

1-1-2010

Governing the Presidential Nomination Commons

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Brigham Daniels, *Governing the Presidential Nomination Commons*, 84 TUL. L. REV. 899 (2010).

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Governing the Presidential Nomination Commons

Brigham Daniels*

States jockeying to hold primaries and caucuses as early as possible has become the central theme of the presidential primary system. While the trend of racing to vote is not new, it has increased alarmingly. In 2008, more than half the states held contests by the first week of February. This free-for-all hurts the democratic process by encouraging uninformed voting, emphasizing the role of money in campaigns, and pressing candidates to rely on sound-bite campaigning. Because the presidential nomination is one of the most important decisions left to voters in the United States, this problem is well-recognized. It is also widely misunderstood. This Article casts the problem in a different light, demonstrating that the front-loading of the nomination process is a classic tragedy of the commons. Recognizing the problem as a commons dilemma provides a powerful explanation for the trend towards earlier primaries and, more importantly, provides insights into how best to reform the nomination system.

I.	INTRODUCTION.....	900
II.	THE PRESIDENTIAL NOMINATION SYSTEM AS A COMMONS RESOURCE.....	903
A.	<i>How Influence Unlocks the Benefits of the Nomination System.....</i>	903
B.	<i>Commons Resources and the Nomination Commons.....</i>	906
1.	Influence Has the Characteristics of a Commons Resource.....	906
2.	Appropriators and Appropriation in the Nomination Commons	909
3.	What About States that Stay Out of the Fray?	912
C.	<i>Dimensions of the Nomination Commons</i>	914
1.	Influence, Lack of Influence, and Competition.....	914

* © 2010 Brigham Daniels. Assistant Professor, University of Houston Law Center. I express gratitude to the *New York Times* and the Iowa Electronic Market for sharing data that helped shape this Article. I am grateful to Jim Salzman, John Mixon, Scott Daniels, Lincoln Davies, Marcilynn Burke, Erika Weinthal, Meg McKean, Chris Schroeder, and Holly Reuter for helpful suggestions on various drafts of this Article. For helpful comments, I also thank various participants of the Southeastern Association of Law Schools Sixty-Second Annual Meeting, where I presented this Article. I gratefully acknowledge the National Science Foundation for providing me with a graduate research fellowship that enabled me to perform a portion of the work underlying this Article and to Cynthia Mabry, Bonnie Kim, and Kristine Waddell for excellent research assistance and for the excellent help and professionalism of the membership of the Tulane Law Review.

2.	Candidate Visits, Press Coverage, and Campaign Spending	919
3.	Experiences of a State's Electorate	928
4.	Political Interests.....	929
III.	TRAGEDY OF THE PRESIDENTIAL NOMINATION COMMONS	931
A.	<i>Tragedy of the Commons and Resource Races</i>	931
B.	<i>The Presidential Nomination Commons Resource Race</i>	933
1.	History of the Presidential Nomination Resource Race	934
2.	Costs of the Nomination Influence Resource Race	938
a.	Mathematical Disenfranchisement	938
b.	Increased Uninformed Voting	940
c.	Loss of Retail Politics and Increased Prominence of Paid Media	941
d.	Increased Role of Momentum and Diminished Role of Reflection	942
e.	Increased Probabilities That the Process Will Allow for Mistakes.....	943
IV.	CRAFTING A COMMONS SOLUTION FOR THE NOMINATION COMMONS.....	944
A.	<i>End the Resource Race</i>	944
B.	<i>Unitize</i>	945
C.	<i>Rethink Regulating the Nomination Commons</i>	947
1.	Assessing Potential Regulators	947
2.	Assessing Our Regulatory Alternatives	949
D.	<i>Getting States To Bind Themselves</i>	951
E.	<i>Using Market Regulation To Induce State Commitments</i>	953
V.	CONCLUSION.....	955

I. INTRODUCTION

The 2008 presidential primaries featured two highly contested races—one among the candidates hoping to represent their party and one among the states vying to hold the earliest primary or caucus. In fact, the 2008 election cycle was the most front-loaded in the country's history. Much attention during the last cycle focused on what to do with Florida and Michigan's delegates at the convention. After all, these states had flaunted the national parties' rules by scheduling their

primaries immediately after the January opening bell. But they were just the only states who pushed it so far that they got caught. More than half of the states had voted by the first week of February, a good seven months before the party conventions.

Front-loading is more problematic than states simply rushing to the starting line. It weakens our democracy by encouraging uninformed voting, greater prominence of money, and sound-bite tarmac campaigns—all trends that threaten the integrity of a process aimed, we hope, at finding better candidates for the most powerful political office in the country and probably the world.

States rushing to vote presents a riddle. Observers almost uniformly agree that front-loading is bad for the country, yet few states have shown any interest in holding back. Why would state politicians, closely attuned to both popular sentiment and the importance of political institutions, eagerly participate in the derby that undermines both of these concerns?

On one level, this riddle is not so difficult. State leaders allow parochial interests to trump all other interests. States want more influence over the nomination process. They want candidates and the media to pay attention to *their* states and energize *their* voters. This obvious explanation that states use the system to win local benefits has satisfied many political scientists.

But the explanation is incomplete. On closer inspection, it becomes apparent that this problem is eerily familiar. The rush to vote is a tragedy of the commons.¹ The script of the tragedy of the commons is simple. We have a valued commons resource; we fail to limit access to the resource adequately, and the result is a free-for-all that threatens collective interests. The tragedy of the commons explains many problems: why fur traders nearly pushed the buffalo and the grizzly bear to extinction; why the crabbers on the Discovery Channel's *Deadliest Catch* put their lives on the line in pursuit of Alaskan king crab; why we see oil booms and busts; and, here, why states clamber over each other to gain from the nomination process. In all these situations, we see a rush to satisfy narrow self-interests work

1. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968) (introducing the concept of the tragedy of the commons). At least one other scholar has fleetingly recognized that the presidential primary system represents a tragedy of the commons. WILLIAM G. MAYER & ANDREW E. BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* 50 (2004). This Article develops this insight and explains not only why it helps demystify the presidential nomination system and its challenges but also how it provides a playbook of potential solutions.

to the detriment of broader interests—individually rational decisions leading to collective catastrophes.

We frequently use a tragedy of the commons to explain problems in the natural resources area; we use it less in the political sphere. But, its insight here is just as important. Understanding the rush for early nomination contests as a commons problem allows us to draw on a wealth of experience and insights from many other commons areas for potential solutions. Consider several examples. First, both of the major political parties set a timeline after which any state can vote, and both parties allow a few states like Iowa and New Hampshire to move even ahead of this line. By drawing a line in the sand, parties provide ground rules, but also inadvertently encourage crowding up to that line. A farmer with river rights uses that water; a fisherman likes to catch his uppermost limit. It is not surprising that so many states have ventured right to the line. While only Florida and Michigan jumped over the line in the last cycle, it is no accident that pundits came to dub the very first Tuesday in 2008 available for voting under the rules as “Tsunami Tuesday.” Given the incentives at work in the commons, we should only expect the wave to grow with each election cycle.

Second, getting states to space out their primaries and caucuses will take more than finger wagging. State leaders understand the national importance of the nomination system, but they nevertheless consistently put local interests ahead of national interests. Yet, this is hardly different from other dysfunctional resource allocation systems, like the relentless pursuit for codfish that wiped out the fishery or the slash-and-burn agriculture that continues to destroy the Amazon. The tragedy occurs because what is irrational for society makes complete sense to individuals—those holding back are just suckers. The important point is that the tragedy is not inevitable. It is possible to end resource races in the commons, but it takes more than well-founded criticism. It will take a solution crafted with the commons in mind.

Perhaps the greatest lesson we can learn from the literature on the commons is that we need well-constructed institutions to avoid commons resource problems. Many natural commons, like our national parks, are managed quite successfully. And one thing is certain: we can do better than the primary leapfrog the states now play.

I explore these issues in depth below. Part II sets out why the commons provides a useful lens to explain the presidential nomination system. It identifies the types of benefits states seek and how moving contest dates rewards these parochial interests. The Article supports

this argument by providing new empirical evidence that demonstrates why state decision makers change their contest dates.

Part III explores how the tragedy of the commons has played out in the context of the presidential nomination system. It provides a snapshot of how states' decisions to compete for primary dates have unfolded over the past few decades and explains the main costs of front-loading as symptoms of typical commons resource problems.

Part IV moves from diagnosis to prescription. It applies what has been learned about managing commons resources generally to the challenges facing the presidential nomination commons. This Part draws on lessons learned from governing resources as diverse as groundwater, national parks, and the radio spectrum to show us how to help reform the presidential nomination system.

