

RETURNING PEER REVIEW TO THE AMERICAN PRESIDENTIAL NOMINATION PROCESS

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INTRODUCTION

As Americans, we take for granted that those we entrust with significant authority have been judged by their peers to be competent at the task. Peer review is a concept commonly accepted in most professions. For instance, in medicine “peer review is defined as ‘the objective evaluation of the quality of a physician’s or a scientist’s performance by colleagues.’”¹ That is why we license plumbers, electricians, manicurists, doctors, nurses, and lawyers. We do this in most aspects of life—except politics. In 2016, Americans nominated and then elected Donald Trump, the most unqualified (by virtue of traditional measures of experience and temperament) person ever elected to the Office of the President of the United States, in a system without

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¹ Lamk Al-Lamki, *Peer Review of Physicians’ Performance: Is It a Necessary Quality Assurance Activity?*, 9 SULTAN QABOOS U. MED. J. 109, 109 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3074768/> (quoting *Peer Review*, MCGRAW-HILL CONCISE DICTIONARY OF MODERN MEDICINE 497 (Joseph Segen et al. eds., 2d ed. 2006)).

peer review. This Article is an argument for the restoration of some modicum of peer review in the modern nominating system of both major political parties.

This Article proceeds in three parts. The first part describes the presidential nomination system which prevailed for the entire nineteenth century and most of the twentieth century. The second section describes the transformation of the nomination system which took place in the 1970s. The final section discusses how peer review was lost in the transition from one system to another and offers some ideas for how the system might reincorporate peer review while maintaining a nomination system that is responsive to the public.

I

THE OLD DAYS: WHEN POLITICIANS NOMINATED OUR LEADERS

Imagine for a moment that Franklin Delano Roosevelt, Dwight D. Eisenhower, and John F. Kennedy were among us once again. Then imagine that they found themselves in the middle of a presidential general election campaign. In spite of all the new technologies in use, especially the internet, the campaign strategy for the election in November would look quite familiar to them. The goal would still be to win the majority of electoral votes, and the strategy would be quite familiar: categorize states into “safe” for one party or the other and “toss-up,” and then campaign around the country attempting to win enough battleground states to win the electoral college.

Suppose, however, that our three former presidents found themselves in the midst of campaigns for their parties’ nominations. The object today would be the same as it had been in their day—to accumulate a majority of the delegates at the party’s nominating convention. There, however, the similarities would end. Imagine the confusion over the term “momentum” being discussed in February of the year of the convention. In their day, “momentum” was a term that only had meaning at the convention itself.² Imagine their confusion over delegates being “bound” by the outcome of a primary.³ Or imagine how our three former presidents would react to the fact that two senior and respected Democratic senators, Christopher Dodd and Joe Biden, were never serious contenders for the nomination because

² ELAINE C. KAMARCK, *PRIMARY POLITICS: HOW PRESIDENTIAL CANDIDATES HAVE SHAPED THE MODERN NOMINATING SYSTEM* 6 (2009).

³ *See id.* at 19 (discussing the genesis of binding primaries).

two much less experienced politicians, Hillary Clinton and Barack Obama, were locked in a tight race for the nomination.⁴

The strategy for winning the nomination today bears little resemblance to the strategy of days gone by because the system is so different. Most Americans today view the ability to participate in a primary election for the nominee of a political party as a “right” akin to the basic right to vote in the presidential election itself.⁵ No one is alive today who can remember an era when presidential primaries were few and far between and did not bind delegates.⁶ They were, therefore, mostly ignored by serious presidential candidates.⁷

But most Americans would be surprised to know that one of our great presidents was nominated by a small cabal of congressmen before he went on to win the 1800 election. That would be Thomas Jefferson.⁸ Or that another famous president was nominated by a convention consisting of 1154 “superdelegates” before he went on to win the 1932 election. That would be Franklin Delano Roosevelt.⁹ Or that another famous president insisted that he would not seek the Republican nomination and was drafted by his party’s leaders and won the 1952 election with his name on the ballot in only five primaries. That would be Dwight D. Eisenhower.¹⁰

For most of American history, ordinary citizens not only did not participate in the nomination process—they did not *expect* to partici-

⁴ For a comparison of presidents and their prior experience, see Philip Bump, *Is Hillary Clinton the Most Experienced Presidential Candidate in History?* WASH. POST (June 14, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/06/14/is-hillary-clinton-the-most-experienced-candidate-in-history/>.

⁵ As we saw in the 2016 election, Bernie Sanders’s supporters waged a long and intense campaign to get rid of superdelegates, which they considered a corrupt part of the system since superdelegates were not bound by the will of the voters. See, e.g., Rebecca Savransky, *The Concept of Superdelegates Is ‘Problematic,’* HILL (Mar. 20, 2016, 11:10 AM), <http://thehill.com/blogs/ballot-box/presidential-races/273691-sanders-the-concept-of-super-delegates-is-problematic>.

⁶ See KAMARCK, *supra* note 2, at 14–15 (discussing the shift to the binding primary in the late 1960s).

⁷ *Id.* at 22.

⁸ JAMES W. CEASER, *PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT* 96 (1979); see also *id.* at 96–106 (describing the history of the early presidential nomination process).

⁹ See STEVE NEAL, *HAPPY DAYS ARE HERE AGAIN* 3 (2005). For a quick history of Franklin Delano Roosevelt’s 1932 convention, see Rebecca Onion, *The Art of the New Deal*, SLATE (Mar. 31, 2016, 6:00 AM), http://www.slate.com/articles/news_and_politics/history/2016/03/how_franklin_roosevelt_won_the_contested_1932_convention_and_the_white_house.html.

