Note

Legitimate Absenteeism: The Unconstitutionality of the Caucus Attendance Requirement

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As a wave of hope spread across the country during the 2008 election season, Felipe Goodman grew cynical.[1] After serving ten years as a rabbi in Nevada, the Mexico native completed the citizenship process with the intention of voting in the election.[2] He registered to vote, only to learn that he had to choose between two defining American promises—the freedom of religion and the right to vote.[3] State party officials had scheduled Nevada's caucuses on a Saturday.[4] Party rules stipulated that he had to be physically present to vote in the party caucus, no exceptions.[5] Therefore, as an Orthodox rabbi, Goodman could not participate.[6]

Rabbi Goodman is not alone in his disenfranchisement. He lives in one of fourteen states whose political parties still hold caucuses to endorse presidential candidates.[7] The physical at-

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1. *See* Hilary Leila Krieger, *Caucus Deals Shabbat Blow to Vegas Rabbi*, JERUSALEM POST, Jan. 18, 2008, at 1.

2. *Id.*

3. *Id.*

4. *Id.*; *see also* Michael Falcone, *Iowa Caucuses Move to Saturday in '10*, POLITICO (July 29, 2009, 10:46 AM), http://www.politico.com/news/stories/0709/25555.html (illustrating a possible trend toward Saturday caucuses).

5. *See* Krieger, *supra* note 1, at 1.

6. *Id.*

7. FEC, 2008 PRESIDENTIAL PRIMARY DATES (2008), *available at* http://www.fec.gov/pubrec/2008pdates.pdf. This number includes the District of Columbia, as well as states like Minnesota and Texas, which have two-step caucus-

tendance requirement of most caucuses tends to disenfranchise identifiable factions of voters, such as deployed service members, religious observers, persons with disabilities or in poor health, students who attend school away from home, and shift workers unable to leave work.[8]

Dubbed by the *Washington Post* as "undemocratic,"[9] the caucus system has been the focus of much-deserved criticism. Historically, caucuses have drastically lower voter turnout rates than primaries,[10] attract voters from extreme ends of the ideological spectrum,[11] involve cumbersome procedural rules,[12] and require long time commitments.[13] Recent events have

plus-primary systems, and states like Washington and Idaho, in which at least one party holds a nonbinding primary in addition to caucuses. *See also 2008 Presidential Primary Calendar*, NAT'L CONF. ST. LEGISLATURES (Jan. 9, 2008), http://www.ncsl.org/LegislaturesElections/ElectionsCampaigns/PresidentialPrimariesCalendar2008/tabid/16512/Default.aspx. Some sources refer to the New Mexico Democratic caucus as a primary because it is logistically similar and allows for absentee voting. *See* Teddy Davis, *Hillary Clinton Wins New Mexico Primary*, ABCNEWS.COM, Feb. 14, 2008, http://blogs.abcnews.com/politicalradar/2008/02/hillary-clinton.html.

8. *See, e.g.*, Scott Helman, *Getting Out the College Vote—When Campuses Are Empty: Primary Dates in N.H., Iowa Will Clash With Breaks*, BOS. GLOBE, Dec. 7, 2007, at A34, *available at* 2007 WLNR 24191117 (discussing the barriers students face in returning to campus to caucus and vote in primaries during winter break); Jodi Kantor, *Caucuses Give Iowa Influence, But Many Iowans Are Left Out*, N.Y. TIMES, Jan. 2, 2008, at A1, *available at* 2008 WLNR 58001 (reporting that even the chairman of the Iowa Republican Party had to miss his own caucus because he had to travel out of town on party business).

9. Sean Wilentz & Julian E. Zelizer, *A Rotten Way to Pick a President*, WASH. POST, Feb. 17, 2008, at B3.

10. *See, e.g.*, Michael McDonald, *2008 Presidential Primary Turnout Rates*, U.S. ELECTION PROJECT (Oct. 8, 2008), http://elections.gmu.edu/Turnout_2008P.html. For an example of the disparity, compare the historical numbers of two states with similar populations from the same geographical region, such as Minnesota and Wisconsin. In 2008, Wisconsin's primary attracted 37.1 percent of eligible voters, while Minnesota's caucuses drew only 7.4 percent. *Id.* Considerably more voters participate in Wisconsin primaries, despite Minnesota's traditionally high level of civic participation. *See, e.g.*, *Voter Turnout Since 1950*, MINN. SECRETARY ST., http://www.sos.state.mn.us/index.aspx?page=667 (last visited Oct. 24, 2010).

11. *See* JAMES W. DAVIS, U.S. PRESIDENTIAL PRIMARIES AND THE CAUCUS-CONVENTION SYSTEM 49–50 (1997) (employing Barry Goldwater's success in the 1964 caucuses to illustrate how an ideological minority of party voters can sway caucus outcomes); William G. Mayer, *Caucuses: How They Work, What Difference They Make*, *in* IN PURSUIT OF THE WHITE HOUSE 105, 130 (William G. Mayer ed., 1996).

12. *See* Mayer, *supra* note 11, at 108–16.

13. *See* TOVA ANDREA WANG, THE CENTURY FOUND., HAS AMERICA OUTGROWN THE CAUCUS? SOME THOUGHTS ON RESHAPING THE NOMINATION CONTEST 3 (2007), *available at* http://tcf.org/media-center/2007/pr136.

spawned a flood of additional scorn.[14] For instance, in 2008, a surge of new voters left caucus officials overwhelmed by the masses, causing cramped voters to stand for hours in overcrowded elementary schools.[15]

Despite their flaws, caucuses are treasured by many voters who have grown up with the tradition.[16] Nonetheless, caucuses in their current form may unconstitutionally deny some voters their rights to vote. While some legal scholars have dismissed party endorsements as private processes that are effectively off-limits to regulation,[17] federal judicial precedent leaves the door open for colorable constitutional arguments against the caucus attendance requirement.

This Note contends that eligible party voters[18] have the constitutional right to vote in their parties' caucuses without being physically present.[19] Part I details the history of the American political caucus—its origin, changing form, and the role political parties have played in shaping its structure. Part

14. *See id.*; Gilbert Cranberg et al., Op-Ed., *Iowa's Undemocratic Caucuses*, N.Y. TIMES, Dec. 18, 2007, at A35, *available at* 2007 WLNR 24915832.

15. *See* George Diepenbrock & Sophia Maines, *Overflow Crowds Jam Caucus Sites*, LAWRENCE J.-WORLD & NEWS, Feb. 6, 2008, http://www2.ljworld.com/news/2008/feb/06/overflow_crowds_jam_caucus_sites/.

16. *See* Kantor, *supra* note 8, at A1 (explaining that many caucus-goers value the community engagement opportunity caucuses provide). *But see* Kathryn Pearson, *Caucuses Are Voices of the Few*, STAR TRIB. (Minneapolis, Minn.) (Feb. 10, 2008, 5:22 PM), http://www.startribune.com/opinion/commentary/15453976.html (responding that in some caucuses, no dialogue between neighbors actually takes place).

17. *See, e.g.*, Richard L. Hasen, *Whatever Happened to "One Person, One Vote"?*, SLATE (Feb. 5, 2008, 5:33 PM), http://www.slate.com/id/2183751/ (arguing that parties have ultimate legal discretion over delegate selection).

18. One inherent difficulty in categorizing primary voters is that each state has different eligibility rules. For instance, to caucus in Colorado, state party members must be "affiliated" with the party for at least two months prior to the caucus. *See* COLO. DEMOCRATIC PARTY, PLAN OF ORGANIZATION AND RULES 25 (2009), *available at* http://www.coloradodems.org/docs/PartyRules_20091205.pdf. By contrast, in states like Minnesota, eligibility is more flexible as voters need not prove party loyalty even though they are statutorily supposed to "agree[]" with party principles. *See* MINN. STAT. § 202A.16 (2008) ("Only those persons who are in agreement with the principles of the party as stated in the party's constitution, and who either voted or affiliated with the party at the last general election or intend to vote or affiliate with the party at the next state general election, may vote at the precinct caucus.").

19. This Note focuses on presidential elections, but most of its arguments extend to other federal and state elections. The Constitution protects the right of all qualified citizens to vote in both state and federal elections. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 554 (1964); United States v. Classic, 313 U.S. 299, 315 (1941).

II examines three legal arguments that cast doubt on the constitutionality of the attendance requirement. First, caucuses may violate the First Amendment associational rights of voters. Second, they may breach Fourteenth Amendment equal protection of the right to vote. Third, they may constitute an unconstitutional poll tax. Part III proposes four alternatives to the present system to mitigate potential unconstitutionality and evaluates their likelihood of success against anticipated barriers to reform. Additionally, it examines which actors are best situated to reform caucuses. This Note concludes that the two most effective avenues to reform the caucus system to reduce the risk of unconstitutionality are an associational rights judicial challenge and congressional legislation. In light of the recent establishment of reform commissions within the two major national parties to address delegate selection and an upcoming presidential election with a wide-open Republican field, a failure to reform caucuses could have substantial adverse implications.