II. THE PRESIDENTIAL NOMINATION SYSTEM AS A COMMONS RESOURCE

This Part presents the case for why we should view the benefits states receive from the presidential nomination system as commons resources. The Part begins with a description of the rationales state decision makers provide for moving their states' contest dates and discusses how each of these rationales is tied to a state's influence over the presidential primary system. The Part then provides an explanation of what makes a resource a commons resource and why it makes sense to view influence over the presidential primary system as a commons resource.

A. *How Influence Unlocks the Benefits of the Nomination System*

The presidential nomination system can provide states many benefits, ranging from increased candidate visits to drumming up voter turnout. I argue here that we can reduce virtually all the benefits states seek down to a common denominator: influence.² Now, if we were to ask state leaders why they changed the dates of their nomination contests, admittedly, the response we would receive would almost certainly be more nuanced than, "Simple, we want more influence." One of the better examples of what might be on the minds of decision makers comes from the findings section of a bill the California legislature passed when it moved up its primary for the 2008 nomination cycle. The bill states:

2. See discussion *infra* Part II.C (providing a more nuanced explanation of the benefits states seek).

The Legislature finds and declares all of the following:

- (a) California has the largest population and largest congressional delegation of any state in the union yet California's current June presidential primary election date virtually ensures the presidential nominees for the major political parties will be determined before California voters have an opportunity to cast their ballots.
- (b) It is vital to restore to California voters the opportunity to vote in a presidential primary election that is timely and meaningful in choosing presidential candidates.
- (c) Conducting the California presidential primary election on the first Tuesday in February will encourage presidential candidates to campaign in California, and to debate and discuss issues and policies important to the people of California.
- (d) Conducting the California presidential primary election on the first Tuesday in February will encourage voter registration, voter interest, and voter participation in the 2008 presidential primary election and subsequent presidential primary elections in California.³

While California's list is extensive, it is not comprehensive. In order to get a broad picture of what motivates decision makers to change their contest dates, I reviewed and coded—with the help of an excellent research assistant—approximately 700 documents from the public record. In addition to rationales in bills like the one from California above (which are unfortunately a rarity), the review included other legislative materials and media content where decision makers were quoted or interviewed. Parsing the public record in this way provided an interesting window into the motivations of the decision makers who opted to change a state's nomination contest.⁴

As shown in Table 1, 37% of the rationales provided by decision makers on the public record involve direct attempts to appropriate influence or to avoid irrelevance. Smaller shares of the rationales included the following aims: compete with other states (13%), attract candidates and media (18%), improve the voters' experience (11%),

3. S. Res. 113, 2007 Leg., (Cal. 2007).

4. Admittedly, the statements on the public record of state decision makers are not a perfect window into the mind of legislative bodies or political parties. It only allows us access to the remarks meant for the general public and ignores the fact the legislative bodies are a "they" and not an "it." See Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992). But despite the obvious warts, statements on the public record provide at least a version of the truth of what individual decision makers were thinking and, taken as a whole, provide a useful snapshot of the rationales of decision makers more generally.

and further a political interest (20%). While I will discuss these rationales in further detail below, at this point I will briefly address my claim that all these motivations boil down to influence.

Table 1. Explanations for Why States Altered Contest Dates	
Influence	
Gain Influence Over Process	22%
Avoid Contest After Nomination Secured	15%
Competition	
Competition with Other States	13%
Attract Candidates and Media	
Candidate Attention	12%
Media Attention	3%
Economic Benefit	3%
Improve Voting Experience	
Turn Out Voters	8%
More Candidates for Voters to Consider	3%
Advance a Political Interest	
State Interest	9%
Regional Interest	6%
National Interest	4%
Help Specific Candidate or Type of Candidate	1%

Consider the example of a state that wants to attract candidate visits. What makes a candidate want to visit? It is not much of a leap to assume that candidates visit mainly because they want to improve their chances of becoming the nominee and then president. In other words, what the candidate assesses is the state's influence. Taking it a step further, how can states alter the way a candidate assesses that state's ability to help his or her candidacy? There are a myriad of factors that a candidate might find relevant. For example, a candidate might see the number of delegates a state can bring to the national convention as a measure of state influence. However, the number of delegates that a state is allowed to bring to the convention is based mainly on population and to a lesser extent past voting trends. So, there is not much a state can do about that. In fact, there is not much state leaders can do about most of factors a candidate might see as relevant. State leaders have very limited influence to sway voters from one candidate to another, to create the candidate's desired setting for a message he or she is pushing, to increase the candidate's ability to raise

money in the state, to lessen the burden imposed on a candidate who travels to the state, or to change the degree a candidate believes the state is important in the event he or she becomes the nominee.

Yet, there is something that state leaders can do quite easily that will change candidates' calculus. As discussed below in greater detail, states that vote earlier tend to have more influence in the process. For this reason, candidates tend to visit states slated earlier in the nomination cycle much more than those states that come later. About the only thing a state can do to change a candidate's perception of that state's influence is to change its contest dates. Similar stories can be told with at least all of the parochial justifications state leaders put forward in the summary above in Table 1. While the justifications vary, the means of accomplishing them are the same.

Before getting into too many of the details about how influence acts as a commons resource, it is first necessary to explain briefly what is meant by commons resource.

B. Commons Resources and the Nomination Commons

1. Influence Has the Characteristics of a Commons Resource

Commons resources have two defining characteristics. First, use of a commons resource is consumptive.⁵ A consumptive use does not necessarily permanently diminish the amount of a commons resource available, but it diminishes opportunities for rival users at least for a time. For example, a pedestrian on a sidewalk takes up space on the sidewalk only while using it; other resources like fisheries are renewable with time; still others like hard rock minerals are gone once consumed.

The second trait that characterizes commons resources is that it is difficult to stop others from using them.⁶ It takes a lot of effort, for example, to keep others from using the radio spectrum or from fishing in a lake or river. And, the more difficult it is to exclude others, the more the resource works like a commons resource.

Taken together, these traits often spell trouble for commons resources: the resource is consumed when used, and it is difficult to keep people from consuming it.

Commons resources are just about everywhere we look. Consider the diversity of resources that scholars have identified as

5. ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 30 (1990).

6. *Id.*

exhibiting traits of a commons resource. Most natural resources of significant size have traits of commons resources including groundwater aquifers,⁷ beaches,⁸ air sheds,⁹ and the polar ice caps,¹⁰ to name a few. Much of our developed environment also exhibits traits of commons resources, such as parking spots¹¹ and sidewalk vending.¹² Over the past decade, scholars devoted to an area often referred to as “new commons” have identified much less intuitive things that exhibit the traits of commons resources including knowledge,¹³ government budgets,¹⁴ silence,¹⁵ and e-mail inboxes.¹⁶ New commons resources are *new* in one of two respects. First, they might be considered new in that, like an e-mail inbox, they are a fairly recent invention. Second, they might be familiar but only recently categorized as a commons resource, as in the case of silence or knowledge.¹⁷

This Article argues that influence over the presidential nomination system should be considered a commons resource, and therefore fits within the new commons literature. How is influence over the system a commons resource? First, states compete for influence because it is a finite resource. Regardless of what dimension of the commons is at issue, this is the case: candidates only have so much time to visit states, only so many commitments to make, and only so much money to spend; the media coverage—no matter how big the story—always has some limits; and a state can only hold a finite amount of sway over the voters in other states.

7. See *id.* at 104-27.

8. See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 777-81 (1986).

9. See Hardin, *supra* note 1, at 1245.

10. See CHRISTOPHER C. JOYNER, *GOVERNING THE FROZEN COMMONS: THE ANTARCTIC REGIME AND ENVIRONMENTAL PROTECTION* (1998).

11. See Richard A. Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. S515 (2002).

12. See Gregg W. Kettles, *Regulating Vending in the Sidewalk Commons*, 77 TEMP. L. REV. 1, 3-4 (2004).

13. See UNDERSTANDING KNOWLEDGE AS A COMMONS: FROM THEORY TO PRACTICE (Charlotte Hess & Elinor Ostrom eds., 2007).

14. See Kenneth A. Shepsle, *Overgrazing the Budgetary Commons: Incentive—Compatible Solutions to the Problem of Deficits: Discussion 1*, in THE ECONOMIC CONSEQUENCES OF GOVERNMENT DEFICITS 211, 211 (Laurence H. Meyer ed., 1983).

15. See Ivan Illich, *Silence Is a Commons*, 40 COEVOLUTION Q. 4 (1983), available at <http://wholeearth.com/issue-electronic-edition.php?iss=2040>.

