York is not the only example of early registration deadlines, but it is the strictest case. Kentucky sets the new year as the deadline, requiring party registrations be changed before December 31<sup>st</sup> prior to the election. (KY 116.055). New Hampshire requires those who are previously registered with a party to reaffiliate 97 days before the election (the start of the filing period) but allows registered independents to affiliate with a party at the polling place. Further, they may then immediately file paperwork to disaffiliate from the party as they exit their polling location. Another six states (CO, CT, DE, ID, NJ, and RI) have a window between 50 to 100 days before the election in which voters can change affiliation. This confusion, and the wide variance in states, makes the study of primary types particularly difficult in terms of tracking changes to laws, however there have been some notable changes in the last few years.

Since 2012 there have been some significant changes to state primary systems. Alaska has reconfigured their Republican primary to allow unaffiliated voters while all other parties operate an open primary. The state may become a battleground for this issue as the debate has reached the state house. Early in 2017, a bill was introduced (HB200) that would completely open the primaries. Courts have recently been reluctant to uphold open or closed primaries on unwilling parties, so any changes would have to stand up to potential legal challenges. There have been court challenges on both sides of this issue, and the courts have repeatedly upheld a party's associational rights to closed (see cases in Idaho and Kansas and Oklahoma) or open (see Connecticut) primaries. This is not to say that the courts have found any right for individuals in states to sue for a particular system (*Crum v Duran*, a recent NM Supreme Court case, upheld their closed primary after a challenge from a citizen that argued that closed primaries do not qualify as 'free and fair' elections). On top of these legal challenges, the Alaska Democratic Party recently sued the state and won the right to allow unaffiliated *candidates* to participate in their primary, overturning a state law that required that candidates be members of the party with whom they are seeking nomination.

Kansas has grappled with these recent legal challenges, with a new recent change to their primary system— the latest in a series of changes reaching back to 2004. In a case stemming from an Oklahoma controversy (Beaver et al. v. Clingman et al), the Tenth Circuit Court of Appeals had ruled that states cannot impose a closed primary on unwilling parties. Due to their location in the Tenth Circuit, the Kansas Secretary of State was bound by the decision and reached out to the parties to ask them if they wanted to continue to hold closed primaries. Both parties had responded that they would open their primaries to unaffiliated voters (Thornburgh 2004) After an intraparty squabble, the Republican party subsequently closed their primaries, leaving Kansas

with a hybrid primary system - closed by default, but with a semi-open Democratic primary. This leads us to the most recent change. With relatively little fanfare the Democratic party has decided that they would be better served by closing their primary as well (Associated Press 2013). This brings the state back to its original position of a fully closed system and ending 10 years of experimentation with open primaries.

The reason for this attention to party registration centers around a debate regarding the relationship between these primary systems and such factors as voter turnout or the ideological extremity of elected officials. Closed primaries are often cited as being indicative of strong party organizations, as they are able to more fully control nominations. This is reflected in conventional wisdom that suggests that open primaries lead to more moderate legislators rather than more ideologically pure officials (Kanthak and Morton 2001). If parties were interested in protecting the ideological sanctity of their nomination processes, we would expect state parties to pursue closed systems. Another important concern is the possibility of 'crossover voting' where members of one party attempt to collectively assert influence on the primary of the other party by 'crossing over' to vote in the primary of the other party.

Three problems immediately arise with the study of primary systems and parties. First, recent studies have concluded that open primaries have not necessarily led to more moderate roll call votes among legislators (McGhee et al. 2013), calling into question our conventional wisdom on primaries. Another recent study was able to leverage the recent changes in Idaho in order to see the effects of a change in primary systems. The study identified a decrease in voter turnout of roughly 4% after the introduction of the closed primary but little change in interparty and intraparty competition (May 2016). Unfortunately, studies have yet to be done to assess any differences in the ideological extremity of Idahoan legislators. In addition to these concerns,

concrete evidence of any effects of crossover voting remains to be found, and the problem, or worries about the problem, seem to be rooted in anecdote rather than empirical evidence. Finally, as I have previously noted, many states are responsible for setting participation rules for the party primaries, as state voter registration is generally the mechanism for party registration. It seems reasonable to question the ability of parties to be able to affect meaningful change to state laws when these changes would need to be made statutorily. With this being said, I should also repeat another previous point that courts have generally been sympathetic to party challenges to both open and closed primary systems. This at least opens some avenue of action for the party organization itself, rather than relying on a state legislative delegation.