I. THE ORIGINS AND CHANGING FORM OF POLITICAL CAUCUSES

The process of selecting presidential nominees has evolved considerably in the past two centuries from a system in which congressmen chose their parties' nominees to today's state-by-state primary and caucus scheme.[20] Primaries and caucuses in their modern forms are reactions to the party-controlled "Boss Tweed" and "King Caucus" era of the late nineteenth and early twentieth centuries.[21] In the 1910s and shortly thereafter, the voting public came to regard the caucus system as an instrument of party leader control; this perception stimulated a shift in many states from caucuses to primaries.[22] Today, most states either hold state-operated primaries or outsource the process to political parties in the form of caucuses.[23] This Part

20. *See* DAVIS, *supra* note 11, at 9–18.

21. *Id.* at 11–12.

22. *Id.*

23. *See, e.g.*, Robert McDowell, *It's Time to Return to the Caucus System*, TULSA BEACON, Apr. 30, 2009, http://www.tulsabeacon.com/?p=1940. Despite the overall trend toward primaries, in recent years some states have considered returning to caucuses to save desperately needed revenue. *See id.* (advocating a shift from primaries to caucuses to conserve tax dollars). Some states have gone so far as to debate eliminating the primary system altogether. *Cf. Presidential Primaries*, NAT'L CONF. ST. LEGISLATURES (May 12, 2005), http://

examines the origin and changing nature of the party caucus within the American political landscape.

A. POLITICAL CAUCUSES AND PRIMARIES DEFINED

The term "caucus" has several meanings in American nomenclature. Early accounts refer to it as an informal nickname for party meetings for selecting candidates for political office.[24] Today, in addition to referring to meetings for selecting candidates, it also refers to an organized group of people who share common interests, such as a caucus within a legislature.[25] The caucus attendance requirement, as used in this Note, refers to any state party rule requiring physical attendance in order to vote for a presidential nominee in a precinct caucus.

In contrast, a "primary election" is a preliminary election, not requiring physical attendance, in which voters nominate a candidate for the general election.[26] The most significant difference between caucuses and primaries is administration. Parties usually operate and pay for caucuses while state governments fund and administer primaries.[27] An "open" primary allows voters to choose the party from which they wish to endorse a candidate, no matter their political affiliation.[28] Most states have "closed" primaries, which require voters to indicate a party preference and limit their choice of candidates to one party.[29] A "blanket" primary requires no party affiliation and does not restrict a voter's choice of candidates to a single party.[30]

www.ncsl.org/default.aspx?tabid=16568 (listing state bills introduced to eliminate presidential primaries).

24. JOHN PICKERING, A VOCABULARY 55 (1816). The word "cant" illustrates the slang-like, informal nature of caucuses. *Id.*

25. JACK C. PLANO & MILTON GREENBERG, AMERICAN POLITICAL DICTIONARY 95, 130 (rev. ed. 1967).

26. BLACK'S LAW DICTIONARY 557 (8th ed. 2004). This Note also employs "primary" as a general term for the primary season, which encompasses both primaries and caucuses.

27. *See, e.g.*, McDowell, *supra* note 23.

28. NEW DICTIONARY OF AMERICAN POLITICS 302–03 (Edward Conrad Smith & Arnold John Zurcher eds., 1949); DAVID ROBERTSON, A DICTIONARY OF MODERN POLITICS 274–75 (1985).

29. NEW DICTIONARY OF AMERICAN POLITICS, *supra* note 28, at 302–03.

30. THE CONCISE OXFORD DICTIONARY OF POLITICS, at x (Iain McLean & Alistair McMillan eds., 2009) ("[V]oters are free to move back and forth across a blanket-sized ballot that includes all candidates from all parties.").

B. COURT- AND PARTY-INITIATED CAUCUS REFORM

Political theorists and party leaders have argued that nominations are more important than general elections because "the quality of the people's verdict [in the general election] depends on the quality of the options from which they cho[o]se."[31] It is no surprise, then, that traditionally excluded caucus and primary voters have challenged party attempts to prevent their participation. This section highlights legal and political developments that frame the constitutional issues surrounding primary elections, in general, and the caucus attendance requirement, in particular.

In a series of cases spanning the 1920s–1930s, courts pierced the private structure of political parties by invalidating white-only primaries. In 1927, the U.S. Supreme Court unanimously overturned a Texas white-only primary statute as a violation of the Fourteenth Amendment Equal Protection Clause.[32] The Texas Democratic Party's State Executive Committee then passed a new resolution limiting eligibility in its primary to white voters.[33] Finding that the Executive Committee was acting not as a mere private organization but "in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions," the Court held 5-4 that the Committee's actions violated the Equal Protection Clause.[34] Twelve years later in *Smith v. Allwright*, the Court crafted a stronger rule that white-only primaries also violated the Fifteenth Amendment.[35] These cases[36] provide a basis for judicial intervention into party activities when a party

31. Alexandra L. Cooper, *Nominating Presidential Candidates: The Primary Season Compared to Two Alternatives*, 54 POL. RES. Q. 771, 774 (2001) (quoting WILLIAM R. KEECH & DONALD R. MATTHEWS, THE PARTY'S CHOICE 1 (1976)); *see also* DAVIS, *supra* note 11, at 1 (quoting infamous party boss William Marcy Tweed as saying, "I don't care who does the electing just so I can do the nominating.").

32. Nixon v. Herndon, 273 U.S. 536, 540–41 (1927).

33. Nixon v. Condon, 286 U.S. 73, 82 (1932).

34. *Id*. at 88–89.

35. Smith v. Allwright, 321 U.S. 649, 664 (1944) ("When primaries become a part of the machinery for choosing officials, state and national[,] . . . the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election.").

36. Collectively, this universe of cases is commonly referred to as the "white primary cases." *See, e.g.*, Michael J. Pitts, *Redistricting and Discriminatory Purpose*, 59 AM. U. L. REV. 1575, 1616 (2010).

violates the Constitution while performing a state-like function, such as administering elections.[37]

In 1968, the nation watched in shock as violence erupted at the Democratic National Convention in Chicago.[38] In response to the "bitter disharmony"[39] of 1968, the Democratic Party initiated what became known as the McGovern-Fraser Commission.[40] The Commission established guidelines for the delegate-selection process that weakened the degree of party leader control.[41] The National Republican Party largely mirrored the Democratic reforms suggested by the Commission.[42] In response to public calls for reform, many state legislatures also replaced their caucuses with primaries even though the national parties had not mandated it.[43]

While party attempts to reform delegate selection have not subsided, recent changes have been more incremental.[44] One noteworthy change is party efforts to expand the caucus-going population. For instance, in 2004 and 2008, the Maine State Democratic Party responded to historically low caucus turnout by operating a robust absentee voting program.[45] Further, or-

37. *Allwright*, 321 U.S. at 664.

38. Cooper, *supra* note 31, at 772.

39. Judith A. Center, *1972 Democratic Convention Reforms and Party Democracy*, 89 POL. SCI. Q. 325, 326 (1974).

40. Cooper, *supra* note 31, at 772.

41. THOMAS R. MARSHALL, PRESIDENTIAL NOMINATIONS IN A REFORM AGE 36 (1981). The guidelines focused on three recurring themes: more rank-and-file party members should be encouraged to participate; the convention should be more representative of historically underrepresented groups like racial minorities, women, and young voters; and the allocation of delegates should better reflect the wishes of ordinary party voters, not just party regulars. *Id.*

42. *See id.* at 40.

43. *Id.* at 47. In 1968, sixteen Republican state parties and seventeen Democratic state parties held primaries. *Id.* By 1980, thirty-six Republican and thirty-four Democratic state parties had shifted to primaries. *Id.*

44. *See* THOMAS GANGALE, FROM THE PRIMARIES TO THE POLLS: HOW TO REPAIR AMERICA'S BROKEN PRESIDENTIAL NOMINATION PROCESS 21 (2008) (finding that after McGovern-Fraser, parties "tinker[ed] around the edges" with efforts like the Mikulski and Winograd Commissions).

45. *See* Arden Manning, Letter to the Editor, *Democrats' Caucus Will Play Large Role in Election*, MORNING SENTINEL (Maine), Feb. 9, 2008, http://morningsentinel.mainetoday.com/view/letters/4737404.html; Telephone Interview with Arden Manning, State Exec. Dir., Me. Democratic Party (Nov. 12, 2009) [hereinafter Manning Interview]. In Douglas County, Nebraska, the local Democratic Party created its own absentee process to expand caucus voting to deployed troops, people in nursing homes, the homebound, the disabled, students, and employees who could not miss work. *See* Telephone Interview with Carol Casey, Exec. Dir., Douglas Cnty. Democrats (Oct. 19, 2009).

ganizers within both major national parties have compelled their national committees to establish commissions to study caucus-related voting reform.[46] Despite these efforts, most caucus state parties maintain stringent physical attendance requirements.[47]

C. LEGAL PRECEDENT FOR CHALLENGING THE ATTENDANCE REQUIREMENT

Federal election law offers several methods for challenging the caucus system. This section provides the background for three colorable constitutional challenges: associational rights, equal protection, and poll taxes.