16. See Nigel Melville et al., *Unsolicited Commercial E-Mail: Empirical Analysis of a Digital Commons*, 10 INT’L J. ELECTRONIC COM. 143 (2006).

17. See Charlotte Hess, *Mapping the New Commons* 3-4 (Syracuse Univ. Library, Working Paper Series, Paper No. W08-21, 2008), available at <http://ssrn.com/abstract=1356835>.

Furthermore, when one state appropriates any one of these finite benefits, its gains come at the cost of the states. Just as the fish hauled into the boat are not available to other fishermen, the benefits of early contests are no longer available to other states. And, while one may argue that these benefits are not strictly limited because the number of visits a candidate makes, for example, can fluctuate, the same is true of most commons resources. A fishery can generally be managed in a way that leads to a more robust fishery; we can usually plant another tree in the forest. The main requirement—which is satisfied here—is that appropriation of the commons resource results in a diminishing stock of the resource base.

Second, it is very difficult for a state to exclude other states from trying to gain more influence. State leaders only control when they hold their respective contests; they have virtually no control over the dates of other states' contests. If any at all, the only recourse a state has is to participate in a game of one-upmanship. This harmonizes with my review of the public record: 13% of states' rationales for changing their contest dates explicitly referenced the need to respond to another state's movement or the desire to change where the state stood in line.¹⁸ Sometimes a movement by one state prompted another to do likewise even if they were only "stealing each other's oxygen."¹⁹ However, competing is not only how a state gets to hold a contest at a preferred time, but also how a state protects itself when other states move. This is how one lawmaker from Connecticut framed his support for moving up the state's contest in 2008: "The choice is between being lumped in with everybody else on Super Duper Tuesday or being completely irrelevant in the beginning of March when everybody has come and gone So we take the best position we can with the flawed system that we have"²⁰

Additionally, the harsh labels that commentators placed on the state actions that make up the presidential primary calendar illustrate that at a macro level, states work to compete with each other. Consider a few of these: a "chaotic mad dash,"²¹ a "stampede,"²² a "helter-skelter" system,²³ a "free-for-all,"²⁴ a "frenzy,"²⁵ a "hyper-drive video-

18. See *supra* Table 1.

19. Brian M. Carney, *Super-Duper Tuesday*, WALL ST. J., Mar. 12, 2007, at A14.

20. Ken Dixon, *State Workers Face Ban on Politicking*, CONN. POST, Mar. 31, 2007, available at <http://forum.connpost.com/politics/2008/01/>.

21. Pamela M. Prah, *What Gobs Think of '08 Primary Calendar*, STATELINE.ORG, Feb. 28, 2008, <http://www.stateline.org/live/details/story?contentId=286106>.

22. Editorial, *A Helter-Skelter Primary System*, OREGONIAN, Jan. 2, 2008, at E4.

23. *Id.*

game world,”²⁶ a “pell-mell scramble,”²⁷ “vigorous jockeying,”²⁸ an “arms race,”²⁹ a “high-speed demolition derby,”³⁰ “a sound-bite-saturated sprint,”³¹ and a “lemming-like rush.”³² In large part, these labels speak for themselves and could be used to describe any group of appropriators pushing each other further into a tragedy of the commons.

2. Appropriators and Appropriation in the Nomination Commons

Appropriator is the term used to describe those who seek to consume a commons resource, and *appropriation* is how consumption occurs. A miner, for example, is an appropriator, and steam shoveling, for example, is how the miner goes about appropriating.

Commons resources are often complex and frequently serve multiple, and sometimes conflicting, purposes. For example, a forest might serve as a place for recreation for hikers, wildlife habitat for hunters, a source of income for loggers, and a greenhouse gas sink for still others. Understanding resource appropriators is an important step to understanding the commons resource itself.

While many interests explain the motivations of commons resource users, there are a few generalities that stand out. First, we would expect to see commons resource appropriators appreciate how costs and benefits play out in the commons: those extracting the resource gain virtually all the benefits of that behavior whereas the costs of such extraction are borne by all the potential consumers of the

24. Lloyd Dunkelberger, *Florida—In Full and Up Front*, SARASOTA HERALD-TRIB. (Fla.), Aug. 25, 2008, at A1; Op-Ed., *Secretaries of State Offer Primary Plan*, BATTLE CREEK ENQUIRER (Mich.), July 27, 2008, at A4.

25. John Nichols, *Wisconsin Could Have Been the Decider*, CAPITAL TIMES (Madison, Wis.), May 7, 2008, at 39; Bob von Sternberg, *Will the First Votes of '08 Election Be Cast in '07?*, STAR TRIB. (Minneapolis, Minn.), Sept. 10, 2007, at A1; Editorial, *Presidential Primary System Needs Reform*, SAN ANTONIO EXPRESS-NEWS, June 16, 2007, at B10.

26. Walter Shapiro, *My Letter to the Most Important Man in American Politics*, SALON.COM, Oct. 15, 2007, http://www.salon.com/opinion/feature/2007/10/15/new_hampshire/index.html?source=newsletter.

27. Matt Stearns, *States 'Tripping over Each Other' for Prime Primary*, CHARLESTON GAZETTE (W. Va.), Sept. 30, 2007, at 14A.

28. Alexander P. Lamis & Renee M. Lamis, Editorial, *Back Load the Primaries*, PITTSBURGH POST-GAZETTE, Oct. 14, 2007, at G1.

29. Kathy Stevens, *York Officials Debate Whether Pennsylvania's Primary Should Be Moved to February*, YORK DISPATCH (Pa.), June 25, 2007.

30. MAYER & BUSCH, *supra* note 1, at 3.

31. *Id.*

32. *Id.*

resource.³³ In Garrett Hardin's famous yet fictional example of the herdsmen on the open pasture, the herdsman that puts the cow on the pasture brought it home for the slaughter, whereas all herdsmen shared the cost of the additional cow eating and tromping on the commons.³⁴

The second and closely related point is the way in which an appropriator perceives the actions of other appropriators. When an individual user of the commons resource unilaterally decides to cut back in the commons resource, the appropriator is only leaving more for others. This is the case because one characteristic trait of a commons resource is that it is difficult to exclude others from using the resource. Particularly in light of how the commons resource allocates benefits and costs, it does not make sense to cut back unilaterally.

The appropriators of concern for this Article are the states that stand to benefit from the nomination system.³⁵ As mentioned above, states attempt to appropriate benefits from the presidential nomination system by changing the timing of state candidate selection contests. And, while states may seek influence in itself (for example, Delaware wants more of a say in the nomination process) and as a means to many other benefits (for example, if Maryland had more influence, more candidates would visit), this is not unusual in the commons. Consider the example of appropriating water in a river. Some might want the water for the water itself—for drinking, household use, or to fill a pond. In other instances, the water is part of the means to a different end. It is what makes the crops grow, it is an input in an industrial process, or it provides a habitat for fish and wildlife. One can also think about the radio spectrum: what users of the spectrum want is control of a particular bandwidth—that is what they

33. Hardin, *supra* note 1, at 1244.

34. *Id.*

35. Of course, states are not the only ones to benefit from the presidential nomination system. And, there might be other potential ways to use the commons lens to explore these actors in ways not employed in this Article. Perhaps the most obvious users of the presidential primary system not explored in depth below are the candidates themselves. For example, one could attempt to frame political candidates as potential resource users where the resource is, for example, media or voter attention. See Shi-Ling Hsu, *What Is a Tragedy of the Commons? Overfishing and the Campaign Spending Problem*, 69 ALB. L. REV. 75, 105-21 (2005). Along similar lines, the commons paradigm could be used to frame how media outlets use the system to attract viewers, how interest groups gain supporters or attention from candidates, or how various entities attempt to extract money from the candidates' war chests. Again, the fact that a number of resource users might view the commons as serving different purposes is entirely consistent with a large number of commons resources. See Brigham Daniels, *Emerging Commons and Tragic Institutions*, 37 ENVTL. L. 515, 537 (2007).

appropriate. However, the reasons for wanting to use a portion of the bandwidth range from sending a radio station's signal to using Wi-Fi on a laptop. Thus, the fact that states have many reasons to appropriate influence from the nomination commons is in line with the commons more generally.

At first glance, it might seem odd to think about states moving the dates of their contests as a form of resource appropriation. However, in many ways it is not so out of the ordinary. Timing of appropriation is an important factor in many commons resources. Fishers and hunters worry about seasons, irrigators need water when their crops are in season, and finding a seat on the subway is much easier during off-peak than on-peak hours. Additionally, while not every commons resource requires temporal spacing, physical spacing is often an issue in the commons: tapping an oil well or water aquifer in large part relies on choosing a prudent spot to drill; identifying the best spot is often a key to a successful hunting or fishing excursion; and, use of radio bandwidth requires spacing in order to avoid signal interference.