¹⁰ See Jill Lepore, *How to Steal an Election*, NEW YORKER (Jul. 4, 2016), <https://www.newyorker.com/magazine/2016/07/04/conventions-primaries-and-the-presidency>; see also STEPHEN E. AMBROSE, *EISENHOWER: SOLDIER AND PRESIDENT* 268–87 (1990) (discussing Eisenhower’s nomination and presidential campaign).

pate.¹¹ Of course, the machinations of the various political parties in convention were the stuff of great drama. Ordinary citizens read the newspaper accounts from the convention cities with great interest. When radio became ubiquitous, they huddled around to hear live the speeches coming from the convention. And as the mid-century point passed, they watched the conventions unfold on television. But the only way ordinary citizens could have a say in who they nominated was to participate in party politics at the precinct, county, and state levels and hope to eventually get to participate at their state convention where the national convention delegates were usually chosen.¹²

Thus, from 1796 to 1968, the candidates for president were chosen in a process that was by and large closed to the public.¹³ Most Americans today would consider these processes unfair and undemocratic because of changes that took place beginning in the 1972 nomination process; changes that few could anticipate. The story of the McGovern-Fraser Commission has been told by many, perhaps most thoroughly by Byron Shafer in his 1983 book, *Quiet Revolution*.¹⁴ The Commission was formed in the aftermath of the contentious 1968 Democratic convention when anti-war protesters inside and outside the convention hall complained that they had been shut out of the nomination process.¹⁵

As per the title of Shafer's book, few people really foresaw what the upshot of a commission designed to throw a bone to the anti-war movement would be.¹⁶ As Shafer concludes, "The politics of reform surrounding all this received precious little attention during the time it was unfolding, and surprisingly little in the period since."¹⁷ There was no one rule that said that political parties should use primaries to select delegates, and that elected officials' and party leaders' roles should be downgraded or eliminated. Rather, it was the combination of several rules regarding caucus participation, caucus timing, presidential preference, and, most importantly, rules binding delegates to the outcome of a primary that changed the nomination system in ways that increased the power of the public and decreased the power of

¹¹ KAMARCK, *supra* note 2, at 7-8 (describing how the presidential nomination process was largely a closed affair). Of course, there were no public opinion polls in those days to ask the question of the public, but until 1972 there were no presidential elections in which the nomination system itself was challenged.

¹² *Id.*

¹³ *Id.*

¹⁴ BYRON E. SHAFER, *QUIET REVOLUTION: THE STRUGGLE FOR THE DEMOCRATIC PARTY AND THE SHAPING OF POST-REFORM POLITICS* (1983).

¹⁵ KAMARCK, *supra* note 2, at 14-15.

¹⁶ *Id.* at 538.

¹⁷ *Id.*

political elites.¹⁸ In the years prior to these reforms, delegates were, more or less, free agents at their conventions, subject only to the wishes of the political power structures in their states.¹⁹ But once the rules required that state delegations fairly reflect the will of the voters, the role of delegates and power brokers diminished and the role of the primary voter increased.²⁰ As more and more states adopted binding state-run primaries, the Democratic Party's reforms had a second unintended consequence—they reformed the Republican Party's nomination system as well.²¹

II FROM THE NEW PRESIDENTIAL ELITE TO SUPERDELEGATES

The transformation of the nominating system, evident in the raucous 1972 Democratic National Convention in Miami, surprised the old party and engendered a brief outburst of interest in the effects of the new rules on the system.²² The political scientist Jeane Kirkpatrick, later to become the United States Ambassador to the United Nations, studied convention delegates to both parties in 1972 and concluded that, on the Democratic side at least, there was a new presidential elite whose “motives, goals, ideals, ideas and patterns of organizational behavior are different from those who have dominated American politics in the past.”²³ Mayor Richard Daley, of Chicago, a powerhouse in the Democratic Party, had his delegation thrown out of the Miami Convention—a stark reminder of just how different American politics had become in the new era.²⁴ In a 1983 book, James I. Lingle explored the profiles of those who voted in the 1968 and 1972 presidential primaries in California. His study led him to con-

¹⁸ See KAMARCK, *supra* note 2, at 13–14 (describing changes to the nominations process).

¹⁹ *Id.* at 8.

²⁰ See *id.* at 153–54 (discussing the demise of the uncommitted delegates).

²¹ *Id.* at 20–21. From 1970 to 1992, Democrats controlled more state legislatures than Republicans did—therefore when Democrats adopted primaries in order to comply with the new national party rules, the state ended up having primaries for the Republican Party as well as for the Democratic Party. *Id.*; see also Philip Bump, *How Your State's Politics Have Shifted over the Years, in 49 Charts*, WASH. POST (Sept. 13, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/09/11/49-charts-that-tell-the-partisan-history-of-state-legislatures/?utm_term=.3a9a0b391416 (compiling data from several decades of state legislature party membership).

²² See JEANE KIRKPATRICK, *THE NEW PRESIDENTIAL ELITE: MEN AND WOMEN IN NATIONAL POLITICS* 3–9 (1976) (discussing the fallout from the 1972 convention).

²³ *Id.* at 3.