1. The Right to Political Association

It is settled law that individuals have the right to politically associate under the First[48] and Fourteenth[49] Amendments, which, among other things, allows them "to band together in promoting . . . the electorate candidates who espouse their political views."[50] Regulations that "severe[ly] burden" associational rights must be tailored to serve a compelling state interest.[51]

46. *See* Telephone Interview with Roman Buhler, Former Staff Member, Republican Nat'l Convention (RNC) (Oct. 28, 2009) [hereinafter Buhler Interview]. In anticipation of the RNC, organizers from John McCain's campaign for president drafted a resolution requiring the party to provide an absentee voting option in caucuses for military personnel. *Id.* Two military veterans introduced this strongly worded proposed rule to the RNC Rules Committee, but the final version passed by the RNC was amended to encourage state parties to use "every means practicable" to encourage military participation in the delegate selection process. *Id.*; *see also* REPUBLICAN NAT'L COMM., THE RULES OF THE REPUBLICAN PARTY, Rule 15(c)(7), at 20 (2008), *available at* http://www.gop.com/images/legal/2008_Rules_Adopted.pdf. Similarly, the Democratic National Committee instituted a commission to study the nominations process and improve the caucus system by 2012. Jeff Zeleny, *It's Never Too Soon to Think About 2012*, N.Y. TIMES, Mar. 23, 2009, http://thecaucus.blogs.nytimes.com/2009/03/23/its-never-to-soon-to-think-about-2012/. The final report vaguely recommends the Party's Rules Committee undertake more detailed oversight of state caucus systems. *See* DEMOCRATIC NAT'L COMM., REPORT OF THE DEMOCRATIC CHANGE COMMISSION 20 (2009), *available at* http://www.thegreenpapers.com/P12/Democratic_Change_Commisison_Report-2009-12-30.pdf.

47. *See, e.g.*, WANG, *supra* note 13, at 3.

48. U.S. CONST. amend. I.

49. *Id.* amend. XIV, § 1.

50. Clingman v. Beaver, 544 U.S. 581, 586 (2005) (quoting Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000)).

51. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997); *see also* Lauren Hancock, Note, *The Life of the Party: Analyzing Political Parties'*

Political parties also have a right to political association, which includes the right to determine their criteria for selecting delegates to their national conventions.[52] However, this right is not limitless, even though the Supreme Court has not precisely defined the boundaries.[53] In fact, in *Cousins v. Wigoda*, the Court was careful to leave the door open for future judicial intervention into party nominations.[54] In addition to individual and party rights, state governments also have legitimate interests in fair election administration.[55] In the context of party nominations, these rights often conflict.

The individual right to associate does not extend to participation in elections operated by private entities.[56] In order for a disenfranchised voter to claim constitutional violation of her right to vote, a court must find that the *state* has acted in violation of a right.[57] Traditionally, courts have viewed political parties as private actors.[58] However, the Supreme Court has pierced the shield of private organizations in instances when a party effectively acts as a state.[59] For instance, in *Allwright*, the Court held that a party acted as the state in administering matters intimately connected with state authority.[60] In *Terry v. Adams*, a local Democratic party required candidates to secure the nominations of a private club instead of the party itself.[61] The party's ostensible purpose was to protect itself from the reach of the Fifteenth Amendment.[62] However, the Court rejected a formalistic public-private distinction and held that the

First Amendment Associational Rights when the Primary Election Process Is Construed Along a Continuum, 88 MINN. L. REV. 159, 169–71 (2003).

52. Cousins v. Wigoda, 419 U.S. 477, 487 (1975) (holding that an Illinois state law on delegate qualifications did not prevail over conflicting national party rules).

53. Bachur v. Democratic Nat'l Party, 836 F.2d 837, 841 (4th Cir. 1987).

54. *Id.* (stating that *Cousins* did not decide the extent to which the Court advised judicial intervention into party matters).

55. Storer v. Brown, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.").

56. *See, e.g.*, Nixon v. Condon, 286 U.S. 73, 86–89 (1932).

57. 42 U.S.C. § 1983 (2006) (outlining the causes of a civil action for deprivation of rights).

58. *E.g.*, Smith v. Allwright, 321 U.S. 649, 656, 659–61 (1944); *Nixon*, 286 U.S. at 86–89.

59. *See Allwright*, 321 U.S. at 663–64.

60. *Id.*

61. Terry v. Adams, 345 U.S. 461, 461 (1953).

62. *Id.* at 462–64.

Jaybird Association had taken state action within the scope of the Constitution.[63] In essence, the Court found that the party's action amounted to an attempt to hide a public action behind a private subterfuge.[64]

Later cases have tended to favor party associational rights over state interests. In 1980, Wisconsin adopted open primaries in violation of the National Democratic Party's rules.[65] *Democratic Party of the United States v. La Follette* pitted state interests in election administration against the right of the national party to define the boundaries of its political association.[66] The Court held that a state could not constitutionally compel a national party to seat delegates chosen in violation of the national party's rules.[67] While this was a decisive victory for political parties, the Court left several questions unanswered. For instance, was the ruling limited to open primaries? When should courts apply the white-primary cases—and thereby pierce the party structure—and when should they look to *La Follette*?

In 2000, the Court moved further away from the earlier public-private distinction and toward stronger party rights.[68] *California Democratic Party v. Jones* involved a state attempt to institute a blanket primary over the objections of a state political party.[69] It presented the question of whether a state legislature had the constitutional authority to define the party's political association so broadly.[70] In conducting its analysis, the Court employed a "flexible" *Burdick* balancing test, which first measures the degree of injury to the plaintiff's First and Fourteenth Amendment rights and then weighs it against interests claimed by the state to justify its actions.[71] Even if the imposition on a party is "severely" burdensome, a state regulation may still survive the scrutiny if it is "narrowly drawn to advance a state interest of compelling importance."[72] Weighing the interests of the state in fair election administration against

63. *Id.* at 470.

64. *See id.*

65. Democratic Party of the U.S. v. Wis. *ex rel.* La Follette, 450 U.S. 107, 109 (1980).

66. *Id.*

67. *Id.* at 126.

68. *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 586 (2000).

69. *Id.*

70. *Id.* at 569.

71. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992).

72. *Id.* (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).

the right of the party to define its association, the Supreme Court held 7-2 that the party's right outweighed the compelling interests of the state.[73]

Two recent cases appear to back away from *La Follette* and *Jones*. First, the Court in *Washington State Grange v. Washington State Republican Party* upheld a ballot initiative approved by voters that allows candidates to self-designate their party preference.[74] The Party lost, despite its objection that voters would misinterpret the self-designated party label as a party nomination.[75] In *Clingman v. Beaver*, the Court also employed a less absolutist party-or-state approach.[76] It upheld a state-created semi-closed primary in which registered members of a third party could not vote in the primary of a majority party (and vice versa).[77] The Court underscored that states must have the authority to enact reasonable regulations of parties, elections, and ballots to reduce the risk of disorder.[78] The outcomes of these cases raise questions as to the future of associational rights jurisprudence.

2. Equal Protection of Votes: One Person, One Vote

The right to vote is fundamental to our political system.[79] Although the U.S. Constitution does not explicitly prescribe a right to vote, the Court has declared that voting is a fundamental right protected by the Constitution.[80] The right to vote extends beyond the physical act of voting to the election procedures that affect the proportional weight of one's vote.[81] The

73. *See Jones*, 530 U.S. at 568, 586 (indicating that the California law severely and unnecessarily burdened the Democratic Party's right to political association).

74. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 444 (2008).

75. *Id.* at 448 (describing the Republican Party's contention that the new system forced it to associate with candidates it did not endorse).

76. *See* Clingman v. Beaver, 544 U.S. 581, 589–90 (2005).

77. *Id.* at 584–85.

78. *Id.* at 593.

79. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 13 (Anne M. Cohler et al. eds. & trans., 1989) (1748) ("Just as the division of those having the right to vote is a fundamental law in the republic, the way of casting the vote is another fundamental law.").

80. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966) (citing United States v. Classic, 313 U.S. 299, 314–15 (1941)).

81. Bush v. Gore, 531 U.S. 98, 104 (2000) ("The right to vote is protected in more than the initial allocation of the franchise."). Although the Court stated that *Bush* was limited to its circumstances, multiple courts have since affirmed that voting extends beyond the initial franchise. *See, e.g.*, League of

Equal Protection Clause of the Fourteenth Amendment[82] also protects the right of voters to participate in elections on an equal basis with one another.[83] A state may not value one person's vote over another's by arbitrary and disparate treatment.[84] Effectively, this body of law commands the equal weight of votes in both theory and practice.