As for the mindset of the states appropriating influence from the nomination commons, my review of the public record suggests that state decision makers almost always make the decision to move their contests in a way that is consistent with the commons paradigm. We would expect that decision makers in a commons would focus on potential parochial benefits of appropriation and largely ignore the larger costs at stake. This is exactly what we see; sometimes it is as if policymakers were reading right off of Hardin's script. For example, in 2000, as California considered moving up its primary, many of the other states squawked, and the California Secretary of State responded: "I didn't get elected to be secretary of state of New York. My job is to get Californians in the game."³⁶ A similar statement came from a state leader in Massachusetts who came to the same conclusion but with a somewhat more remorseful tone: "We won't be left out of the process I was very reluctant to support moving [the primary date]. But to do otherwise would have left Massachusetts voters with no voice in this election at all."³⁷

Even if one were to take the rationales on the record in the light most negative to the commons framework, at least 88% of the rationales have a parochial focus—excluding rationales aimed at

36. Scott Lindlaw, *2000 Primary Date Draws Fire*, FRESNO BEE, Sept. 4, 1998, at A4.

37. Dave Wedge, *Mass. Voters Get a Say on Super Tuesday*, BOSTON HERALD, Nov. 27, 2007, at 15 (internal quotation marks omitted).

advancing a regional interest (6%), advancing the interests of a particular candidate or type of candidate (1%), and advancing a national interest (4%).³⁸ Even among these, one could argue that regional interests—similar to state interests—can undermine national interests as could assistance to a particular candidate or type of candidate. As for national interests, the record reviewed did not provide a single instance where state decision makers suggested a move arguably served a national interest without also referencing some other parochial interest the move would also serve. One of the more interesting justifications for an attempt to change a primary was put forward by California State Senator Bill Jones. When attempting to justify legislation that would move California's primary from the back of the pack to much closer to the front, he explained, "a side benefit [of moving up the primary] is that it does create an energy in other states to look at options to alleviate this problem [of front-loading], and we are proposing an alternative [in the form of rotating regional primaries]."³⁹ But, regardless of how we frame arguments focused on regional interests, helping a particular candidate or sort of candidate, or justifications rooted in at least the rhetoric of national interests, the evidence I reviewed is still overwhelming.

3. What About States that Stay Out of the Fray?

While the commons lens explains many of the challenges facing the presidential nomination system, it is not perfect. Even in the front-loaded election cycle of 2008, where about half of the states had held their respective contests by the beginning of February, there were other states that did not move up their contests. This became highly apparent as the race for the Democratic nomination continued into June. How does this square with the commons paradigm?

While some states' decisions to hold later primaries still might be viewed as rational given the commons paradigm, it is important to concede that the paradigm is not a perfect one—which should not be surprising. Yet the actions of the states holding back are not completely unlike actors in many commons resources. Potential

38. See *supra* Table 1.

39. Doug Willis, *Supporters of Early Primary Will Try Again*, CONTRA COSTA TIMES, Aug. 10, 1998, at A8. In chiming in on that same proposal to move California's primary election date, a spokesman for the California Secretary of State, said essentially the same thing. Editorial, *States Must Learn Primary Lessons*, S.F. CHRON., July 26, 1998, at 6 ("We hope this forces the country to take a look at a national solution to the primary process." (internal quotation marks omitted)).

appropriators opt out of the commons all the time: not everyone who can register domain names, use parking lots, or even tap into oil fields chooses to do so.

It is interesting to note that many of the states that ultimately opted to move their primary dates did so only after determining that it would come at a cost. The main costs that bothered decision makers were the costs of holding a nomination contest separate from other state primary elections that generally came later on in the year—holding off allows states to get the nomination contest and regular state primaries in a single shot. For example, in 2008, Alabama estimated the costs of holding an earlier primary at more than \$3.3 million;⁴⁰ Michigan's January primary cost the state more than an estimated \$10 million.⁴¹ This approach seems to square with the theory of many who study consumption of commons resources: appropriation stops when the costs of appropriating outstrip the value gained from restraint.⁴² Additionally, while very few states moved their primaries back in the primary calendar, Oregonian decision makers decided to move back their contest because they felt that the calendar was so front-loaded that they no longer enjoyed the influence that they once had and therefore determined that the cost of an early primary was no longer worth it.⁴³

Lastly, there are some aspersions that at least in one case, a state held back its contest date because those in power did not approve of the voting inclinations of the populace at large. Specifically, in 1988, Alabama joined many southern states and held a contest on a March Super Tuesday.⁴⁴ In its Democratic primary, Alabamans came out for Jessie Jackson. Thereafter, Alabama moved its primary to near the end of the nomination cycle. Some have speculated that disapproval with

40. Phillip Rawls, *Last Day May Make State Presidential Player in '08*, MOBILE REG. (Ala.), Apr. 16, 2006, at B1.

41. Editorial, *A Public Election?*, GRAND RAPIDS PRESS (Mich.), Aug. 29, 2007, at A10.

42. See KNUT WICKSELL, *LECTURES ON POLITICAL ECONOMY* (1934) (addressing the one-time forest harvest phenomenon); Colin W. Clark & Gordon R. Munro, *The Economics of Fishing and Modern Capital Theory: A Simplified Approach*, 2 J. ENVTL. ECON. & MGMT. 92 (1975) (applying this theory to fisheries); Martin Faustmann, *On the Determination of the Value Which Forest Land and Immature Stands Possess for Forestry* (1849), reprinted in 1 J. FOREST ECON. 137 (1995) (multiple forests harvests); Harold Hotelling, *The Economics of Exhaustible Resources*, 39 J. POL. ECON. 137 (1931) (nonrenewable resources).

43. See B. Drummond Ayres Jr., *Political Briefing: Oregon Advances By Retreating*, N.Y. TIMES, Aug. 15, 1999, at A24.

44. Kyle Whitmire, *Crashing Our Parties: Could Early Voting Save Alabama's Early Primary?*, BIRMINGHAM WKLY., Mar. 1, 2007.

the voters' choice of Jackson prompted the leaders of Alabama to move back its primary.⁴⁵ While it does not seem likely that many states holding back fit into this category, some states might be holding back their contests because there is a rift between the interests of those charged with making the decisions and the voters, and state leaders can get what they want out of the nomination commons by making their own state less important.

C. Dimensions of the Nomination Commons

Influence in the nomination commons has many faces. In this Part, I try to provide a window into the various dimensions that state appropriators find valuable. Below, I provide a brief overview of these dimensions. In several instances, I add to the empirical evidence already available in applicable scholarly literature.

1. Influence, Lack of Influence, and Competition

In reviewing the public record, the two most cited reasons decision makers altered the dates of their nomination contests were to gain influence over the process (22%) and to avoid irrelevance in the process (15%).⁴⁶ These two responses rest on opposite sides of the same spectrum. Generally speaking, that spectrum is also rooted in time, with a great deal of influence associated with the early contests and very little influence associated with the later contests.

Competition among states was the third most-cited reason for changing contest dates (13%).⁴⁷ Competition relates directly to the influence spectrum because states readily understand that it is not the date of their contest that matters as much as where their contest falls in the sequence of contests. The way states attempt to secure influence over the process and frustrate each other is by upping the ante with earlier contest dates.

States competing to both get to the front of the line and to avoid the back of the line is what creates nomination leapfrog. The net effect of this, as leapfrog would suggest, is that we see continual pressure to move up the calendar. One way to illustrate this trend is by setting a benchmark. For example, in 1972, the vast majority of primaries and

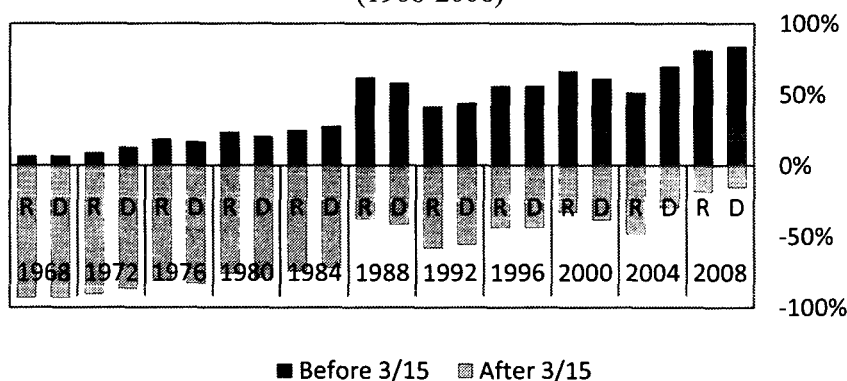
45. *Id.* ("For nearly 20 years, the state had languished in the political netherworld of a June presidential primary. After Jesse Jackson had won the 1988 Alabama Democratic Primary nomination, the state's good ol' boy establishment hid the primary near the back of the line.").