One should take away the larger point that party registration should be an issue to watch in 2018 and 2020 - indeed one state has already made post-2016 changes to their primary election system. Colorado had traditionally run a closed primary system, and while some election spectators noted that it resembled a semi-closed system (in that voters could affiliate with a party on election day) reformers put Proposition 108 before the voters in order to allow unaffiliated voters to participate in the primaries without needing to affiliate at the polls. The proposition was passed and will take effect in the next election cycle. Other closed primary states have seen grassroots attempts to open primaries, but at this point, no efforts have garnered as much support as the Colorado movement. South Dakota attempted, unsuccessfully, to institute a top-two primary similar to that in Washington and California. The amendment failed 55-45, but there are already discussions of another attempt in 2018.

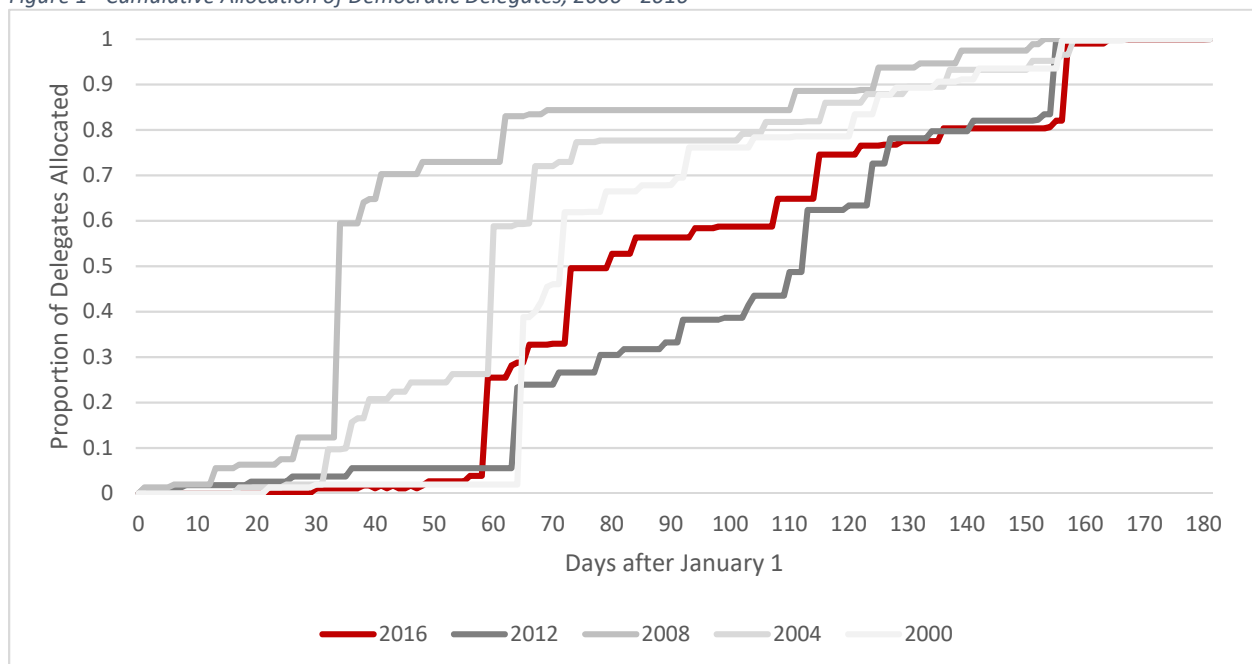
### Primary Sequencing

Another one of the most discussed features of the presidential primaries is the

sequencing of state contests. This sequencing is important in a ‘macro-electoral’ sense because of the frontloading of states and the speed of a nomination contest. In a ‘micro-electoral’ sense the primary calendar is important because those states that hold primaries and caucuses earlier in the election cycle ostensibly exert more power over the nomination process. This perception has led parties, state legislatures, and political observers to see the primary calendar as an important tool to shape the nomination.