The 2008 election fueled public discourse over the arbitrary weight assigned by parties to caucus votes.[85] In Nevada, voters challenged an at-large caucus district because votes cast there had greater mathematical weight than at other caucuses.[86] In Texas, voters litigated whether the Democratic Party can knowingly allot disproportionate values to caucus votes.[87] In totality, the caucus system raises grave concerns about the arbi-

Women Voters of Ohio v. Brunner, 548 F.3d 463, 477 (6th Cir. 2008) (applying *Bush*); *In re* Contest of Gen. Election Held on Nov. 4, 2008, for the Purpose of Electing a U.S. Senator from Minn., 767 N.W.2d 453, 465–66 (Minn. 2009) (same).

82. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

83. *See supra* notes 74–75. The Court has stated that "all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." Reynolds v. Sims, 377 U.S. 533, 557–58 (1964) (quoting Gray v. Sanders, 372 U.S. 368, 379–80 (1963)).

84. *Bush*, 531 U.S. at 104–05.

85. *See, e.g.*, Shailagh Murray, *After Nevada Caucuses, Charges of Foul Play*, WASH. POST BLOG (Jan. 20, 2008, 6:56 PM), http://blog.washingtonpost.com/44/2008/01/20/after_nevada_caucuses_charges.html. In the public comments to the article, caucus-goers from across the state described their negative experiences, like waiting in lines for hours. *Id.* One voter was shocked to learn, after being elected a delegate, that she would have to pay thirty-five dollars to attend the next caucus. *Id.*

86. David McGrath Schwartz, *Ruling on Strip Voting Looks Likely Today*, LAS VEGAS SUN, Jan. 17, 2008, http://www.lasvegassun.com/news/2008/jan/17/Strip_voting/. Ultimately, a federal district court held in favor of the Nevada Democratic Party in a bench decision, finding that parties may set up their own caucus guidelines if they do not discriminate against voters based on race, gender, or religion. *See* June Kronholz, *Judge Upholds Nevada's Casino Caucuses*, WALL ST. J. WASH. WIRE (Jan. 1, 2008, 5:12 PM), http://blogs.wsj.com/washwire/2008/01/17/judge-upholds-nevadas-casino-caucuses/; Adrienne Packer, *Judge OKs At-Large Caucuses on Strip*, LAS VEGAS REV.-J., Jan. 18, 2008, http://www.lvrj.com/news/13891177.html.

87. *See* LULAC of Tex. v. Tex. Democratic Party, 651 F. Supp. 2d 700, 700–02 (W.D. Tex. 2009) (finding that the portion of the Voting Rights Act requiring a political party to preclear delegate allocation formulas did not impermissibly infringe on the party's associational rights, but not deciding whether the Texas Democratic Party's delegate allocation plan discriminated against minority voters on account of race or color).

trary and disproportionate weight assigned to factors like wealth, health, and geography.[88]

3. Twenty-Fourth Amendment Poll Tax

The Twenty-Fourth Amendment states that the right of citizens to vote "shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax *or other tax*."[89] The Court overturned a poll tax in *Harman v. Forssenius* on the basis of the amendment, but has otherwise largely avoided its application.[90] In a later decision, *Harper v. Virginia Board of Elections*, the Court invalidated a poll tax, but on Fourteenth Amendment equal protection grounds.[91] Categorized by some as "the most insignificant" amendment,[92] the Twenty-Fourth Amendment's sparse history suggests that courts are hesitant to consider in their voting-rights jurisprudence the disproportionate effects of voting-related costs on less affluent voters. However, with the recent movement by state legislatures to require voters to present government-issued identification at the polls, courts are encountering a resurgent body of poll tax-related litigation.[93] Indeed, with increasing state budget constraints and the possibility that state and local governments might attempt to pass election administration costs onto voters, some legal scholars suggest that litigators should define the contours of the amendment before "it makes a difference in a charged political context."[94]

Looking to the history of the amendment, courts have treated its passage as an attempt to sever the link between wealth and voting eligibility.[95] *Harman*, for example, presented

88. *Cf. id.*

89. U.S. CONST. amend. XXIV, § 1 (emphasis added).

90. Harman v. Forssenius, 380 U.S. 528, 544 (1965); *see also* Allison R. Hayward, *What Is an Unconstitutional "Other Tax" on Voting? Construing the Twenty-Fourth Amendment*, 8 ELECTION L.J. 103, 104, 117–22 (2009).

91. Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966).

92. *T.R.B. from Washington*, NEW REPUBLIC, Mar. 9, 1963, at 2.

93. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 198–99 (2008).

94. Hayward, *supra* note 90, at 122.

95. *See Harper*, 383 U.S. at 668; David Schultz & Sarah Clark, Wealth v. Democracy: The Unfulfilled Promise of the Twenty-Fourth Amendment 4–5 (2010) (unpublished manuscript), *available at* http://works.bepress.com/david_schultz/14/ (arguing that the Supreme Court and Congress understood the amendment to be a broad rejection of the link between wealth and voting). For a more comprehensive history of property tests in voting, see KIRK H. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 77–111 (1969).

the issue of whether Virginia could constitutionally require a voter to either pay a poll tax or file a certificate of residency.[96] The majority said that the legislative history of the amendment illustrated Congress's "repugnance to the disenfranchisement of the poor occasioned by failure to pay [a poll] tax."[97] The Court emphasized that even negligible taxes that impose only a slight economical obstacle violate the amendment.[98] The majority also noted that voter turnout in poll tax states was low compared to the eligible voting population.[99] Since the amendment states that the right to vote shall not be "denied *or abridged*,"[100] the *Harman* Court stated that the amendment's language "nullifies sophisticated as well as simple-minded modes" of voting impairment.[101] In *Harper*, the Court similarly concluded that to introduce wealth or payment of a fee as a measurement of voting qualifications would be to introduce a capricious or irrelevant factor.[102]

Recent voter identification cases have challenged courts to incorporate the financial burdens on voters as a factor in deciding voting-rights litigation. In *Crawford v. Marion County*, the Court held that the compelling state interests in requiring photo identification sufficiently justified the burden it imposed on voters.[103] Although the petitioner did not make a Twenty-Fourth Amendment claim, the majority acknowledged that admissible evidence demonstrating the burden the law placed on voters might comprise a constitutional objection.[104] In *Common Cause/Georgia v. Billups*, the Eleventh Circuit upheld a similar voter identification law after weighing the state's interest in electoral integrity against the burden on voters of procuring

96. Harman v. Forssenius, 380 U.S. 528, 538 (1965).

97. *Id.* at 539.

98. *Id.*

99. *Id.* That the Court identified a correlation between voting taxes and low voter turnout is particularly applicable to the caucus context because caucuses have drastically lower turnout than primaries. *See, e.g.*, McDonald, *supra* note 10.

100. U.S. CONST. amend XXIV, § 1 (emphasis added).

101. *Harman*, 380 U.S. at 540–41 (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).

102. Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966) ("'A citizen, a qualified voter, is no more or no less so because he lived in the city or on the farm.' . . . We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all . . . ." (quoting Reynolds v. Sims, 377 U.S. 533, 568 (1964))).

103. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 198–99 (2008).

104. *Id.* at 202–03.

voter identification.[105] However, the circuit court highlighted a key fact that the identification was available to voters for free, which may not be true of all voter identification schemes.[106] It is also noteworthy that while the court required the state to identify a compelling interest, it did not require the state to prove that voter identification was necessary to prevent voter fraud.[107] In other cases, however, courts have overturned voter identification requirements. For instance, in *Winschenk v. Missouri*, the Missouri Supreme Court distinguished the controversy from the voter identification schemes in Indiana and Georgia by highlighting that the plaintiffs provided empirical evidence illustrating the burden on voters to acquire the proper identification.[108] Such costs convinced the court that the plaintiffs had satisfied both strict scrutiny and the lesser burden of the *Burdick* test.[109]

Drawing from this jurisprudence, potential plaintiffs have colorable constitutional challenges to the caucus system under the First, Fourteenth, and Twenty-Fourth Amendments.

II. LITIGATING THE CONSTITUTIONALITY OF THE ATTENDANCE REQUIREMENT

Although some scholars maintain that state regulation of caucuses constitutes impermissible government intervention,[110] federal case law suggests that there is room for alternative interpretations of the constitutional relationship between parties, voters, and the state. This Part analyzes three central arguments for challenging the caucus attendance rule: first, that the associational rights of voters outweigh those of party associational rights; second, that caucuses may violate the equal protection doctrine by allocating unequal weight to votes; and, third, that the financial burdens of caucuses may constitute a poll tax. Under this analysis, the caucus attendance requirement may be unconstitutional under First Amendment association rights doctrine and Fourteenth Amendment equal protec-

105. Common Cause/Ga. v. Billups, 554 F.3d 1340, 1353–55 (11th Cir. 2009).

106. *Id.*

107. *Id.* at 1353.