46. *See supra* Table 1.

47. *See supra* Table 1.

caucuses occurred after March 15th.⁴⁸ In 1988, when the first Super Tuesday was held, it was held on March 9th.⁴⁹ So, mid-March is what divided the early contests from the later contests. By 2008, March 15th was late in the process. This trend towards earlier contests is illustrated in Figure 1. There is little reason to believe the trend will change going forward.⁵⁰

Figure 1.
Percentage of Primaries and Caucuses Held Before
March 15
(1968-2008)



One important thing to note is that while states may move their contests towards the front of the cycle and appropriate some of the influence other states once enjoyed, this does not make the back of the line any more appealing. Even as the amount of influence a state may gain diminishes, the crowd up front makes it increasingly likely those in the back of cycle will hold their contests after enough other states have weighed in to determine the nominee. Thus, the advantage of moving up shrinks even as the penalty for holding back grows. Holding back only transfers influence to those unwilling to show restraint. This is why even commons scholars give those willing to hold back in the commons labels such as “patsy,”⁵¹ “sucker,”⁵² or

48. See *infra* Figure 1.

49. See *NewsHour: The First Super Tuesday* (PBS television broadcast Mar. 9, 1988), available at http://www.pbs.org/newshour/retro/super_tuesday_88.html.

50. See *id.* (giving assessment that the trend will continue to grow with time).

51. Barton H. Thompson, Jr., *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 241, 242 (2000).

52. OSTROM, *supra* note 5, at 44.

“chump.”⁵³ As states left in the dust have reconsidered their position, it shows that they think that they need to play or get played. Consider this from a state political leader from California: “One thing I am sure of: Never again will the voters of California allow us to choose the role of irrelevance.”⁵⁴ This inertia is what creates the *tragedy* in the tragedy of the presidential nomination commons: “[T]he earlier nomination races get settled, the more the incentives for front-loading increase.”⁵⁵ How the tragedy plays out is discussed in greater detail below.⁵⁶

In reviewing the record, the competition among state leaders was often palpable. The animosity was particularly clear when it came to the privileged role given in the process to Iowa and New Hampshire. Consider a few examples: “I’m so sick of New Hampshire. They’re a little two-bit state up in New England and they think they run the whole process.”⁵⁷ Or, “Why should they spend all their time in New Hampshire and Iowa and some of those other states where they’re pea pods in terms of electoral clout and population?”⁵⁸ And finally, “The method we have now, eulogizing New Hampshire and Iowa, raises them to a level they don’t deserve.”⁵⁹

As compared to the angling that goes on to get to the front of the line, the pressure of staying out of the back of the line is something that has been only given relatively scant attention, despite its importance to states. As a leader from one state put it, “If we don’t change, we’ll be dead-last to go again next year and the candidates won’t even be willing to send in their dog-walkers to talk to us.”⁶⁰

While there might be a couple of ways to think about what it means to hold an “irrelevant” nomination contest, even the narrowest meaning would include a contest held after a candidate secured a

53. John Hasnas, *Two Theories of Environmental Regulation*, 26 SOC. PHIL. & POL’Y 95, 97 (2009).

54. Thomas Farragher, *Delegate-Rich State Moves to March*, MERCURY NEWS, Oct. 6, 1993.

55. MAYER & BUSCH, *supra* note 1, at 49.

56. See discussion *infra* Part III.

57. Paul Leavitt, *Balkans Situation Spurs Some in GOP To Change Tax Stance*, USA TODAY, Apr. 21, 1999, at A12.

58. *Ohio Primary Election Being Moved Up from May to March Date*, AKRON BEACON J., Oct. 1, 1995, at B5 [hereinafter *Ohio Primary Election Being Moved*] (“If we’ve got these presidential candidates in here crawling around they’re going to be making all kinds of promises.”).

59. Joe Hallett, *Ohio May Move Up Presidential Primary Day*, PITTSBURGH POST-GAZETTE, May 16, 1993, at B8.

60. Dave Addis, *GOP’s Early Primary Gets Va. an Invite to the Party*, VIRGINIAN-PILOT, June 23, 1999, at B1.

mathematical lock on a party's nomination. As shown in Table 2, over the past five election cycles, fifty-nine state Democratic contests and eighty-nine Republican contests have occurred after a candidate secured a mathematical lock on the nomination.

Table 2.		
Number of Contests Held After Candidate Holds Numerical Lock		
	Democratic	Republican
2008	0	12
2004	16	28*
2000	20	18
1996	22*	14
1992	1	17*

* Indicates incumbent running

However, waiting for a mathematical lock may seem overly cautious. For example, a contest might seem quite irrelevant in the process if one candidate mounts such a lead that the end result seems like a foregone conclusion. This often happens well before a candidate secures a mathematical lock. In the last cycle, for example, pundits began to treat John McCain as the apparent nominee well before he secured a mathematical lock. This began after Mitt Romney dropped out of the race in early February.⁶¹ Once a candidate becomes the "inevitable" nominee, it not only takes the drama out of the race, but with each step it also makes it all the more difficult for any challenger to stage a comeback.

While a numerical lock is much easier to get our arms around than this sense of "inevitability," political futures market data might help put this into perspective. The political futures market is like the futures market for wheat or corn, but instead of crop yields, futures payoff based on political outcomes. The markets provide a macro picture view of the impressions of the large number of market participants who one would suspect at least follow politics casually; after all, they are wired in enough not only to know about political futures markets but also interested enough to wager money on the

61. Dan Balz, *Romney Out, McCain Looks Ahead*, WASH. POST, Feb. 8, 2008, at A1 (calling McCain the "apparent GOP nominee"); Republican Romney Drops Out of Presidential Campaign (Feb. 7, 2008), <http://www.reuters.com/article/idUSN0738842920080207> (calling McCain the "all but certain nominee").

enterprise. Perhaps due to the nature of market participants, political futures markets have been trumpeted for their reliability.⁶²

While the political futures market is priced in a number of ways, the simplest market to understand is the winner-take-all market. Simply put, if you had put money behind Barack Obama to win the Democratic Party's nomination, the futures market would pay one dollar for each future purchased. On the other hand, had you chosen any other Democratic candidate, the market would pay out nothing. The market prices candidates based on demand. So, if the market prices a candidate at five cents, this suggests investors collectively think that the candidate is a long shot. (At that price, if the candidate becomes the nominee, the market pays out one dollar for each nickel put into the market.) On the other hand, the price of ninety cents suggests much more certainty in the minds of investors, and the price of fifty cents suggests investors see the bet as something like a toss-up.

For illustrative purposes, consider that a sustained market price of at least eighty-five or ninety cents on the Iowa Electronic Market suggests a national sense of "inevitability" that a candidate will become the nominee.⁶³ The Iowa Electronic Market has kept political futures data since 1992 on all nomination contests without an incumbent running.⁶⁴ Looking at these races, in most instances there is a great deal of certainty about which candidates will become nominees well in advance of candidates mathematically clenching their respective nominations. As shown in Table 3, in four of the seven elections for which there is data, more than half of the states had yet to vote at the point the market price for a particular candidate stabilized at the ninety cents level. In five of the seven elections, more than half of the states had yet to vote when a candidate's political future price stabilized at the eighty-five cents level. Given these measures, at the ninety cents level, more than twice as many states held "irrelevant"

62. *E.g.*, Sarah Lovenheim, *Betting on the Futures of Politics* (Oct. 2, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/02/AR2008100202053.html> ("The markets at times have worked as an uncanny bellwether of political trends—in some cases proving to be a more accurate indicator of political trends than the pundits or the polls.").

63. Just to provide perspective, the closing price for Obama futures to win the Democratic nomination did not reach \$.95 until August 5, 2009. From the market's perspective a numerical lock does not equate to an actual victory but rather includes room to hedge against numerous risks ranging from political scandal to the candidate dropping out of the race. On the other hand, I note that the market hit the \$.90 and \$.85 levels a few days before Romney bowed out of the race.

64. Univ. of Iowa, *About the IEM*, <http://www.biz.uiowa.edu/iem/about/index.html> (last visited Jan. 18, 2010).

contests than those holding contests after a candidate locked up the nomination; at the eighty-five cents level, the number escalates to almost three times the mathematical lock number.