²⁴ THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT 1972*, 164–92 (1973) (describing Daley's delegation at the 1972 convention).

clude that the primary electorate is quite different from the general party membership and that this had a significant impact on who got nominated.²⁵ In addition, Lengle and Shafer illustrated how the new system diminished the power of big states and elevated the power of small states.²⁶

The nominee of the 1972 Democratic convention, Senator George McGovern, went on to a spectacular loss against Richard Nixon in the fall, a hint perhaps that something was fundamentally wrong with the new nominating system. And yet, a subsequent rules commission failed to halt the trend towards more binding presidential primaries and less influence by party leaders.²⁷ By the 1976 nominating season, the number of binding primaries had mushroomed from three in the pre-reform era to seventeen.²⁸ And caucuses had become the functional equivalent of primaries.²⁹ However, unlike in 1972, in 1976 the new system produced a candidate, Governor Jimmy Carter, who won the presidency.³⁰

What these reforms produced was a nomination system unlike that of any other major democracy in the world.³¹ Most of the other democracies are parliamentary democracies, where the head of government is chosen by the legislature and forms a government. In those systems the executive and the legislature are not separate from each other. The party which wins the most seats in parliament is invited to form a government and the party leader becomes the prime minister. Prime ministers are not chosen in primaries; they are chosen by their party members. In most of these democracies, it is nearly impossible for someone who has not spent years in a leadership role inside the party to become the head of government.

A truism of the modern nomination system is that within a given political party, winning does a great deal to dampen criticism of any system that produced a winner. Since the first goal of a political party

²⁵ James I. Lengle, *Presidential Primaries and Representation*, in *PRESIDENTIAL POLITICS: READINGS ON NOMINATIONS AND ELECTIONS* 160, 171–73 (James I. Lengle & Byron E. Shafer eds., 2d ed. 1983).

²⁶ James I. Lengle & Byron Shafer, *Primary Rules, Political Power, and Social Change*, 70 *AM. POL. SCI. REV.* 25, 35 (1976) (analyzing how different nominating rules impact the relative power of different states).

²⁷ See KAMARCK, *supra* note 2, at 149 (describing the impact of commissions in the 1970s that weakened the control of party leadership).

²⁸ *Id.* at 20 tbls.1 & 3.

²⁹ See *id.* at 14–15 (describing the transformation of party caucuses).

³⁰ *Id.* at 27.

³¹ See Stephen Gardbaum & Richard H. Pildes, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 *N.Y.U. L. REV.* 647 (2018) (describing how major democracies structure the process of choosing party leaders or candidates for chief executive).

is to win elections, criticism of the new nomination rules tended to subside in 1977. But as Jimmy Carter's presidency floundered, critics of the new system emerged. By the early 1980s, after Carter's presidency had gone down in an electoral landslide to Ronald Reagan, scholars and political leaders began to argue that by pushing party leaders and elected officials to the sidelines, the nomination system had lost its ability to judge whether or not candidates for president would, in fact, be good presidents.³² The chief virtue of the old system, it was argued, was that it allowed for "peer review"—i.e., the ability of a potential president to be judged by others in the political system who, presumably, knew what it took to lead in a political context and who could become successful presidents.³³

Thus, against the background of Jimmy Carter's failed presidency, participants in yet another rules commission—headed by Governor James (Jim) Hunt of North Carolina—argued for a way to put the party leaders back into the process.³⁴ Austin Ranney, the esteemed scholar of political parties, told the Hunt Commission:

In every other democratic country in the world, you name it, this is the case, the candidate is picked by a relatively small group of party people in which the party's elected public representatives, people who have faced the test of getting themselves elected to public office, play a prominent role. In many countries and in many parties they are the only ones that pick the party leader. . . . I would like to see us reintroduce as much as we can—and how much we can is a different question—into our system, and that is what David Broder calls peer review, that is to say, people who know the potential candidates personally, who have seen them operate under fire, under conditions of stress, have seen them when they've had to display judgment, when they've had to decide when to stand firm and when to compromise, and with whom, have certainly developed a kind of knowledge about them as to whether they would be good Presidents or not, that those of us who know the candidates only as voices and faces on the television tube cannot possibly know.³⁵

Another famous political scientist, James Sundquist, wrote in a 1980 article:

³² See KAMARCK, *supra* note 2, at 156–57.

³³ See *id.* at 24, 156–57.

³⁴ See *id.* at 156–57 (discussing the Hunt Commission). The Commission on Presidential Nominations began meeting in August of 1981 and issued its final report to the DNC in February 1982. See Austin Ranney, Remarks at the Meeting of the DNC Commission on Presidential Nominations (Aug. 20, 1981) (transcript available in the National Archives).

³⁵ Ranney, *supra* note 34, at 54–55.

When the state primaries became the mode rather than the exception after 1968, a basic safeguard in the presidential election process was lost. Previously an elite of party leaders performed a screening function. They administered a kind of competence test; they did not always exercise the duty creditably, but they could—did—ensure that no one was nominated who was not acceptable to the preponderance of the party elite as its leader.³⁶

Writing in 1983 in a book called *Consequences of Party Reform*, the political scientist Nelson Polsby made the argument for peer review again. “What it takes to achieve the nomination differs nowadays so sharply from what it takes to govern effectively as to pose a problem that has some generality,” he wrote.³⁷ He went on to say that:

Peer review is a criterion which entails the mobilization within the party of a capacity to assess the qualities of candidates for public office according to such dimensions as intelligence, sobriety of judgement, intellectual flexibility, ability to work well with others, willingness to learn from experience, detailed personal knowledge of government and other personal characteristics which can best be revealed through personal acquaintance.³⁸

The result of these concerns was the creation, in time for the 1984 election, of a group of delegates who would be automatic delegates to the convention by virtue of their office and who could vote for whom-ever they pleased, regardless of the outcome of a primary or caucus in their state.³⁹ These party leaders and elected officials came to be called “superdelegates” by opponents of the idea, mostly supporters of Senator Ted Kennedy who, in preparing to take on former Vice President Walter Mondale, understood, probably correctly, that Mondale would have the bulk of these voters.⁴⁰ Kennedy never did run in 1984, but the moniker “superdelegate” persists to this day.