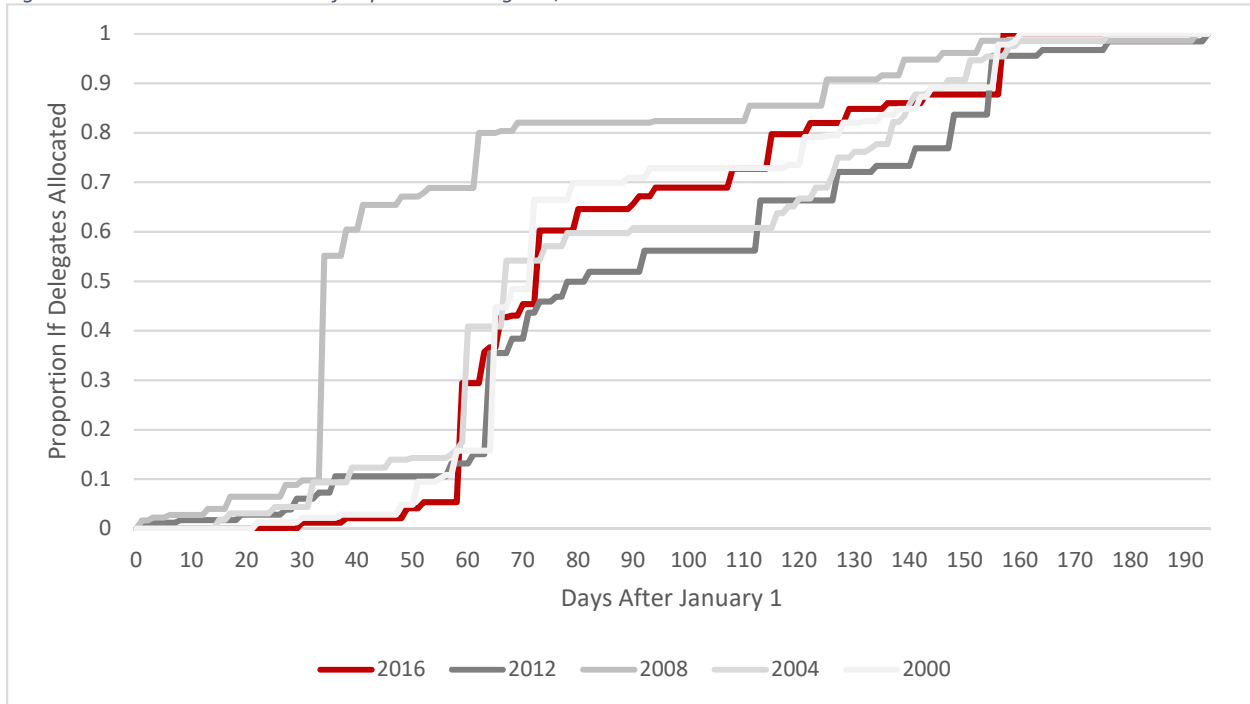
Perhaps the most important of these consequences, or at least the clearest to see, is the speed of the primary calendar. An easy way of measuring this speed is by looking at the proportion of delegates which delegates are allocated over time. Figure 1 shows the cumulative delegate allocation of Democratic delegates from 2000-2016 and Figure 2 shows the Republican delegate allocation. The impressive frontloading of the 2008 calendar demonstrates how quickly delegates can be allocated, however looking back at the actual speed of the 2008 primary, this story becomes more complicated.

Figure 1 - Cumulative Allocation of Democratic Delegates, 2000 - 2016



Source: *The Green Papers*

Figure 2 - Cumulative Allocation of Republican Delegates, 2000 - 2016



Source: *The Green Papers*

While delegate allocation looks fairly similar for both parties in 2008, the Republican primary was decided on March 4<sup>th</sup> while the Democratic contest continued on until June 3<sup>rd</sup>. This shows that a rapid pace of delegate allocation does not necessarily yield a fast nomination. However, parties can presumably delay the process, through a slower delegate allocation.

Another important consideration when looking at the primary calendar is the perception that regional or ideological interests can be brought to bear if primaries can be strategically stacked early in the process. If an ideological group or regional interest can be overrepresented early in the primary process, momentum from early wins might be able to carry a candidate to the nomination. For example, the southern Super Tuesday primary was intended to bring a more conservative element to Democratic party nominations (Norrander 1992). Whether it had this intended effect is debatable, but the perception that timing matters remains powerful within the parties. In 2016, media narratives spoke of early southern states giving an advantage to the