Table 3. States Remaining To Vote at the Time a Candidate Achieves a Numerical or Perceived Lock on the Nomination

	Numerical Lock	States Yet to Vote	Perceived Lock at \$.90	States Yet to Vote	Perceived Lock at \$.85	States Yet to Vote
2008 Democratic	June 3	0	May 21	2	May 6	5
2008 Republican	March 4	12	February 5	22	February 2	42
2004 Democratic	March 13	16	February 29	31	February 21	34
2000 Democratic	March 14	20	January 25	49	January 22	50
2000 Republican	March 14	18	March 1	39	February 21	45
1996 Republican	March 26	14	March 5	31	March 5	31
1992 Democratic	June 2	1	June 5	1	April 6	23

Source: Data generously provided to the author by the Iowa Electronic Market administered by the University of Iowa College of Business.

2. Candidate Visits, Press Coverage, and Campaign Spending

In reviewing the public record, 12% of state decision makers' rationales for why they changed contest dates related to the desire to attract candidates to visit the state.⁶⁵ Three percent of the rationales related to attracting press coverage and another three to attracting campaign-related spending.⁶⁶ Scholars have often noted that states change their contest dates in hopes of attracting all three of these factors.⁶⁷

The degree candidates desire to visit or spend money or the degree the press will cover a state, in large part, is beyond states' control. To the extent that state decision makers can change the calculus of candidate visits, press coverage, and campaign expenditures, it is with the timing of their nomination contests. If this sounds similar to the story of a state's relative influence, it should; candidate visits, press coverage, and campaign-related spending are substantially driven by a state's importance in the nomination process.

65. See *supra* Table 1.

66. See *supra* Table 1.

67. R. LAWRENCE BUTLER, CLAIMING THE MANTLE: HOW PRESIDENTIAL NOMINATIONS ARE WON AND LOST BEFORE THE VOTES ARE CAST 18 (2004) (noting states' desire for candidates who support local needs and issues); WILLIAM CROTTY & JOHN S. JACKSON III, PRESIDENTIAL PRIMARIES AND NOMINATIONS 65 (1985) (highlighting the benefits of candidate visits).

Candidates have come to understand that the contest schedule matters a good deal: early states can be used as a launching pad for candidates—as Iowa was for Barack Obama;⁶⁸ they also might work as a brick wall—as was Iowa for Joe Biden's 2008 presidential run.⁶⁹ A frustrating third place finish in Iowa was, in fact, what precipitated Howard Dean's 2004 *I Have a Scream* speech.⁷⁰

This is why conventional wisdom suggests that New Hampshire and Iowa are so important: "[T]he results in New Hampshire and Iowa can dramatically reshape the standings in a contested nomination race. Candidates who win or do 'better than expected' in these two states generally see a large increase in their support across the country; candidates who lose frequently see their stock tumble."⁷¹ And, it is not just popular support that hinges on the results of early contests; it is also the candidate's organizational strength and support base: "Morale is boosted or deflated, volunteers join up or leave discouraged, and most importantly, money flows in faster or it begins to dry up. The underachieving candidates quickly find themselves unable to sustain their campaigns and are gone."⁷²

Looking at the actual visits candidates made in past election cycles, it is easy to see why states believe an early contest can persuade candidates to visit them. A number of entities track presidential candidates' visits. One of these is the *New York Times*. To my knowledge, while this information is readily available, academics have done very little with this data set.⁷³ For the 2008 nomination cycle, the *New York Times* tracked more than 6000 visits (3214 for Republican candidates and 2943 for Democratic candidates).⁷⁴ Although the newspaper began tracking the data as of April 1, 2007, and continued to track the data through the election, I only reviewed data through the last primary contest in June 2008.

68. See Shailagh Murray, *Obama's Triumphant Iowa Return* (May 20, 2008), http://voices.washingtonpost.com/44/2008/05/20/obamas_triumphant_iowa_return.html (calling his victory in the Iowa caucus his "first and most important victory").

69. See Michael Cooper, *Iowa Results Lead Dodd and Biden To Quit Race*, N.Y. TIMES, Jan. 4, 2008, at A14.

70. Blake Morrison, *Dean Scream Gaining Cult-Like Status on Web*, USA TODAY, Jan. 22, 2004, at 4A. While many candidates have probably felt like screaming after Iowa and New Hampshire, Dean made the mistake of actually doing it on live television. See *id.*

71. MAYER & BUSCH, *supra* note 1, at 27; see also BUTLER, *supra* note 67, at 19-20.

72. SCOTT KEETER & CLIFF ZUKIN, *UNINFORMED CHOICE: THE FAILURE OF THE NEW PRESIDENTIAL NOMINATING SYSTEM* 31 (1983).

73. I know of no published article that discusses this in any substantial way.

74. Sarah Wheaton & Magdalena Sharpe, *New York Times 2008 Presidential Candidate Visit Data* (on file with author).

Here are some of the highlights of the data. Amazingly, about half of all visits entailed visits to either New Hampshire or Iowa (1025 and 2017, respectively).⁷⁵ While that statistic is startling enough, a couple of factors underscore the point. First, candidates made roughly the same number of visits to Des Moines, Iowa (333) as they did to the five largest cities in the nation—New York, Los Angeles, Chicago, Houston, and Phoenix—combined (337).⁷⁶ Second, the Democratic candidates collectively visited New Hampshire roughly 17 times per delegate and Iowa 21 times per delegate. Republican candidates collectively visited New Hampshire roughly 42 times and Iowa 21 times per delegate. And, while the numbers of the first few contests are the most striking, as seen in Table 5, the relationship between the sequence of contests is still correlated.⁷⁷ Similar analyses of other data sets have come to similar conclusions.⁷⁸

75. *Id.*

76. *Id.*

77. The sequence of contest dates and candidate visits have correlation coefficient of .26 for Democratic candidates and .34 for Republican candidates. Considering the large number of factors that could potentially play into a candidate's decision to visit a state, these correlation coefficients are noteworthy.

78. See Travis N. Ridout & Brandon Rottinghaus, *The Importance of Being Early: Presidential Primary Front-Loading and the Impact of the Proposed Western Regional Primary*, 41 PS: POL. SCI. & POL. 123, 128 (2008) (“[W]hen it comes to candidate decision-making about where to campaign, timing trumps all else.”).

Table 4.
Candidate Visits to States
(total and per delegate 2008 Election Cycle)

	Democrats			Republicans		
	Contest Date	Total Visits	Visits Per Delegate	Contest Date	Total Visits	Visits Per Delegate
Alabama	2/5/2008	16	0.267	2/5/2008	12	0.250
Alaska	2/5/2008	3	0.167	2/5/2008	1	0.034
Arizona	2/5/2008	1	0.015	2/5/2008	30	0.566
Arkansas	2/5/2008	21	0.447	2/5/2008	6	0.176
California	2/5/2008	62	0.141	2/5/2008	279	1.613
Colorado	2/5/2008	32	0.457	2/5/2008	5	0.109
Connecticut	2/5/2008	15	0.250	2/5/2008	9	0.300
Delaware	2/5/2008	0	0.000	2/5/2008	3	0.167
Florida	1/29/2008	148	1.403	1/29/2008	202	3.544
Georgia	2/5/2008	44	0.431	2/5/2008	9	0.125
Hawaii	2/19/2008	0	0.000	5/16/2008	0	0.000
Idaho	2/19/2008	7	0.304	5/16/2008	1	0.031
Illinois	2/5/2008	87	0.473	2/5/2008	11	0.157
Indiana	5/6/2008	48	0.565	5/6/2008	21	0.368
Iowa	1/3/2008	1326	23.263	1/3/2008	691	17.275
Kansas	2/5/2008	2	0.049	2/9/2008	6	0.154
Kentucky	5/20/2008	9	0.150	5/20/2008	14	0.311
Louisiana	2/9/2008	9	0.136	2/9/2008	31	0.660
Maine	2/10/2008	2	0.063	2/1/2008	4	0.190
Maryland	2/12/2008	14	0.141	2/12/2008	5	0.135
Massachusetts	2/5/2008	40	0.331	2/5/2008	10	0.233
Michigan	1/15/2008	105	1.338	1/15/2008	43	1.433
Minnesota	2/5/2008	2	0.023	2/5/2008	18	0.439
Mississippi	3/11/2008	14	0.350	3/11/2008	4	0.103
Missouri	2/5/2008	28	0.318	2/5/2008	35	0.603
Montana	6/3/2008	10	0.400	2/5/2008	4	0.160
Nebraska	2/9/2008	2	0.065	5/13/2008	5	0.152
Nevada	1/19/2008	132	3.882	1/19/2008	49	1.441
New Hampshire	1/8/2008	447	14.900	1/8/2008	578	48.167
New Jersey	2/5/2008	18	0.142	2/5/2008	22	0.423
New Mexico	2/5/2008	15	0.395	6/3/2008	5	0.156
New York	2/5/2008	12	0.043	2/5/2008	115	1.139
North Carolina	5/6/2008	38	0.284	5/6/2008	26	0.377
North Dakota	2/5/2008	6	0.286	2/5/2008	0	0.000
Ohio	3/4/2008	63	0.389	3/4/2008	25	0.284
Oklahoma	2/5/2008	1	0.021	2/5/2008	20	0.488
Oregon	5/20/2008	11	0.169	5/20/2008	20	0.667
Pennsylvania	4/22/2008	30	0.160	4/22/2008	104	1.405
Rhode Island	3/4/2008	1	0.030	3/4/2008	8	0.400
South Carolina	1/26/2008	309	5.722	1/19/2008	156	6.500
South Dakota	6/3/2008	5	0.217	6/3/2008	11	0.407
Tennessee	2/5/2008	6	0.071	2/5/2008	32	0.582
Texas	3/4/2008	126	0.553	3/4/2008	50	0.357
Utah	2/5/2008	1	0.034	2/5/2008	21	0.583
Vermont	3/4/2008	0	0.000	3/4/2008	4	0.235
Virginia	2/12/2008	21	0.208	2/12/2008	52	0.825
Washington	2/9/2008	5	0.052	2/19/2008	33	0.825
West Virginia	5/13/2008	12	0.308	5/13/2008	2	0.067
Wisconsin	2/19/2008	18	0.196	2/19/2008	27	0.675
Wyoming	3/8/2008	11	0.611	1/5/2008	3	0.214