By 1988, the number of presidential primaries was at thirty-five and the political class had adapted to the new system.⁴¹ No longer did established politicians eschew running in primaries. Between 1984 and 2008, both parties nominated presidential candidates through the primary system who probably could have won their party’s nominations in the pre-reform system as well. Ronald Reagan was a two-term gov-

³⁶ James L. Sundquist, *The Crisis of Competence in Our National Government*, 95 POL. SCI. Q. 183, 193 (1980).

³⁷ NELSON W. POLSBY, *CONSEQUENCES OF PARTY REFORM* 89 (1983).

³⁸ *Id.* at 169–70.

³⁹ See KAMARCK, *supra* note 2, at 155–58 (discussing the creation of a new class of unbound delegates who were party insiders).

⁴⁰ *Id.* at 157.

⁴¹ *Id.* at 18 tbl.1–2 (citing CONG. QUARTERLY, *PRESIDENTIAL ELECTIONS SINCE 1789*, 11 (4th ed. 1987)).

ernor of the biggest state in the union, California, a powerful springboard to the nomination in any year or any system. Michael Dukakis was twice elected governor of Massachusetts. George H.W. Bush was the former director of the CIA and ambassador and chairman of the Republican National Committee. Bill Clinton was governor of Arkansas for over a decade and had been the state's attorney general before that. John Kerry was a war hero who had served in the United States Senate for twenty years when he was nominated in 2004.

Concern about the nomination system being open to "outsiders," or people who were not ready for prime time, as the saying goes, waned as the system produced nominees who were plausible presidents. Even though the so-called superdelegates were present at every convention from 1984 on, the fact that their votes never changed the outcome of the public process meant that their existence was practically forgotten.⁴²

Until 2008. In that year, a senator from Illinois, Barack Obama, and a senator from New York, Hillary Clinton, faced off in one of the closest nomination fights since President Jimmy Carter and Senator Ted Kennedy had fought for the 1980 nomination. By spring of 2008 it was clear that the distance between their delegate counts was very small indeed, and the Obama forces began to fear that the superdelegates, many of whom were for Clinton, would hand the nomination to her.⁴³

So the Obama campaign waged a public battle against the superdelegates, arguing that they should vote for the winner of the popular vote.⁴⁴ Most of the public had never heard of superdelegates before. And in an indication of just how much the system had changed in forty years, voters in 2008 were outraged. In a span of a generation, the nomination system had flipped. The views of the voters in a primary were considered the *only* legitimate views, while the views of the party leaders were considered illegitimate at best and downright corrupt at worst. In a March 5, 2008 poll by Pew Research, respondents—by a two-to-one margin of 63% to 32%—thought the superdelegates should vote for the person who won the most support in primaries and caucuses rather than for the person they personally thought was best.⁴⁵

⁴² *Id.* at 160.

⁴³ *See id.* at 161–62 (summarizing the Obama campaign's strategy towards superdelegates in the 2008 Democratic Party primary).

⁴⁴ *See id.* at 163.

⁴⁵ *How Super Delegates Should Vote*, PEW RES. CTR. (Mar. 5, 2008), <http://www.pewresearch.org/fact-tank/2008/03/05/how-super-delegates-should-vote/>.

Eight years later the superdelegate issue was back in both parties, this time raised by Senator Bernie Sanders in his close race against Hillary Clinton. And this time Clinton's lead among the superdelegates was even more commanding, given that Sanders had spent his political career as an Independent and a democratic socialist, occasionally campaigning against Democrats and never really committing himself to the party. Despite having spent nearly thirty years in the United States Congress, first in the House and then in the Senate,⁴⁶ Sanders failed to win more than a handful of supporters in the House and the Senate.⁴⁷ His own fellow senator from Vermont, Senator Pat Leahy, endorsed Clinton.⁴⁸ Rank and file Sanders voters were outraged at the very existence of superdelegates.⁴⁹ The outrage continued throughout the election year. Once Sanders dropped out in favor of Clinton, Sanders delegates managed to get, as a concession, the creation of a commission called the Unity Commission that would look at ways to reduce the importance of the superdelegates.⁵⁰

In the meantime, over in the other party, many Republican establishment leaders were watching in horror as Donald Trump, a complete outsider and a suspect conservative in a party of stalwart conservatives, won the Republican nomination. While many Democrats were bemoaning the existence of superdelegates, more than one Republican activist wished they had some unpledged superdelegates to stop Trump's roll towards the nomination.⁵¹ By the time of his convention, Trump's candidacy had become so controversial that a number of high-profile Republicans decided to skip his con-

⁴⁶ *Meet Bernie*, BERNIE SANDERS, <https://berniesanders.com/about/> (last visited May 6, 2018).

⁴⁷ See Clare Foran, *Can Bernie Win Over the Establishment?*, ATLANTIC (Mar. 15, 2016), <https://www.theatlantic.com/politics/archive/2016/03/bernie-sanders-superdelegates/473769/> (describing the Sanders campaign's efforts to sway superdelegates).

⁴⁸ Daniel Strauss, *Bernie's Home-State Blues*, POLITICO (Feb. 23, 2016), <https://www.politico.com/story/2016/02/bernie-sanders-vermont-democratic-support-219631>.