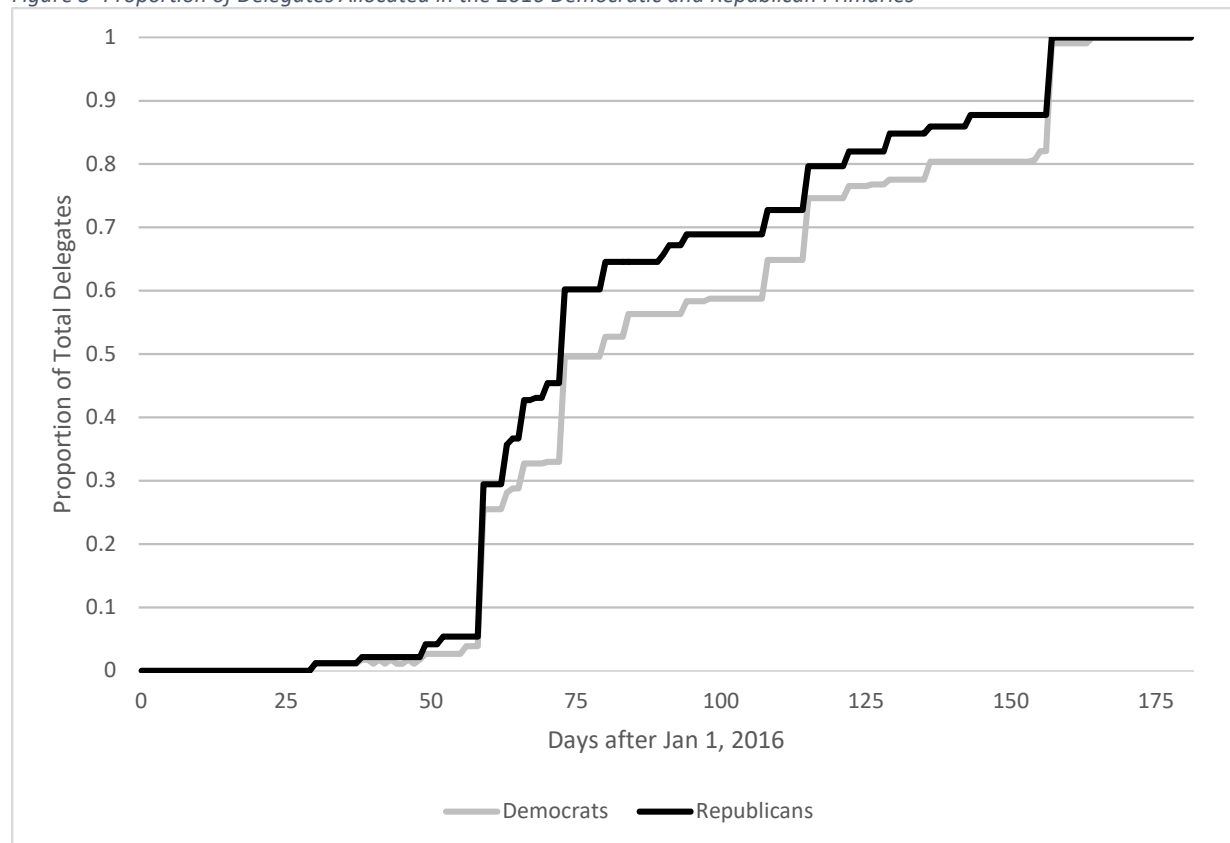


Clinton campaign, as opposed to western progressive states which favored Sanders. This narrative appeared before the primaries even began (Healy and Chozick 2015) and continued throughout the primary season (Benen 2016), with some commenters even stating that these southern primaries were ‘unfair’ (Johnson 2016). What is striking is that the Democratic primary calendar looks virtually the same in 2016 as it did in 2012. With the exception of the later start, which actually represents a ‘normal’ start (early ‘carve out’ states were forced to move their primaries to January in 2012 due to efforts by states like Florida to move their primaries into February), there are only some subtle differences in state election timing. The narrative that the party had unfairly stacked the deck in favor of Clinton with early southern primaries does not seem to bear out given the fact that many of these southern states have regularly scheduled their primaries in March. Indeed, Arkansas and North Carolina were the only pro-Clinton states to the front of the line – the remainder of the early southern primaries had not changed dates. This is not to say that there was a built-in structural advantage that helped Clinton – just that it was not manufactured for her in 2016.