108. *See* Weinschenk v. State, 203 S.W.3d 201, 214 (Mo. 2006).

109. *Id.* at 216 (deciding ultimately to apply strict scrutiny). While the court acknowledged that the Missouri state constitution appeared to offer more voter protection than the U.S. Constitution, it was not clear that it was dispositive. *Id.*

110. *See, e.g.*, Hasen, *supra* note 17.

tion, and questionable under the Twenty-Fourth Amendment's prohibition of poll and other voting taxes.

A. THE ASSOCIATIONAL RIGHTS OF INDIVIDUAL VOTERS OUTWEIGH PARTY RIGHTS

In the white-primary cases, the Court rejected a formalistic public-private distinction to hold that private action sometimes constitutes state action. The logic of the white-primary cases is applicable to present-day caucuses. This section posits that political parties, in administering caucuses, take state action. Further, it argues that if courts were to conceptualize party associational rights as a collection of individual associational rights, there is a strong argument that courts should prioritize individual rights over those of the party.

In *Terry v. Adams,* the Court emphasized the overall effect of the private action rather than restricting the concept of state action to a formal distinction between public and private entities.[111] *Terry* found that the state, in permitting party-operated primaries, had effectively sanctioned the unconstitutional activity.[112] Thus, if a state permits a party to operate an unconstitutional caucus, it may also sanction an unconstitutional activity.

By contrast, in its ruling in *Jones*, the Supreme Court held that the party's associational rights outweighed the compelling interests of the state.[113] Although this most recent articulation affirms the associational rights of parties when pitted against less-than-compelling state interests, it does not directly compare the associational rights of a party to those of individual party voters, as do the white-primary cases.[114] Therefore, *Jones* does not stand for the proposition that party associational rights will always trump individual associational rights.

Although parties have substantial freedom to determine the rules by which they select presidential electors,[115] neither *Jones* nor *La Follette*—which pitted a state's interest in election

111. Terry v. Adams, 345 U.S. 461, 469–70 (1953) ("It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. . . . The effect of the whole procedure . . . is to do precisely that which the Fifteenth Amendment forbids . . . .").

112. *See id.*; *supra* notes 35–36 and accompanying text (describing *Smith v. Allwright* and the Court's disapproval of white-only primaries).

113. *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 582, 585–86 (2000).

114. *See id.*

115. *See id.*; Democratic Party of the U.S. v. Wis. *ex rel.* La Follette, 450 U.S. 107, 122 (1980).

administration against a national party's right to define its political association—measured the associational rights of party voters against the party. Conceptualizing a party as an entity comprised of its members, the party unit becomes nothing more than a collection of individual associational rights. By defending the party unit at the expense of the individual voters, a court would undermine the more vital associational rights of voters in favor of a nonhuman entity. It is also noteworthy that the regulations invalidated in *Jones* and *La Follette* were exceptional examples of state intervention.[116] In both cases, a state attempted to define a party's political association for the party by opening its primaries to voters not ideologically aligned with the party.[117] Caucus reform policies under which parties retain substantial autonomy to define their association likely would not trigger nor violate *Jones* or *La Follette* precedent, making it more likely that a court would uphold a party member's associational rights challenge.

In a case between a party and potential caucus-goers, a court would likely begin by employing the "flexible" two-part *Burdick* balancing test.[118] First, a court would assess the magnitude of the asserted injury to the plaintiff's First and Fourteenth Amendment rights.[119] Then, a court would weigh whether the precise state or party interests outweigh the injury.[120] Thus, in order for a potential litigant to establish a claim, she would need to prove that a party's physical attendance requirement abridged her right to associate[121]—a relatively straightforward argument for someone who was literally unable to attend due to military deployment, and a more difficult but still feasible contention for someone who could not leave work during caucus hours. The litigant would also need to convince a court that her individual rights are more compelling than the party's interest.[122]

For instance, assume that litigants challenged a state party's physical attendance requirement. A party might defend its associational rights by asserting that it has a right to define the

116. *See Jones*, 530 U.S. at 570; *La Follette*, 450 U.S. at 110–12.
117. *See Jones*, 530 U.S. at 570; *La Follette*, 450 U.S. at 110–12.
118. *La Follette*, 450 U.S. at 110–12.
119. *Id.*
120. *Id.*
121. *See id.*
122. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992); *La Follette*, 450 U.S. at 110–12.

contours of its political association. However, a party cannot establish that a court ruling against a physical attendance requirement would be paramount to a *Jones* infringement on its associational rights.[123] Depending on the remedy—such as whether the court issued an injunction or required a party to provide an alternative or absentee process—a party probably cannot successfully argue that elimination of the physical attendance requirement would open its caucus doors to people with whom a party would not otherwise associate. Those voters would already be eligible to caucus with the party. In fact, the voters who would take advantage of an alternative process like an absentee ballot are people who would participate *but for* the prohibitive attendance requirement. In contrast to a party, a potential caucus voter has an equal, if not more compelling, associational right to participate in the caucus process.[124]

Alternatively, suppose that a state legislature enacted a mandatory absentee process for state party caucuses. In a court case challenging the absentee process, a party would probably assert the same arguments as discussed in the previous hypothetical, claiming that it infringes on its associational rights. However, the state could argue that it had several compelling reasons for regulating the caucus process: increasing access for persons with disabilities,[125] increasing voter participation,[126] improving election administration, and enhancing voter confidence in a highly criticized system.[127] It could also argue that it reformed the law specifically because the attendance requirement violates the associational rights of caucus-goers. One advantage to this approach is that precedent exists establishing a state's compelling interest in fair, accessible elections. Even if a court found the state's requirements "severely" burdensome on the party, the state regulation could still survive judicial scrutiny if it was "narrowly drawn to advance a state interest of

123. *See* Cal. Democratic Party v. Jones, 530 U.S. 567 (2000) (finding that the law forced parties to associate with those who did not share their beliefs).

124. *See, e.g.*, Nixon v. Condon, 286 U.S. 73, 82 (1932) (finding that a state cannot deny participation in a primary based on race); Nixon v. Herndon, 273 U.S. 536, 541 (1927) (addressing a similar law in which primary voting was determined by race).

125. *See infra* note 147 and accompanying text.

126. *See* Clingman v. Beaver, 544 U.S. 581, 609 (2004) (Stevens, J., dissenting) ("States do have a valid interest in conducting orderly elections and in encouraging the maximum participation . . . .").

127. *See Burdick*, 504 U.S. at 439–40.

compelling importance."[128] Given this framework, states, too, may have a strong claim to regulate some aspects of party activity, particularly given that states have a lower burden of proof than parties in this context.[129]

Two recent cases give additional weight to the argument that litigants might prevail on an associational rights challenge to the caucus attendance requirement. First, in *Washington State Grange*, which upheld a referendum allowing candidates to self-select their party affiliation, the Supreme Court took a more flexible, less formalistic approach to state party interests than in *Jones*.[130] The Court underscored a state's power to prescribe the time, place, and manner of elections for federal and state offices.[131] The opinion also reiterated that the Court has repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls.[132] Finally, the Court rejected the state party's attempt to extend the *Jones* decision by arguing that the primary system opened the party to outsiders.[133] The majority opinion suggests that *Jones* is not a broad rule guiding all associational rights litigation, but one limited to severe, demonstrable infringements.

In a second recent case, *Clingman v. Beaver*, the Court also recognized the right of states to intervene in certain party operations.[134] Upholding a restriction that members of a third party could not vote in the majority party's primary, the Court underscored that states must be able to enact reasonable regulations of parties, elections, and ballots to reduce the risk of election disorder.[135] Although *Clingman* affirms a party's right to define its political association, it appears to back away from *Jones* and indicates that the Court is willing to engage in a closer, fact-specific analysis.

128. *Id.* at 434 (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).

129. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 208–09 (1992) (applying a modified burden, which does not require empirical proof by the state of election fraud for cases in which a First Amendment right threatens to interfere with the act of voting, such as voter confusion or when the activity physically interferes with a voter's ability to cast a ballot). Such a modified burden would likely apply to caucuses. *See id.*

130. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 444, 442–59 (2008).

131. *Id.* at 451.

132. *Id.* at 452.

133. *Id.* at 452–53.

134. *See* Clingman v. Beaver, 544 U.S. 581, 589–90 (2005).

135. *Id.* at 593–94, 598.

Currently, political parties have substantial latitude to define their political association,[136] and the lack of direct government regulation of caucuses allows parties free reign to dictate the parameters of caucus participants' associational rights. Political parties, through caucuses, can narrow a field of candidates in a race from a dozen to one, making pre-general elections crucial fora for meaningful political association.[137] Thus, in organizing caucuses, political parties have considerable power and administer matters intimately connected with state authority.