⁴⁹ Daniel Strauss, *Sanders Supporters Revolt Against Superdelegates*, POLITICO (Feb. 14, 2016), <https://www.politico.com/story/2016/02/bernie-sanders-superdelegates-democrats-219286>.

⁵⁰ For background on the Unity Commission and a copy of their final report, see *Unity Reform Commission*, DEMOCRATIC NAT'L COMMITTEE, <https://democrats.org/page/unity-reform-commission> (last visited July 27, 2018); see also JEN O' MALLEY DILLON & LARRY COHEN, UNITY REFORM COMMISSION, REPORT OF THE UNITY REFORM COMMISSION 1-2 (2017), http://s3.amazonaws.com/uploads.democrats.org/URC_Report_FINAL.pdf.

⁵¹ See Rudy Takala, *Can GOP 'Superdelegates' Stop Trump?*, WASH. EXAMINER (Jan. 12, 2016), <https://www.washingtonexaminer.com/can-gop-superdelegates-stop-trump/article/2580289>. The Republican Party allows members of the Republican National Committee to go to the convention without running in primaries but they are bound to vote for the winner of their state, so they are not superdelegates in the same way the Democrats are. *Id.*

vention. With the exception of former Senator Bob Dole,⁵² all the living former GOP nominees decided not to go, as did members of Congress as diverse in their opinions of Trump as the anti-Trump senator from Arizona, Jeff Flake—who told the press he had to “mow his lawn”—to Trump supporter, now Office of Management and Budget director, Congressman Mick Mulvaney.⁵³ And yet, a Stop Trump movement fizzled and died, leaving Republican leaders with a nominee they believed was not qualified to be president. Republican concern about Trump was embodied in a remarkable letter later signed by 50 former Republican national security officials. They said of Trump:

He is unable or unwilling to separate truth from falsehood. He does not encourage conflicting views. He lacks self-control and acts impetuously. He cannot tolerate personal criticism. He has alarmed our closest allies with his erratic behavior. All of these are dangerous qualities in an individual who aspires to be President and Commander-in-Chief, with command of the U.S. nuclear arsenal.⁵⁴

III

IS IT TIME TO BRING BACK PEER REVIEW?

In 2008, four political scientists wrote a book called *The Party Decides: Presidential Nominations Before and After Reform*.⁵⁵ Their thesis was that in spite of the vast changes in the nomination system, the party insiders still controlled the party’s nomination by virtue of their activities in the years prior to the convention year—traditionally known as the “invisible primary.”⁵⁶ And up until 2016, they had a pretty sound thesis. As noted above, by and large the nominees of both parties in the years after reform had been experienced, plausible candidates.⁵⁷

Until Donald Trump.

In 2016, the Republicans nominated the least experienced person to ever hold and win the presidency. A large field of candidates, unable to unite to oppose Trump, sat idly by as an unknown and

⁵² Susan Page, *Bob Dole: ‘Trump’s Going to Make a Great President,’* USA TODAY (July 20, 2016), <https://www.usatoday.com/story/news/politics/elections/2016/07/20/bob-dole-says-trump-will-make-great-president/87340048/>.

⁵³ See Jill Ornitz, *‘I’ve Got to Mow My Lawn’: Here Are the Prominent Republicans Skipping the Convention and Why,* L.A. TIMES (July 18, 2016), <http://www.latimes.com/politics/la-na-pol-republicans-skipping-convention-20160718-snap-htmlstory.html>.

⁵⁴ *A Letter From G.O.P. National Security Officials Opposing Donald Trump,* N.Y. TIMES (Aug. 8, 2016), <https://www.nytimes.com/interactive/2016/08/08/us/politics/national-security-letter-trump.html>.

⁵⁵ MARTY COHEN, DAVID KAROL, HANS NOEL & JOHN ZALLER, *THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM* (2008).

⁵⁶ *Id.* at 353–58.

⁵⁷ See *supra* note 41 and accompanying text.

untested leader won primary after primary, rolling up enough delegates to clinch the nomination. His lack of governmental experience did not worry a primary electorate fed up with the status quo, suffering from economic anxiety and harboring racial resentment and determined to send a message to the Republican establishment. The primary system had made it possible. More than three decades after people had worried about the absence of peer review in the nominating system, the only thing 2016 Republicans who hoped for a more traditional candidate could do was to hope that Trump's more outrageous behavior and statements were part of an act and that he would settle down to be a good conservative American president.⁵⁸

Of course, we cannot make any definitive pronouncements about the ultimate quality of a Trump presidency at this point. But the signs are not good. Early confusion and missteps may be simply part of a learning curve that is somewhat worse than normal, but so far into his presidency Trump shows few signs of curbing his most self-destructive behaviors and little familiarity with policy. Throughout his first year in office, Trump has had the lowest approval ratings of any modern president at this period in office.⁵⁹ And there were signs that his unpopularity could threaten Republican congressional control.⁶⁰ If, in retrospect, Trump, like Jimmy Carter before him, is understood to have taken down his party, then we can expect the Republicans to toy with some version of peer review in the future of their nominating process.

Hints of what that would look like occurred in the 2016 Republican nomination race as Trump moved towards victory and worries about him mounted. A longtime Republican National Committeeman from North Dakota, Curly Haugland, launched a long-shot campaign arguing that Republican delegates were not bound to the results of the primaries and caucuses.⁶¹ He was motivated by a rule change that came out of the 2012 Republican conven-

⁵⁸ Interviews with Republicans Attending the Republican Nat'l Convention, in Cleveland, Ohio (July 2016) (off-the-record).