This point raises another serious issue about the ability of parties to affect meaningful change in the calendar. Looking at Figure 3, one can immediately see the similarity both parties calendars. What we can see from this chart is that the Republican party got off to a slightly faster start than the Democrats, although both parties allocated the first half of their delegates within a week of each other, on the 15<sup>th</sup> and 22<sup>nd</sup> of March, respectively. This similarity tells us something important about setting the primary calendar. With the exception of caucus states (including the split primary/caucus arrangement in Kentucky for 2016) and South Carolina (which operates party primaries on successive Saturdays), state primaries are conducted on the same day for both parties. This means that any differences in this calendar come from the

independent changes in caucus-state dates, and because of differences in delegate allocation to the states (discussed further in the next section). This is an important point because it highlights the fact that primary dates are often set by state legislatures, and not the parties. To put a finer point on this, primary election dates are set by the *majority* party in many states - states and parties are both hampered by this reality. States are limited in their ability to effectively move about the primary calendar when they are time-limited by the legislative session. It becomes difficult for states to one-up each other on the primary calendar if a particular state's legislative session ends before another. This has led some states to grant election-setting authority to executive branch entities, such as the governor, secretary of state, or a board of elections.

Figure 3- Proportion of Delegates Allocated in the 2016 Democratic and Republican Primaries



Source: *The Green Papers*

Parties are also limited in their ability to affect change to the calendar in two ways. First, the national party has no mechanism to set the election calendar beyond their ability to coerce states

through the delegate allocation process. While the parties have been effective in granting special status to Iowa, New Hampshire, Nevada, and South Carolina, their ability to coerce later states is questionable. Parties are also limited by their ability to garner cooperation from the calendar-setting authority in the state. A dubious prospect in states where a party is in the minority. Returning to our previous example of Arkansas and North Carolina entering the March window and potentially stacking the deck for Clinton, it seems unlikely that the Democratic Party would have been able to solicit the assistance of two Republican trifectas (that is, Republican majority upper and lower houses, and a Republican governor) in crafting a calendar to better help their favored candidate.

Before moving on to a discussion of delegate allocation, it is worth looking at some specific changes that parties made. The DNC cleared up some language regarding start times for the four early states – allowing New Hampshire to avoid conflict with their state law, but otherwise did not meddle with things from their end. This is not to say that state moves did not occur, but that the party did little to compel or entice any changes to primary dates. As mentioned earlier, one carrot that the Democratic party does have is the ability of states to gather ‘bonus delegates’ by delaying and clustering their primaries. The Democratic party awards states a 10% or 20% delegate bonus when states delay their primaries to April (Stage 2), or May/June (Stage 3), respectively. Additionally, the party awards a 15% delegate bonus when three or more contiguous states cluster their primaries on the same day. This clustering bonus takes effect in late March – no changes to this policy have been made since 2012. Some states were able to take advantages of these delegate bonuses with calendar moves. Arizona, Idaho, and Utah, and Alaska, Hawaii and Washington all gained a 15% cluster bonus in March, however, some of these states lost a previously held bonus for holding their primary in Stage 2 (Alaska, Idaho, and

Washington – further, Idaho had a previous clustering bonus with Wyoming, Nebraska, and Kansas, and thus sustained a net loss in bonus delegates with their move forward in the calendar, however their previous partners, Nebraska and Kansas, moved into early March and were no longer eligible for a clustering bonus). Delaware, Maryland, and Pennsylvania clustered in April, receiving bonuses for clustering and timing. Pennsylvania previously had partners in Connecticut, New York, and Rhode Island, but when New York moved their primary one week earlier, they disconnected Connecticut and Rhode Island from the cluster, leaving them without a bonus. Looking at these changes broadly, it is not clear that the Democratic party enticed any changes to the calendar beyond some state clustering, and, in fact, this year’s moves suggest that some states are willing to forego delegate bonuses in order to move up in the calendar.

On the Republican side of things, changes had added complexity. While I will discuss the nuances of delegate allocation in the next section, but it is worth noting here that the Republican Party has tied their rules for delegate allocation to the calendar. In 2016, states choosing to hold a primary in the first two weeks of March were required to use a proportional scheme to allocate their delegates. As we will see in the next section, states moving into this window already had proportional systems in 2012, and no non-proportional state moved into the window. While this may be an effective vehicle for delaying primaries (if states do not previously conform to the proportional rule) the lack of change makes any causal argument difficult to make.