Similarly, states can do very little about media attention other than changing the timing of their nomination contests.⁷⁹ There are a number of intuitive reasons that the press would be likely to pay more attention to earlier races. First, the media covers the candidates, and as just discussed, candidates spend much of their time trying to gather support in states holding early nomination contests. Second, the further the nomination process goes, the more likely that a front-runner emerges and other candidates begin to fade, making the coverage of the race generally less appealing. And third, even as the primary calendar moves past states, the press might decide to give a limited amount of coverage to past contests in order to provide a backdrop for the reader.

There are a number of ways one might go about empirically testing the intuition that the press is likely to cover earlier contests more. One way is to monitor a particular media outlet and consider its coverage over time. For example, studies like this were completed for the 1980 cycle—one that focused on stories covering the contests on *CBS Evening News* and one that tracked inches of coverage devoted to the various races in *United Press International*.⁸⁰ The findings of these studies showed that the media covered earlier states more than later states and that Iowa and New Hampshire received a great deal of the coverage devoted to state contests.

Could the same generalizations be made of current media coverage and in a way that considered the media more generally rather than focusing on a particular media outlet? To explore this question, I ran search queries on Lexis-Nexis. Specifically, I queried the number of times different states were referenced in a Lexis-Nexis source material folder called “Campaign 2008 News.”⁸¹ This snap shot of media coverage is generally helpful but not perfect. A review of one hundred articles randomly selected from the database yielded six that did not address the nomination contests in some way. Because the

79. MAYER & BUSCH, *supra* note 1, at 24, 32-36 (calling the domination of press coverage of early states one of political scientists’ “most consistent findings”); BARBARA NORRANDER, *SUPER TUESDAY: REGIONAL POLITICS AND PRESIDENTIAL PRIMARIES* 13-14 (1992).

80. MICHAEL J. ROBINSON & MARGARET A. SHEEHAN, *OVER THE WIRE AND ON TV: CBS AND UPI IN CAMPAIGN ‘80* 176-77 (1983).

81. According to Lexis-Nexis, “The Campaign 2008 News combined source contains 2008 election stories from all the English, language full-text news sources in the combined source News, Most Recent 2 years.” This source folder is created by a complex indexing algorithm, the specifics of which Lexis-Nexis does not make public due to intellectual property concerns.

queries produced hundreds of thousands of hits, the data could not be purged of its degree of imprecision.

Specifically, the queries ran focused on campaign coverage between October 2, 2007, and June 10, 2008. The data, seen in Table 5, highlights the importance of early primaries. In total, the top ten states receiving media mentions were New York, Illinois, Iowa, New Hampshire, Florida, California, Texas, Massachusetts, Pennsylvania, and Ohio.⁸² The two states that really stick out of this group are Iowa and New Hampshire. Seven of these top ten (New York, Illinois, Florida, California, Texas, Pennsylvania, and Ohio) are, in terms of population, the seven largest states in the Union. Additionally, three of the states on the list are home states of prominent candidates (Clinton and Giuliani from New York, Obama from Illinois, and Romney from Massachusetts). Some of the states are also classic battleground states (Florida, Pennsylvania, and Ohio). One state (Florida) was broiled in controversy due to its decision to move its primary to January despite the threat of sanctions from the national parties. The only reason for Iowa and New Hampshire to make the top ten list is their early contests.

The importance of Iowa and New Hampshire are much clearer when one considers coverage on a per delegate basis. Using this lens, the top ten states are New Hampshire, Iowa, South Carolina, Arkansas, Michigan, New York, Florida, Arizona, Massachusetts, and Illinois. The three states with the most coverage using this lens (Iowa, New Hampshire, and South Carolina) are all early contest states. The other states near the top were caught up in controversies for moving their primaries (Michigan and Florida) or home to candidates (Huckabee is from Arkansas and Clinton has roots there too, Clinton and Giuliani are from New York, McCain is from Arizona, Romney is from Massachusetts, and Obama is from Illinois). Furthermore, looking at the bigger picture, the correlation between the contest dates and media coverage seems substantial.⁸³

82. See *infra* Table 5.

83. The data has correlation coefficients of .23 and .25 to the Democratic and Republican election dates respectively and both have a .3 value when adjusted on a per-delegate basis.

Table 5. Articles Found on Lexis Per State
(2008 cycle total and per delegate)

	Contest Date	Total Articles	Articles Per Delegate
Iowa	1/3/2008	42,817	334
New Hampshire	1/8/2008	36,082	703
Michigan	1/15/2008	24,477	186
Nevada	1/19/2008	12,055	128
South Carolina	1/26/2008	23,949	248
Florida	1/29/2008	35,513	172
Alabama	2/5/2008	6618	46
Alaska	2/5/2008	3766	54
Arizona	2/5/2008	26,445	164
Arkansas	2/5/2008	20,562	191
California	2/5/2008	33,137	44
Colorado	2/5/2008	8875	58
Connecticut	2/5/2008	8228	73
Delaware	2/5/2008	4659	85
Georgia	2/5/2008	10,764	47
Illinois	2/5/2008	45,098	146
Kansas	2/5/2008	7324	66
Massachusetts	2/5/2008	30,553	155
Minnesota	2/5/2008	9121	57
Missouri	2/5/2008	7755	41
New Jersey	2/5/2008	12,991	59
New Mexico	2/5/2008	12,236	129
New York	2/5/2008	84,908	184
North Dakota	2/5/2008	2232	33
Oklahoma	2/5/2008	5001	41
Tennessee	2/5/2008	10,808	59
Utah	2/5/2008	5342	57
Louisiana	2/9/2008	7761	52
Nebraska	2/9/2008	4378	49
Maine	2/10/2008	4221	61
Maryland	2/12/2008	12,550	76
Virginia	2/12/2008	16,978	80
Wisconsin	2/19/2008	9234	57
Ohio	3/4/2008	27,032	85
Rhode Island	3/4/2008	5151	75
Texas	3/4/2008	30,603	64
Vermont	3/4/2008	4355	82
Mississippi	3/11/2008	6840	63
Pennsylvania	4/22/2008	30,166	95
Indiana	5/6/2008	13,600	73
North Carolina	5/6/2008	19,717	77
West Virginia	5/13/2008	7745	84
Kentucky	5/20/2008	7149	51
Oregon	5/20/2008	7072	60
Montana	6/3/2008	5922	85
South Dakota	6/3/2008	5665	80

Source: Lexis searches performed on Lexis-Nexis' "Campaign 2008 News" Folder, circa June 2009. "Per Delegate" counts weighed Republican delegates equally with Democratic delegates. Hawaii, Wyoming, and Idaho were excluded because Democrats and Republicans had different contest dates. South Carolina was still included even though it had different dates because dates were so close in time. Washington was excluded because I had a difficult time getting Lexis-Nexis to discriminate between references to the District of Columbia and Washington state.