⁵⁹ According to a December 2017 CNN poll, "Donald Trump has had the worst approval rating at the end of his first year in the White House since the dawn of modern polling, ending with an approval rating of 40%." Jennifer Agiesta, *No, Trump's Approval Rating Hasn't Caught up to Obama's*, CNNPOLITICS (Dec. 30, 2017, 10:39 AM), <https://www.cnn.com/2017/12/29/politics/donald-trump-approval-rating/index.html>.

⁶⁰ See, e.g., *A 'Blue Wave' Is Swelling*, NPR (Apr. 7, 2018, 5:27 PM), <https://www.npr.org/2018/04/07/600565161/a-blue-wave-is-swelling> (discussing the success of Democrats in special elections on *All Things Considered*).

⁶¹ See, e.g., Erick Trickey, *The One Man Who Could Stop Donald Trump*, POLITICO MAG. (May 9, 2016), <https://www.politico.com/magazine/story/2016/05/republican-convention-stop-donald-trump-curly-haugland-213879>.

tion where, in some states, Ron Paul won delegates even though Mitt Romney had won the primary or caucus.⁶²

In *Unbound: The Conscience of a Republican Delegate*, Haugland argued that GOP delegates were not and had never been (with the exception of 1976) bound to vote for the winner of the primary or caucus in their state. While Haugland himself did not endorse a Stop Trump movement, it was interpreted as such.⁶³ In the introduction to his book, he says:

But it is clear, based on recent developments, that there is at the very least a serious misunderstanding by many about the freedom of delegates to vote their consciences, and perhaps even a deliberate effort to strip away this important and longstanding freedom. Delegates to the 2016 convention ought to become familiar with the history of this freedom, and then judge for themselves whether they should fight to protect it or join in an effort to diminish it.⁶⁴

Meanwhile the Colorado Republican Party, objecting to the new national rule, which required convention delegates to support the winner of the primary or preference poll,⁶⁵ took the unusual step of getting rid of Colorado's presidential preference poll—the poll taken, usually at the beginning of the caucus/convention process, in which activists indicate which presidential candidate they prefer.⁶⁶ Steve House, Colorado Republican Party chairman, justified the move as follows: “If we do a binding presidential preference poll, we would then pledge our delegates . . . and the candidates we bind them to may not be in the race by the time we get to the convention.”⁶⁷

The move was initially an anti-Trump, pro-Ted Cruz move, as evidenced at the convention some months later when the Colorado dele-

⁶² See Kyle Cheney, *GOP Panelists Eager to Scrap Rule that Helps Trump*, POLITICO (Mar. 30, 2016), <https://www.politico.com/story/2016/03/republican-convention-rules-trump-cruz-221355>.

⁶³ See, e.g., Bob Bennett, *My Interview with Curly Haugland: A Way to Stop Trump?*, REDSTATE (May 6, 2016), <https://www.redstate.com/blbennett/2016/05/06/interview-curly-haugland/>.

⁶⁴ CURLY HAUGLAND & SEAN PARNELL, *UNBOUND: THE CONSCIENCE OF A REPUBLICAN DELEGATE*, at vi–vii (2016).

⁶⁵ See L. John Van Til, *Conscience and Republican Convention Delegate Voting Rules*, CTR. FOR VISION & VALUES AT GROVE CITY C. (June 28, 2016), <http://www.visionandvalues.org/2016/06/conscience-and-republican-convention-delegate-voting-rules/> (“The intent [of the Republican Party’s national rule] is clear. Delegates are to be bound in their vote based on results at the state level.”).

⁶⁶ See John Frank, *Colorado Republicans Cancel Presidential Vote at 2016 Caucus*, DENVER POST (Aug. 25, 2015, 8:08 AM), <https://www.denverpost.com/2015/08/25/colorado-republicans-cancel-presidential-vote-at-2016-caucus/> (omission in original).

⁶⁷ *Id.*

gation led the “Never Trump” movement.⁶⁸ But it was also a move back in time to when most convention delegates were selected without regard to a public vote.

IV

PEER REVIEW IN AN AGE OF PRIMARIES?

A return to the old days, however, is especially unlikely if Trump turns out to be a successful or even moderately successful American president. If a President with Trump’s background turns out to be successful, the decades-long argument about the importance of peer review in the nominating system will be put to rest.

At this point in time, however, the American people have chosen to embark on a great experiment by electing a president with no public-sector or political experience. With the exception of Donald Trump, Wendell Willkie, who won the Republican nomination in 1940, is the only nominee with no public-sector experience.⁶⁹ Before being nominated, Willkie spent his career as a utilities lawyer in Ohio and as a Democratic political activist.⁷⁰ In 1939, he switched parties to join the Republican Party, where he was nominated on the sixth ballot by a Republican Party seeking an internationalist candidate to run against Roosevelt.⁷¹ Willkie lost the electoral college by a landslide, giving Roosevelt an unprecedented third term.⁷²

The modern nomination system allows anyone to declare themselves a candidate for the nomination. All a person needs to do is pull together the modest amount of money needed to get on primary ballots and be able to afford a coach ticket to cities hosting presidential primary debates. From a pizza entrepreneur to an obscure former senator from Alaska who had been out of office for nineteen years before deciding to run for president, both political parties have found themselves having to make room on the stage for presidential candidates

⁶⁸ The “Never Trump” movement at the Republican National Convention consisted of those who sought rule changes that would “unbind” delegates in the hope that they could deny Trump the nomination. See Scott Detrow, *‘Never Trump’ Campaign Launches Last-Ditch Effort to Stop Nomination*, NPR (July 13, 2016, 4:35 PM), <https://www.npr.org/tags/485923728/never-trump-movement>.