What is clear from examining the primary calendar, is that parties may not be as completely free to alter the calendar as conventional narratives or media spin may suggest. Parties must contend with the realities of party control in the states, as well as statutory limitations to their interference. One of the few tools that parties may be able to leverage in compelling states to alter the calendar may be delegate allocation, which we turn to next.

## Delegate Allocation

Delegate allocation can be thought of as two complimentary processes. First, is the allocation of delegates to the states by the parties. That is, the formulas for determining the number of delegates a state receives. Second, is the process for awarding delegates to the winners in the various caucus and primary contests. In 2016 the rules for both of these processes changed, especially within the Republican party.

Thinking about the first process – the allocation of delegates to the states – we can see few Democratic party changes, but some more important ones for the Republican party. In 2016 the DNC did little to change the awarding of delegates to the states, but they did have fewer delegates to go around. Both parties award delegates to the states through a hybrid consideration of state population and party loyalty. The Democratic formula is based on the number of votes cast for the Democratic presidential candidate over the preceding three elections. This formula results in a proportion that is then multiplied by a set number of base delegates for the entire convention. While this formula did not change, the numbers that go into its calculation were updated for the most recent elections. In addition, the number of base delegates for the Democratic party was reduced from 3700 to 3200 – decreasing the total number of delegates, but not affecting the balance of power between states, with respect to pledged delegates. One caveat to this assertion is that superdelegates in 2016 were a slightly larger percentage of total delegates (15%) than in 2012 (13%), but still a reduction from 2008, when superdelegates were roughly 20% of the delegate total. While this change would not change the outcome of the Democratic nomination, continued consternation over superdelegates – exacerbated by the bitter primary fight between Clinton and Sanders – led to the creation of a Democratic commission

tasked with studying and offering suggestions for reforming the superdelegate process. If they are successful remains to be seen.

Across party lines, the Republican party made one important change to their delegate allocation rules which affects both the first process – awarding delegates to the states – and the second process – awarding delegates to the candidates. Considering the first process, the Republican party sets a universal baseline of 10 at-large delegates per state (presumably to reflect five delegates per Senator). On top of this is added a population-based component in the form of three delegates per congressional district. After this, bonus delegates are awarded for party loyalty – voting for the Republican presidential candidate in the previous election, and for sitting Republican elected officials. This leaves each state with a set number of at large delegates (10+ bonus delegates) and three delegates per congressional district. Like the Democrats, this baseline formula did not change, but as with every year, changes within the states caused differences in delegate allocation from 2012. What was more important, was an new penalty for the RNC.

In 2016, all Republican contests taking place in the first two weeks of March must allocate their delegates on a proportional basis. Republicans first looked at proportionality in the leadup to the 2012 election. Prior to this, there was no national party guidance on delegate allocation. The speed of the 2008 primaries led the party to chart a middle course between a completely hands-off approach, and a strict proportional system. In 2012, the GOP mandated that any contest taking place in the month of March would have to adhere to a proportional allocation scheme, and have now scaled that back to two weeks for 2016. This system has impact on the awarding of delegates to the states in that it is enforceable by the party through a delegate penalty. Previously, the RNC was able to compel some state behavior (preventing states from

moving their contests into February) through a 50% delegate penalty. In 2016, this penalty has been increased and covers this proportionality requirement. The new penalty reduces a state's delegate count to nine, or one third of their delegation, whichever is less. This should theoretically give the RNC much more ability to compel compliance with the calendar and with proportional delegate allocation rules.

Returning to an examination of the new proportionality window, it seems at first like a scaling back of proportionality for the party, and perhaps an attempt to slow down the primary process. This is based on the assumption that a proportional delegate allocation system favors a longer process. There is, however, an important second change that the Republicans made. In addition to mandating proportionality during this two-week window, the GOP is now mandating the particular 'flavor' of proportionality that the states must utilize. The first iteration of the Republican proportionality rule did not set out any requirements for how proportionality was to be carried out, thus states could award their at-large delegates (the state's 10 baseline delegates) proportionally, yet award congressional district delegates in a winner-take-all fashion in each district. 2016 rules changed this and then mandated that both at-large and congressional district delegates needed to be awarded in a proportional basis, minimizing the ability for states to 'water down' proportional voting practices. While some states like Texas have adopted a fully proportional system, others retained the at-large/congressional district distinction and now allocate both sets of delegates proportionately. In practice, this usually means that congressional district winners get two delegates and second place finishers are awarded one delegate, rather than a winner take all scenario. As stated before, the RNC offered little guidance on how to implement proportionality, so many flavors exist in the states.