The Court's associational rights jurisprudence leaves the door open for successful litigation that the caucus attendance requirement is a violation of the First Amendment associational rights of voters. Although litigants pursuing this line of argumentation will likely face a state-action challenge, the Court has pierced private entities when their primaries are a part of the essential election machinery of a state and could do so in the case of caucuses.

B. CAUCUSES MAY VIOLATE THE EQUAL PROTECTION DOCTRINE THROUGH VOTE DILUTION

The caucus attendance requirement also presents a possible equal protection claim under the Fourteenth Amendment. Since an inflexible all-or-nothing attendance requirement divides voters into classes based on arbitrary factors, it may unconstitutionally and disproportionately dilute votes.[138] There are, however, two significant hurdles to making this argument in court: first, providing a factual basis to illustrate electoral irregularity; and, second, establishing discrimination.[139] Nonetheless, with appropriate documentation, litigants could make

136. *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 574–76 (2000); Richard L. Hasen, *Too Plain for Argument? The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees Through Direct and Equal Primaries*, 102 NW. U. L. REV. 2009, 2014–16 (2008).

137. A number of cases suggest that primary elections are more important for political association than general elections. *See, e.g.*, *Clingman*, 544 U.S. at 599–600 (O'Connor, J., concurring) (finding that primaries dictate the range of choices available by voters in the general election); *Cal. Democratic Party*, 530 U.S. at 575 (noting that primaries are a "crucial juncture" in the electoral process).

138. *See* LULAC of Tex. v. Tex. Democratic Party, 651 F. Supp. 2d 700, 701–03 (W.D. Tex. 2009); Schwartz, *supra* note 86.

139. *See* League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 476–78 (6th Cir. 2008).

a strong argument that caucuses unequally and arbitrarily disqualify voters.

Caucuses are relatively informal gatherings that have an immense impact on elections. Caucuses vary by county, state legislative district, and precinct.[140] Since there are few controlling state laws, uneven training among caucus volunteers, and limited institutional knowledge in some localities, there is extreme irregularity in the treatment of votes.[141] Arbitrary discrimination, even without intentionally targeting a suspect class, may violate the Equal Protection Clause by unconstitutionally violating the one person, one vote doctrine.[142] One simple illustration of arbitrary discrimination is that caucuses allow biased voters to count the ballots rather than neutral administrators.[143] This method can affect the weight of votes from one precinct to the next. Another potential source of discrimination is the intimidation factor: caucuses discourage participation by people who are hesitant to publicly announce and defend their votes.[144] Most concerning of all, however, the attendance requirement forces people to attend caucuses at the expense of other significant life responsibilities[145] or constitutionally protected rights, such as the free practice of religion.[146] It also requires people who are disabled or homebound to either make precarious trips to their caucus sites, possibly standing uncomfortably for hours, or surrender their franchise altogether.[147]

140. *See* Mayer, *supra* note 11, at 108.

141. *See* Tom McCarthy, *Nebraska Caucus: Omayhem*, HUFFINGTON POST (Feb. 9, 2008, 4:08 PM), http://www.huffingtonpost.com/tom-mccarthy/nebraska-caucus-omayhem_b_85841.html (describing the problems surrounding a Nebraska caucus).

142. *See* Reynolds v. Sims, 377 U.S. 533, 557–58 (1964); Black v. McGuffage, 209 F. Supp. 2d 889, 898–99 (N.D. Ill. 2002).

143. *See* Pearson, *supra* note 16 ("Every ballot counter . . . wore a T-shirt or button in support of the same candidate. So much for neutrality in election administration.").

144. *See, e.g.*, Ralph Thomas, *Caucus? Primary? Voters Here Can Do Both*, SEATTLE TIMES, Jan. 28, 2008, at A1, *available at* 2008 WLNR 1657266 (paraphrasing a former Washington Secretary of State who contends that caucuses require people to argue with their neighbors about politics); Wilentz & Zelizer, *supra* note 9, at B3.

145. *See, e.g.*, Kantor, *supra* note 8, at A1.

146. *See, e.g.*, Krieger, *supra* note 1, at 1.

147. *See* WANG, *supra* note 13, at 5; Gail Collins, Op-ed., *Notes From a Caucus*, N.Y. TIMES, Feb. 14, 2008, at A35, *available at* 2008 WLNR 2833178 (attesting that a woman on chemotherapy had to leave the caucus for health reasons after several hours of waiting and never voting).

Recent litigation after *Bush v. Gore* presents a promising model for an equal protection challenge of caucuses. In *League of Women Voters of Ohio v. Brunner*, plaintiffs successfully overcame a motion to dismiss for failure to state a claim by illustrating compelling examples of gross disparities between polling locations in a primary based on geographic differences.[148] The court held that such allegations were sufficient to state an equal protection claim. The equal protection claim focused on discrepancies in the following procedures: registration, absentee ballots, polling places by location (including the amount of time travelling to polling places and polling places that did not open on time), lack of training among poll workers, and unfair treatment of disabled voters.[149]

Plaintiffs may be required to prove not just discrimination but *intentional* discrimination to win equal protection claims.[150] The court in *Brunner* did not decide the issue because it was not the precise matter before the court. However, in *Washington v. Davis*, the Court held that intentional discrimination is not the only form of discrimination prohibited by the Constitution.[151] Irrational and arbitrary debasement of a vote violates equal protection, "[e]ven without a suspect classification or invidious discrimination."[152] Nevertheless, with careful discovery, plaintiffs may also be able to demonstrate intentional[153] or knowing discrimination,[154] bolstering their equal protection violation claim.

148. League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 477–78 (6th Cir. 2008). To state a claim, a complaint must allege (1) deprivation of a constitutional right, (2) by a person acting under color of the law. 42 U.S.C. § 1983 (2006); Jones v. Duncan, 840 F.2d 359, 361–62 (6th Cir. 1988).

149. *League of Women Voters of Ohio*, 548 F.3d at 468–69. Since party caucuses are technically independent from the state, uniform disability laws do not apply. *See* PENIEL CRONIN, 2008 DEMOCRATIC PRESIDENTIAL PREFERENCE ELECTION: PRIMARY VERSUS CAUCUS 1 (2008), *available at* http://www.talkleft.com/media/2008caucusreport.pdf; WANG, *supra* note 13, at 5 (discussing how disability laws do not apply to or are not enforced at caucuses). This raises the possibility of a fundamental right to access claim. *See* Tennessee v. Lane, 541 U.S. 509, 533–34 (2004) (holding that Title II of the Americans with Disabilities Act implicates a fundamental right of access enforceable by Congress under the Fourteenth Amendment).

150. *League of Women Voters of Ohio*, 548 F.3d at 476.

151. Washington v. Davis, 426 U.S. 229, 240–41 (1976).

152. Black v. McGuffage, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002).

153. *See, e.g.*, STEVEN SCHIER, BY INVITATION ONLY: THE RISE OF EXCLUSIVE POLITICS IN THE UNITED STATES 31 (2000).

154. *See, e.g.*, WANG, *supra* note 13, at 3 (discussing the debate among Iowa election officials over who they would exclude based on when they sched-

Litigants appear to be having some success in challenging arbitrary election procedures on equal protection grounds. In the caucus context, the inflexible all-or-nothing attendance rule arbitrarily excludes voters, making it potentially fertile ground for an equal protection dispute.

C. CAUCUSES MAY CONSTITUTE AN UNCONSTITUTIONAL POLL TAX

The caucus attendance requirement may also violate the Twenty-Fourth Amendment because the associated financial burden of voting in a caucus amounts to a poll tax. The attendance requirement effectively forces voters who would otherwise vote absentee in a primary to pay to participate in a caucus.[155]

In an attempt to define the amendment's parameters, election-law scholar Allison Hayward proposed a rule to define "poll or other tax."[156] For a tax or fee to be invalid under her rule, it must be a mandatory cost directly tied to voting.[157] Taxes or fees owed irrespective of voting—such as costs paid for licenses that drivers would obtain anyway or avoidable transportation costs—would be constitutional under her proposed rule.[158] Hayward argued that a poll tax claim may actually be stronger than an equal protection claim because equal protection challenges to voting taxes largely depend on the "proclivities of judges," but it is harder for a judge to "reason away" a Twenty-Fourth Amendment standard.[159] Thus, the latter could be a more stable and powerful argument in applicable contexts.[160] By contrast, other commentators argue that a poll or other tax "*should* be read to include any monetized cost which directly or indirectly imposes an additional cost on voters in their casting of a vote such that it would discourage individuals from vot-

uled the caucus); Krieger, *supra* note 1, at 1 (describing how the party knew that holding the 2008 Nevada caucus on a Saturday would exclude Orthodox Jews, but decided to do it anyway).