⁶⁹ See generally STEVE NEAL, *DARK HORSE: A BIOGRAPHY OF WENDELL WILLKIE*, at vii–ix (Doubleday & Co. 1984) (“Wendell L. Willkie never held a public office, yet he nearly became President of the United States.”).

⁷⁰ *Id.* at 16–18.

⁷¹ *Id.* at 56, 108–16.

⁷² *Id.* at 174–76.

who have decided (for reasons only they can fathom) that they should be president.⁷³

But, as we saw in 2008 and again in 2016, the public regards its role in the nomination process as a right. The Bernie Sanders campaign and the Hillary Clinton campaign agreed on a convention resolution and a commission that would reduce the number of unpledged superdelegates at the 2020 convention. The Unity Commission followed through and allowed the members of Congress and Governors to remain uncommitted while requiring that the Democratic National Committee members be pledged to the winner of their state.⁷⁴ The creation of two classes of delegates out of the superdelegate pool did not sit well with members of the Democratic National Committee, who had to vote on the eventual change. Thus, when the package arrived at the Democratic Party's Rules and By-Laws Committee in early 2018 the search was on for a new option.

In spite of congressional opposition, the Democratic National Committee, on August 25, 2018 adopted a final rule which provided that none of the superdelegates could vote on the first convention ballot unless it made no difference to the outcome. The Sanders supporters were pleased and the party regulars happy that at least party officials would retain some of their automatic right to go to the convention and vote on other items such as the party's platform, rules and credentials.

The entire two year long discussion underscored just how, in an increasingly polarized and paranoid electorate, there is no legitimacy given to leaders of the party even though they are elected by the same people.⁷⁵ Given the antipathy—both historic and current—Americans hold towards political parties and politicians, it would be nearly impossible to turn back the clock and return power to the party establishment in each party. There is now an entire generation of voters who have never experienced the old-fashioned method of party-based nominations. The closest we have come to that in the modern era is

⁷³ Herman Cain ran for the Republican party nomination in 2012. He was chairman and CEO of Godfather's Pizza. *About Herman*, HERMAN CAIN, <http://hermancain.com/about-herman/> (last visited May 4, 2018). Mike Gravel had been Senator from Alaska from 1969 to 1981. *Biography*, SENATOR MIKE GRAVEL, <https://mikegravel.com/bio/> (last visited May 12, 2018).

⁷⁴ The author was present at the Unity Commission, the Rules and By-Laws deliberations, and the final Democratic National Committee meeting.

⁷⁵ See Jeffrey M. Jones, *Americans' Trust in Political Leaders, Public at New Lows*, GALLUP (Sept. 21, 2016), <http://news.gallup.com/poll/195716/americans-trust-political-leaders-public-new-lows.aspx> ("At no point in the last four decades have Americans expressed less trust than they do today in U.S. political leaders or in the American people who voted those leaders into office.")

the system Republicans used in Colorado in 2016, where delegates were elected without being formally bound by a presidential preference poll—because there was none. And, while the Colorado example could be replicated in caucus states in the Republican Party, in the Democratic Party it would be nearly impossible to allow delegates to the conventions to be elected free to vote their own conscience without regard to the winners of the presidential preference poll or primary.

It is impractical and also unwise for anyone to try to remove voters from the presidential nomination process at this point in history. Nonetheless, if we are to be concerned about the quality of our presidents and if we are to be protected from demagogues and authoritarians, we may want to consider some ways of fitting peer review into the modern system. Following are some options that may be practical.

A. *Option #1: Superdelegates*

The easiest option is to retain unpledged superdelegates on the Democratic side and for the Republican Party to adopt its own version of that rule. This would mean that every member of Congress, every Governor, and every national committeeperson would get a vote at their party's convention. This is the status quo in the Democratic Party, although the number of superdelegates is likely to be reduced as a result of the Hillary Clinton/Bernie Sanders deal cut at the 2016 convention. Presumably, members of Congress and party leaders, many of whom have worked with past presidents, would be sensitive to whether or not the presidential aspirant would have the gravitas and the talent in areas like negotiation to actually do the job. No Republican member of Congress, for instance, would have taken seriously President Trump's campaign pledge to make Mexico pay for the border wall.

In 2016, the activist supporters of Bernie Sanders, like the supporters of Barack Obama in 2008, feared that the superdelegates would overturn the results of the primary. In the eight presidential elections since superdelegates were empowered, this has never happened. But opponents have a more nuanced complaint. They argue that when one person has an early lead in the superdelegate count it influences and distorts the subsequent elections by giving that candidate the aura of a substantial lead.

This is a legitimate concern even though it did not prevent Barack Obama from winning the 2008 nomination race. In 2016,

Hillary Clinton won the superdelegates, but she also won a majority of the other delegates elected.

The purpose of superdelegates in the current era is not to upend the judgement of voters in primaries. Rather it is to prevent clearly unacceptable candidates from winning the nomination. Because the nomination race takes place over a period of more than six months—usually beginning with the Iowa caucuses in January and not ending until the conventions in the summer—candidates who look good in the winter may turn out to have substantial problems come summer. For instance, had Senator John Edwards (D. N.C.) done well in the winter of 2008 and gone on to amass enough delegates to be the nominee in the summer, his candidacy could have been derailed by news of his extra-marital affair and the pregnancy of his mistress.⁷⁶ In that instance, he would have become a severely damaged potential nominee and the party's elected leaders would have had to take up the task of finding a replacement.