Previous iterations of this proportionality window also lacked specific guidance on two remaining areas, the first of which is the concept of qualifying thresholds. These thresholds are minimum percentages that a candidate must receive before they qualify for a proportional share of the state's delegates. The Republican party has now mandated that these thresholds may not exceed 20% (compared to an across the board mandate of 15% in Democratic primaries). Further, states may set a winner-take-all threshold, at which point the winning candidate takes all of a given state's delegates. In this case, the RNC sets a minimum threshold of 50% (Democrats do not allow a winner-take-all scenario like this). What this means in practice, like the narrowing of the proportionality window, is that the Republican primaries are not as proportional as they may seem on the surface. With the exception of strengthening rules with respect to congressional district delegates, there are plenty of avenues for states to avoid pure proportional delegate allocation. By setting qualifying thresholds, many states were able to disqualify candidates that would who might otherwise be able to scrape together some delegates (and perhaps prompt a brokered convention in a crowded race such as 2016). Winner-take-all thresholds may not seem to have been an important factor for Republicans in 2016, especially high vote fragmentation early in the race, and winner-take-all contests, by rule, late in the cycle. What is clear, however, is that the Republican party continues to have a complicated relationship with proportionality, and will likely continue to in the future.

### Delegate Binding

A final rule worth noting is about, and one that was particularly relevant to this year's Republican contest, is the binding of delegates. Republicans attempted to address this through a rule which now mandates that any contests between Republican candidates must result in a binding of delegates to those candidates. While the party leaves the duration of that binding to



the states (state can mandate how long, or though how many votes, a delegate is bound), this now precludes beauty contests and other machinations that allowed states (Minnesota) to run early non-binding contests in 2012 without breaking RNC rules. This should help simplify some confusing timing issues, and bring more certainty to delegate voting at the conventions.

### Looking Towards 2020

If anything, 2016 was an important year for rules because of an increased focus on procedure. Media, parties, candidates, and citizens alike seemed to take notice of many of the rules behind the primaries which so often go unnoticed. This increased focus may bring change, innovation, or at the very least, reconsideration of the rules which govern this most important process. Already, some states have begun to make moves affecting the 2020 elections. Some news sources have begun to comment that Nevada may lose its privileged place in the primary calendar (Cheney 2016). The Democratic party has a unity reform commission that is currently meeting in order to hash out changes to their nominating structures, paying specific attention to the issue of superdelegates. Maine and Minnesota have decided to move to a primary, rather than a caucus, and California has already passed legislation to move their primary into March. If this flurry of activity is suggestive of the amount of potential change to come, the 2020 primaries may look much different than those in 2016.

What is perhaps more interesting to consider, is what 2016 can tell us about the future prospects for party power over nominations. While cries for reform have come from both parties, it is unclear what the parties can do about this problem. Three immediate issues must be considered. First, and perhaps most important, is whether or not parties have the capacity to affect change in their nominating procedures. Parties have made a proverbial deal with the devil in instituting state-run primaries, in that they have lost most of their direct oversight over these

processes. While the parties have experienced some success in using delegate allocation as a tool for compliance, recent examples as noted here highlight issues with the partisan composition of state legislatures, statutory limitations, and outright state disobedience. Second, is the question of whether or not these rules can actually affect the changes that parties seek in their nomination systems. As noted throughout this paper, it is not clear that primary system type, the calendar, or delegate allocation styles are directly linked to outcomes. To be sure, rules matter, however the relationships between these electoral rules, and the outcomes that parties seek are much more complicated than meets the eye, and parties would be wise to be sure to understand the implications of change before pursuing it. Finally, and intimately related to the first two issues, is whether or not parties know what change they want to affect, and whether or not intraparty factions can agree on a path to reform. Regardless of the power of the parties and the effects of rules, the normative desires of parties seem to change within different factions of the parties, and with each passing year. Does the Democratic party need to open up their process, or dilute the influence of superdelegates, or perhaps change to ensure that an establishment candidate doesn't have such a strong outside challenge? Should Republicans do more to ensure an establishment-friendly candidate? Parties would do well to think seriously about the long term implications of these changes, and scholars should continue to investigate the confusing, and often contradictory effects of these rules.

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