155. *See* Kantor, *supra* note 8, at A1 (describing one person who would miss the caucus because he was an evening cook who could not leave work and another who had to care for her autistic child). Homebound or disabled voters may require unique, expensive transportation in order to attend their caucuses. *See* WANG, *supra* note 13, at 5.

156. *See* Hayward, *supra* note 90, at 118.

157. *Id.*

158. *Id.*

159. *Id.* at 119–20.

160. *Id.*

ing."[161] They contend that their broader test better addresses poll tax "substitutes" and Hayward's test creates a self-defeating loophole.[162] They also suggest that one existing political practice that may fall within the scope of the amendment is the caucus system.[163]

Employing either test, litigants may be able to persuade a court that there are costs directly associated to caucuses that would be absent in primaries or other forms of voting. Litigants should emphasize the two most significant differences between voting in primaries and caucuses: actual, physical attendance and the narrow time period of caucuses. First, plaintiffs should produce evidence of the added financial burden that physically going to their caucus locations could cost them. Examples might include transportation costs for a student attending college away from home or a person who must leave a child or an aging parent with a paid caregiver. Second, voters should argue that the narrow voting time frame of caucuses causes specific hardship that would not be present in a primary situation, like leaving work to attend a caucus. Although there is limited poll tax case law, litigants have had some success with similar arguments in voter identification cases.[164]

Political caucuses impose direct and indirect burdens on voters. Real cost data exist on the trade-offs caucus voters face in casting their caucus ballots.[165] By employing empirical data on burdens produced by the mandatory attendance requirement, litigants may be able to establish that the caucus attendance requirement is an unconstitutional poll or other tax.

III. IMPROVING THE NOMINATIONS PROCESS: RECOMMENDATIONS FOR REFORM

Although this Note has thus far focused on potential court challenges to caucuses, it also speaks to legislatures and party leaders, acknowledging that they may be more effective actors to achieve uniform caucus reform. This Part presents four reform proposals for eliminating or mitigating the burdens cau-

161. *See* Schultz & Clark, *supra* note 95, at 63 (emphasis added).

162. *Id.* at 63–64.

163. *See id.* at 76.

164. *See, e.g.*, Weinschenk v. State, 203 S.W.3d 201, 209–10 (Mo. 2006) (overturning a state voter-identification statute after finding that the statute placed a substantial burden on the fundamental right to vote and was not narrowly tailored to meet a compelling state interest).

165. *See* CRONIN, *supra* note 149, at 1.

cuses place on individual constitutional rights and briefly summarizes the comparative advantages and disadvantages of pursuing reform through various actors. It concludes that Congress is best suited to legislatively and uniformly reform caucuses.

A. REFORM RECOMMENDATIONS

The first proposal is to eliminate caucuses entirely. This would produce the best outcome, as it would resolve the constitutional infirmities of caucuses.[166] However, this may be politically infeasible. Several key actors hold competing interests and the mode of implementation of reform is a critical consideration for maintaining a fair, workable balance. For example, if courts were to intervene by replacing caucuses with primaries, such reform may come at the cost of party independence. Elimination of caucuses may also violate the *Burdick* test, which requires such burdensome intervention to be as narrowly tailored as possible.[167] It is unclear whether state interests in caucus reform justify such significant judicial intervention. Therefore, this Note presents several less intrusive alternatives that a consensus of actors is more likely to support. Nevertheless, there is room in federal precedent for an argument that the potential constitutional violations of caucuses this Note presents necessitate their elimination.[168]

A second proposal is the addition of an absentee ballot option to caucuses. In 2004, the Maine Democratic Party instituted an absentee voting process for its precinct caucuses.[169] In 2008, of its approximately 45,000 presidential preference ballots cast, 5000 were submitted absentee.[170] Using Maine as a model, parties could provide for an absentee ballot option that would operate similarly to a primary election absentee ballot. Since some caucus states have a minimum threshold rule,[171]

166. It is beyond the scope of this Note to discuss the merits of regional and direct national primaries, but this analysis contends that either of these primary systems would better address the constitutional concerns presented by the attendance requirement than caucuses in their present form.

167. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 434 (1992).

168. *See* Am. Party of Tex. v. White, 415 U.S. 767, 781 (1974) (upholding a state's regulation of party activity by instituting a caucus instead of a primary).

169. *See* Manning Interview, *supra* note 45.

170. *Id.*

171. Threshold rules require candidates to receive a minimum percentage of the vote in order to earn delegates. Like instant run-off voting, a candidate

voters could rank their presidential candidates in order of preference in case their top choices were eliminated.[172]

This proposal illustrates a simple, voluntary process that state or national parties could adopt. Although this proposal does not entirely remedy associational rights or equal protection violations, it does mitigate them by expanding voter access and increasing caucus legitimacy by making participation easier. Additionally, it would effectively eliminate the financial burden placed upon individuals unable to participate, thereby resolving the poll tax issue. Nonetheless, two practical concerns impede adoption: funding and party control. The administrative costs of creating, mailing, and counting absentee ballots, as well as optional efforts to publicize an absentee ballot option to potential voters, are unappetizing to many party leaders and may outweigh their genuine desires to improve the caucus process.[173] A second detractor to the absentee option is campaign control. Modern campaigns operate by microtargeting and activating likely caucus-goers.[174] Implementing an absentee process would require campaigns to predict which voters will participate by absentee.[175] Campaigns are often closely connected to the political parties making caucus administration decisions and these initial hassles may influence a party's decision to create an absentee ballot option. Nonetheless, this alone is not a sufficient reason to forgo efforts at caucus reform. Furthermore, this may give parties the satisfaction of crafting their own plans for increasing caucus accessibility, rather than forcing parties to comply with an outside agent's mandate.

A third reform proposal is to employ new technology to increase long-distance participation. One example is a supplemental Internet voting scheme. In 2004, the Michigan Democratic Party allowed caucus voters to either attend a traditional

without this number is eliminated and his or her supporters' votes are redistributed to remaining candidates. *See* Mayer, *supra* note 11, at 111 tbl.4.1.

172. *Id.* At precinct caucuses, voters also select the party delegates who will attend the next caucus level. *Id.* at 108. Since the delegates often announce their intention to run at the caucus, under this proposal voters unable to attend the caucus would only vote for their presidential preference, not specific individual delegates. *Id.*

173. *See* Manning Interview, *supra* note 45.

174. *See* SCHIER, *supra* note 153, at 31.

175. *See* Telephone Interview with Mark Brewer, Chair, Mich. Democratic Party (Nov. 21, 2009) [hereinafter Brewer Interview] (discussing the initial negative reaction of some campaigns to the influx of new voters within the context of Internet voting).

caucus, vote by mail, or submit votes online.[176] The party stated that it implemented the online option to increase voter participation.[177] The party employed "state-of-the-art" security and a system to guard against double-voting,[178] and allowed voters a five-week voting window.[179] A similar proposal is a virtual caucus.[180] Voters would enter a forum administered by the party, chat through instant messaging to form alliances, and vote.[181] The virtual caucus would still have to satisfy the same legal standards as a physical caucus, which means that votes must be equal and cannot be diluted. A third possibility is a public television access system. Voters could participate by watching the caucus on television and then submitting their votes either through the Internet or by telephone, using verification information unique to an individual voter.

An online or supplemental Internet voting scheme would mitigate, but not resolve, the possible associational rights and equal protection concerns. Like absentee ballots, it would give voters more options and limit the party-initiated burden of the attendance requirement. Nonetheless, the attendance requirement would still exclude some people. Perhaps the most significant flaw in using Internet technology is the disproportionate lack of access to computers for certain segments of society, including lower economic classes, racial minorities, and people lacking computer literacy.[182] Additionally, Internet technology does not necessarily eliminate the financial poll tax burden of caucuses for people without Internet access. Recognizing this problem, a member of the Democratic National Committee challenged Michigan's online voting proposal in 2004, but the committee nonetheless approved it.[183] In response, campaigns tried to bridge the digital divide by bringing laptops to poten-

176. *See* Robert E. Pierre & Dan Keating, *Online Voting Clicks in Michigan; Internet Ballots Part of Caucuses*, WASH. POST, Feb. 6, 2004, at A12; Brewer Interview, *supra* note 175.

177. Brewer Interview, *supra* note 175.

178. *Id.*

179. *Id.*

180. Priya Chatwani, Note, *Retro Politics Back in Vogue: A Look at How the Internet Can Modernize the Reemerging Caucus*, 14 S. CAL. INTERDISC. L.J. 313, 324 (2005).

181. *Id.* at 324–31. As in an actual caucus, participants could choose to vote uncommitted. *Id.*

182. *See NewsHour with Jim Lehrer* (PBS television broadcast Feb. 6, 2004), *available at* http://www.pbs.org/newshour/bb/media/jan-june04/michiganinternet_02-06.html.

183. *See* Pierre & Keating, *supra* note 176, at A12.

tial voters at their jobs, nursing homes, and schools.[184] Nonetheless, those targeted efforts did not eliminate the greater problem of disproportionate access.