Superdelegates may or may not have kept the 2016 Republicans from nominating Donald Trump. The base of the Republican Party was clearly very angry and rejected more traditional candidates in primary after primary.⁷⁷ But more formal engagement in the nomination process may have resulted in more support for the Stop Trump movement. He went into his convention with 306 delegates more than needed to nominate—hardly an enormous margin.⁷⁸ And by the time of his convention there were doubts about his electability. More than one Republican in Cleveland, site of the convention, told me that they expected Hillary to win.⁷⁹ Republican senators, congressmen, and governors may have made it a little easier to stop Trump but they were not even in attendance.

B. Option #2: A Pre-Primary Endorsement

Another option for injecting some element of peer review into the current nomination process would be for each party to mandate a pre-primary endorsement of one or more candidates. In

⁷⁶ For a description of the scandal, see ANDREW YOUNG, *THE POLITICIAN: AN INSIDER'S ACCOUNT OF JOHN EDWARDS'S PURSUIT OF THE PRESIDENCY AND THE SCANDAL THAT BROUGHT HIM DOWN* (2010).

⁷⁷ See Nicholas Confessore, *How the G.O.P. Elite Lost Its Voters to Donald Trump*, N.Y. TIMES (Mar. 28, 2016), <https://www.nytimes.com/2016/03/28/us/politics/donald-trump-republican-voters.html>.

⁷⁸ For the delegate count at the time, see *Election 2016 — Republican Delegate Count*, REALCLEARPOLITICS, https://www.realclearpolitics.com/epolls/2016/president/republican_delegate_count.html (last visited May 4, 2018).

⁷⁹ The Author attended the Republican convention in Cleveland as part of her research into the presidential nomination system.

Massachusetts, Democrats hold an annual party convention, and in election years, the convention “endorses” candidates for statewide office. A candidate who does not receive at least 15% of the convention votes on the first ballot will not be eligible for placement on the primary ballot. The candidate who wins the majority of votes is the “endorsed” candidate of the Democratic Party and has the first position on the primary ballot where he or she is identified as the “endorsed candidate of the Massachusetts Democratic Party.”⁸⁰ This process guarantees that the candidates are at least minimally acceptable to the local leadership of the Democratic Party. Newcomers are regularly kept off the ballot.⁸¹

A national endorsing convention would give party officials and activists a big role in limiting who could run for president under the party’s banner since potential candidates would have to cross a threshold of support to be eligible to be on the ballot. However, as effective as this method is for keeping the party involved in Massachusetts, it would be possible but extremely difficult to pull off on a national level. It would push the race for president even earlier than it now is since delegates would have to be elected in the year *before* the primaries are held.

C. Option #3: A Pre-Primary Vote of Confidence

A more feasible option, at least logistically, might be to have members of Congress and the parties’ national committees give up their convention votes in return for a January session or sessions with the presidential candidates that would allow them to drill the candidates (in private) and then to issue a vote of confidence or no confidence. Members could be allowed to vote for more than one candidate and their role would simply be to let the primary voters know what people in government think of the capabilities of these candidates prior to the beginning of the nomination contests. Candidates not receiving a minimum number of votes—say 15%—from these forums would not be able to join the televised presidential debates which have become so much a part of the process, but they could still get on ballots and try to compete in the nominating contests.

⁸⁰ See MASS. DEMOCRATIC PARTY, 2018 CONVENTION RULES 3–4 (2018), <https://massdems.org/wp-content/uploads/2018/01/2018-Convention-Rules-APPROVED.pdf>.

⁸¹ For instance, in the 2014 Democratic Convention, Juliette Kayyem, a former Obama Administration official, failed to reach the 15% threshold at the convention and was not on the primary ballot. Joshua Miller, *Grossman, Coakley, Berwick Reach Primary*, BOS. GLOBE (June 14, 2014), <https://www.bostonglobe.com/metro/2014/06/14/democrats-rally-worcester-state-party-convention/Wvk0JOZYD8NrGg54jVVIP/story.html>.

The political elites would not be making any final decisions—the voters would still do that. But they would be telling the voters two important things. First, are all of these people knowledgeable and experienced enough to have the judgement to do the job of President? Second, are all of these people in line with the general philosophy of the Democratic or Republican Party?

Pizza executives with no government experience, retired former senators close to eighty years old, and reality television stars may very well not make the cut, and they could all fulfill the ballot requirements to run and win in the primaries. But at least the electorate would be formally forewarned. This still may not have prevented the nomination of Donald Trump; after all, the Republican establishment offered its warnings about Trump early on, albeit informally. Primary voters in the Republican Party ignored those warnings because they wanted to send a message to their party. But by forcing would-be presidents to appear before the people they need to work with if elected, a pre-primary vote of confidence could add some element of peer review to the process.

CONCLUSION

The modern American system of nominating major party candidates for president is so wide open that it allows for almost anyone with a minimum amount of support and resources to run. On the one hand, it is very democratic. On the other hand, it can be quite dangerous, potentially putting the republic in the hands of someone who is, for reasons of temperament or experience or both, unfit for office.

In a new book by Steven Levitsky and Daniel Ziblatt called *How Democracies Die*, they make the point that democracies die when leaders in the political system abandon their gatekeeping role and allow authoritarian figures to take over: “The abdication of political responsibility by existing leaders often marks a nation’s first step toward authoritarianism.”⁸² In the name of greater participation and democracy, we have allowed the presidential nomination system to be constructed in such a way that other political leaders have no role and no responsibility.

Some element of peer review should be injected into the process as a safeguard against authoritarian leaders. How to do that while respecting the reality that modern voters expect to have the last word in the nomination process is a challenge—but one worth pondering.

⁸² STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 19 (2018).