A fourth and final reform proposal is to shift from caucuses to a hybrid caucus-primary system, or spread the caucus over two or more days. This proposal would not eliminate the attendance requirement but would widen the timeframe for participation. Some states have debated splitting caucuses into one weekday and one weekend, of which voters would only have to attend one.[185] The Texas Democratic Party offers another model. It instituted a two-step process for selecting delegates, combining a daytime state-operated primary with a nighttime party caucus.[186] The votes in the primary election account for two-thirds of the total delegates selected for a candidate and the caucus accounts for the remaining one-third.[187] This system, or a tweaked version of it, is a step closer to avoiding the more significant constitutional burdens on associational and equal protection rights associated with caucuses, but it does not eliminate them. Further, some litigants have challenged in court the complexity of the Texas system.[188] They have maintained that the system is fundamentally unfair because it treats votes disproportionately.[189] With these concerns in mind, this Note does not endorse a Texas-like system, but does recognize the underlying efforts of such a system to address the fundamental unfairness of the traditional caucus attendance requirement.

B. EVALUATING THE BEST ACTORS TO INITIATE CAUCUS REFORM

Some nonjudicial actors have the authority—but perhaps not the capacity—to reform the caucus system. This section examines the most likely actors and concludes that Congress is the best nonjudicial entity to reform the nominations process.

Perhaps the most effective, legitimate source for regulating caucuses is Congress. The Constitution gives Congress the

184. *Id.*; *NewsHour with Jim Lehrer*, *supra* note 182.

185. *See* David Yespen, *Double the Fun: Split the Dates for Caucuses*, DES MOINES REG., Oct. 4, 2007, at A13, *available at* 2007 WLNR 27441192.

186. *See* Aileen B. Flores, *Texas Demos Rethink '2-Step' Primary Process*, EL PASO TIMES, Oct. 5, 2008, *available at* 2008 WLNR 22091567.

187. *Id.*

188. Elaine Ayala, *Panel Hears LULAC Case over Texas 'Two-Step',* SAN ANTONIO EXPRESS-NEWS (Aug. 13, 2009), http://www.mysanantonio.com/news/53172737.html.

189. *See id.*

power to regulate federal elections in at least two clauses. First, the Presidential Election Clause grants Congress the power to set the time and day for choosing presidential electors.[190] Second, the Congressional Election Clause gives Congress the power to regulate the time, place, and manner of elections for U.S. senators and representatives.[191] Additionally, Congress has at least some power to affect elections under its military authority.[192] For example, Congress may be able to take some actions to change the nominations process as applied to members of the military. Although no clause expressly grants Congress the power to regulate the nominations process, the Supreme Court has recognized broad congressional power to regulate both general elections and primaries. In *United States v. Classic*, for example, the Court held that the Congressional Election Clause grants Congress authority to regulate primaries for congressional elections when they are "integral" to the election process.[193] Additionally, in *Buckley v. Valeo*, the Court upheld Congress's campaign finance regulation of presidential elections, including primaries.[194] In light of the proposed solutions, Congress is the most authoritative actor in this context and could implement any of them as they relate to federal elections.[195] However, empirically, congressional efforts to regulate primary dates to avoid front-loading have been unsuccessful in provoking national party action.[196] Nonetheless, a congressional attempt to regulate primaries may at least galvanize parties to act themselves.[197] The issue of absentee ballots in caucuses is already under consideration by both national parties,[198] so congressional pressure might be effective.

By contrast, state governments have the authority, but probably not the capacity, to uniformly reform caucuses. Al-

190. U.S. CONST. art. II, § 1, cl. 4.

191. *Id.* art. I, § 4, cl. 1.

192. *Id.* art. I, § 8, cl. 16.

193. *See* United States v. Classic, 313 U.S. 299, 315 (1941); s*ee also* Smith v. Allwright, 321 U.S. 649, 659–60 (1944) (recognizing Congress's power to regulate primary elections).

194. *See* Buckley v. Valeo, 424 U.S. 1, 143 (1976).

195. *Cf.* Hasen, *supra* note 136, at 2016–19 (concluding, based on federal case law, that Congress likely has authority to regulate the nominations process).

196. Congress has debated, conducted hearings, and considered legislation on various forms of regulation for decades. *See, e.g.*, Regional Presidential Primary and Caucus Act of 2007, S. Res. 1905, 110th Cong. (2007).

197. *See* Hasen, *supra* note 136, at 2009–10.

198. *See* Zeleny, *supra* note 46; Buhler Interview, *supra* note 46.

though state governments may regulate the time, place, and manner of federal elections, their authority is subject to Congress.[199] Additionally, the Supreme Court has stated, "States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates."[200] In voting for federal officers, voters exercise a federal—not a state—right, although state constitutions may expand this right.[201] Therefore, states may act, but only without congressional objection. It is also noteworthy that states do not have a colorable Tenth Amendment objection to the imposition of greater regulation by Congress.[202]

State legislatures could probably institute most of the recommendations proposed by this Note. However, it is often in the self-interests of state legislators to appease local and state party leaders, as they are repeat players in the electoral system and party leaders are likely to prefer the inflated influence they have under a caucus system.[203] Further, congressional action would be preferable for purposes of national uniformity.

Caucus state political parties and party leaders are unlikely to support caucus reform because they generally benefit by controlling nominations by caucus, especially in early states like Iowa that receive national media attention.[204] For example, if Iowa surrendered its caucus, unless it secured an equally coveted first-in-the-nation primary date, its uniqueness would likely fade, and so would the attention it gleans from candidates and national parties.

Finally, it seems natural that the national parties are the fitting entities to reform the system. However, the parties may not actually have the influence necessary to regulate state parties.[205] This depends on the magnitude of reform national parties pursue. Until recent decades, national parties have gener-

199. *See* U.S. CONST. art. I, § 4, cl. 1.

200. Cousins v. Wigoda, 419 U.S. 477, 489–90 (1975).

201. *Id.*

202. *See, e.g.*, Leonard P. Stark, Note, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 YALE L. & POL'Y REV. 331, 377–78 (1996).

203. Joanna Klonsky, *The Caucus System in the U.S. Presidential Nominating Process*, COUNCIL ON FOREIGN REL. (Mar. 3, 2008), http://www.cfr.org/publication/15640/caucus_system_in_the_us_presidential_nominating_process.html.

204. *See* Stark, *supra* note 202, at 359.

205. *Cf.* DAVIS, *supra* note 11, at 30–31 (illustrating failed attempts by national parties at systematic reform).

ally left delegate selection details to state parties.[206] Therefore, it is unclear whether they could force procedural change on state parties. In the context of primary frontloading, some scholars argue that parties have demonstrably failed to control state party action.[207] For instance, the Democratic National Committee established a time window for delegate selection, but when state parties violated it in 1984, the National Democratic Party relented.[208] In 2008, a similar controversy emerged, with the Democratic National Committee threatening to block Michigan and Florida delegations from the national convention.[209] The Party eventually seated the delegates.[210] Based on this history, it is unclear that national parties would be able to institute national compliance, even if they wanted to.

CONCLUSION

Caucuses have survived in the "backwater" of the nominations process.[211] Despite public calls to modernize the process, many caucus states still require participants to be physically present to vote. This constraint raises grave constitutional concerns under the doctrines of First Amendment associational rights, Fourteenth Amendment equal protection, and the Twenty-Fourth Amendment's prohibition of poll or other voting taxes. This Note suggests that litigants may be able to challenge successfully the attendance requirement on one of these constitutional grounds. Alternatively, Congress would be the best agent to institute uniform presidential nomination reform. National parties may be able to instigate reform but it is unclear whether they have the influence necessary to uproot the entrenched caucus tradition. However, this Note also proposes that various actors may be able to strike a compromise through more subtle caucus reform like an absentee ballot option or Internet voting.

206. *See, e.g.*, Stark, *supra* note 202, at 356–59.

207. *See* Emmett H. Buell, Jr., *The Invisible Primary*, *in* IN PURSUIT OF THE WHITE HOUSE, *supra* note 11, at 1, 7–11.

208. *See, e.g.*, DAVIS, *supra* note 11, at 26–27; Buell, *supra* note 207.

209. *See, e.g.*, Press Release, Senator Bill Nelson, Lawmakers Sue to Protect Right to Vote (Oct. 4, 2007), *available at* http://billnelson.senate.gov/news/details.cfm?id=284931&.

210. *See DNC's Statement on the Florida and Michigan Delegations*, WALL ST. J. WASH. WIRE BLOG (May 31, 2009, 9:03 PM), http://blogs.wsj.com/washwire/2008/05/31/dncs-statement-on-the-florida-and-michigan-delegations/.

211. *See* CONGRESSIONAL QUARTERLY, PRESIDENTIAL ELECTIONS: 1789–1996, at 142 (1997).