Grabbing the attention of candidates and the media can spell dollars for state economies.⁸⁴ Campaigns bring volunteers and campaign workers, advertise, and make investments in campaign organization and infrastructure. During the last nomination cycle, Democratic and Republican candidates combined received nearly a billion dollars.⁸⁵ Add to this amount the expenditures by political action committees, parties, and others making independent expenditures, and the total grows even higher.

For small states particularly, this campaign spending can have a tangible impact on the economy. A study on the 2000 cycle by New Hampshire estimated that it received a \$264 million benefit due to its early primary.⁸⁶ And, some have argued that this number is overly conservative.⁸⁷

It is not just the first states that benefit either. Others have noted that the amount of resources candidates invest in a state largely depends on how early a state votes.⁸⁸ It is somewhat difficult to verify this claim empirically because the data on where candidates spend money is somewhat limited. The major limitation in the data is that the Federal Elections Commission does not require this sort of reporting for candidates who refuse federal matching dollars.

The last nomination cycle where all major candidates reported their spending was 1988. During that cycle, as shown in Table 6, Iowa and New Hampshire captured a quarter of the money spent on the thirty-three Democratic primaries and about a third of that spent in the thirty-four Republican primaries. On a per delegate basis, the first three primaries fared better than those further back in the pack; for Republicans, this is true of the first four states to vote. Statistically, it appears to pay to go earlier, so it is not just the first few states that get the payoff.⁸⁹

84. See MAYER & BUSCH, *supra* note 1, at 27; Ridout & Rottinghaus, *supra* note 78, at 123.

85. See Fed. Election Comm'n, Presidential Pre-Nomination Campaign Receipts Through June 30, 2008, <http://www.fec.gov/press/presssummary.pdf> (last visited Jan. 18, 2010).

86. ROSS GITTELL ET AL., NEW HAMPSHIRE'S 2000 FIRST-IN-THE-NATION PRIMARY: WHAT IT MEANS TO THE STATE AND NATION (2000).

87. MAYER & BUSCH, *supra* note 1, at 187 n.8.

88. *Id.* at 30-32 (running statistical regressions for the election years of 1980, 1984, and 1988).

89. For Democrats, the total amount spent per state and the date of the primary is correlated at a correlation coefficient of .27. On a per-delegate basis, the correlation rises to .37. The Republican race had even more dramatic numbers with correlations for total dollars with a correlation coefficient of .57 and per delegate slightly higher of .58.

**Table 6. Dollars Spent on Primaries
(1988 Nomination Cycle)**

State	Date	Total Dollars		Dollars Per Delegate	
		Democrats	Republicans	Democrats	Republicans
Iowa	2/8/1988	\$4,133,228	\$3,768,711	\$71,263	\$101,857
New Hampshire	2/16/1988	\$2,944,879	\$2,421,122	\$133,858	\$105,266
South Dakota	2/23/1988	\$515,543	\$777,795	\$28,641	\$43,211
South Carolina	3/5/1988	***	\$1,763,055	***	\$47,650
Alabama	3/8/1988	\$455,037	\$518,093	\$7,460	\$13,634
Arkansas	3/8/1988	\$50,934	\$122,062	\$1,185	\$4,521
Florida	3/8/1988	\$1,299,798	\$2,148,512	\$8,903	\$26,201
Georgia	3/8/1988	\$633,175	\$811,028	\$7,363	\$16,896
Kentucky	3/8/1988	\$230,664	\$296,890	\$3,844	\$7,813
Louisiana	3/8/1988	\$230,737	\$600,290	\$3,250	\$14,641
Maryland	3/8/1988	\$364,876	\$429,851	\$4,678	\$10,484
Massachusetts	3/8/1988	\$729,923	\$2,998,214	\$6,697	\$57,658
Mississippi	3/8/1988	\$130,607	\$407,704	\$2,902	\$13,152
Missouri	3/8/1988	\$330,213	\$844,749	\$3,978	\$17,973
North Carolina	3/8/1988	\$863,964	\$1,082,261	\$9,707	\$20,042
Oklahoma	3/8/1988	\$349,520	\$636,565	\$6,853	\$17,682
Rhode Island	3/8/1988	\$19,725	\$174,283	\$759	\$8,299
Tennessee	3/8/1988	\$59,531	\$570,704	\$773	\$12,682
Texas	3/8/1988	\$2,757,348	\$1,589,074	\$13,926	\$14,316
Virginia	3/8/1988	\$496,780	***	\$5,844	***
Illinois	3/15/1988	\$1,574,265	\$2,155,263	\$8,419	\$23,427
Connecticut	3/29/1988	\$190,107	\$279,118	\$3,222	\$7,975
Wisconsin	4/5/1988	\$928,354	\$287,211	\$10,549	\$6,111
New York	4/19/1988	\$2,996,636	\$762,412	\$10,897	\$5,606
Pennsylvania	4/26/1988	\$769,294	\$508,167	\$3,986	\$5,293
Indiana	5/3/1988	\$170,735	\$176,115	\$2,009	\$3,453
Ohio	5/3/1988	\$446,277	\$393,267	\$2,565	\$4,469
Nebraska	5/10/1988	\$262,413	\$406,114	\$9,049	\$16,245
West Virginia	5/10/1988	\$87,633	\$6,165	\$1,992	\$220
Oregon	5/17/1988	\$93,022	\$88,491	\$1,824	\$2,765
Idaho	5/24/1988	***	\$45,132	***	\$2,051
California	6/7/1988	\$1,377,380	***	\$4,099	***
Montana	6/7/1988	\$33,265	\$497,846	\$1,331	\$2,845
New Jersey	6/7/1988	\$822,230	\$91,848	\$6,968	\$1,435
New Mexico	6/7/1988	\$59,586	\$10,472	\$2,128	\$455
North Dakota	6/14/1988	***	\$15,859	***	\$991

Data for the contests dates and delegates comes from NORRANDER, *supra* note 67, at 36-39, Tables 2.2 & 2.3 (1987). The data on campaign spending comes from FEDERAL ELECTIONS COMMISSION, FEC REPORTS ON FINANCIAL ACTIVITY 1987-1988: PRESIDENTIAL PRE-NOMINATION CAMPAIGNS 12-17, Table A9 (1989).

Another way to think about spending is to focus on the goods and services purchased. Media advertisements are among the most expensive line items in running a campaign. A number of scholars have attempted to track candidate media spots. One of the more recent studies tracked media purchases of three nomination races (Democratic races in 2000 and 2004 and the 2000 Republican race). Based on this study, the authors concluded that the later a state held a

contest in a nomination cycle, the fewer advertisements were run in the state.⁹⁰

Whether a state wants candidates to visit, media coverage, or a boost in the local economy, states get more of each of these by moving up their contests. And, those at the very front of the line get the lion's share of each.

3. Experiences of a State's Electorate

In reviewing the public record, state decision makers cited the desire to increase voter turnout 8% of the time and to give voters more choice of candidates 3% of the time.⁹¹ It seems reasonable to stipulate that the voters would find many of the factors discussed in this Part as relevant to their experience: whether a contest is timed before or after a candidate has psychologically or numerically sewn up the nomination; whether they felt candidates were working for their votes by visiting their state, speaking to issues of state concern, and expending campaign resources to win them over; and whether the contest received press coverage beyond the local news.

Still, we might look at factors directly related to the voting experience. The first of these is the choice of candidates. We start out with the obvious yet important observation that candidates drop out of the race over time, and once out, they stay out. This means that states at the beginning of a nomination cycle have a larger field to choose from than those states at the end of the nomination cycle.⁹²

Another way to think about the voting experience is to think about how close the vote outcome is. It seems safe to assume that as the likelihood of casting the deciding ballot increases, the degree voters would find it interesting to participate in a nomination contest would also increase. Looking at the data for the past ten nomination cycles, not only do candidates drop out over time, but also as Table 7 suggests, the races get less competitive as the nomination season wears on.⁹³

90. Ridout & Rottinghaus, *supra* note 78, at 126.

91. See *supra* Table 1.

92. Of course, in some instances, a candidate's name may appear on a ballot after he or she has sailed his or her campaign into the sunset. But, from a voter's perspective, this is not such an exciting option.

93. The relationship between competitiveness and sequence of contests has a correlation coefficient of .32. For races without an incumbent, the correlation coefficient is .46.

Table 7.
Spread Between First and Second Top
Vote-Getters in Primaries
(1972-2008 Nomination Cycles)

Sequence	All Races	Nonincumbent Races
First	13.85%	9.56%
Second	25.61%	18.41%
Third	14.91%	16.28%
Fourth	28.26%	21.28%
Fifth	26.30%	27.01%
Sixth	26.07%	24.49%
Seventh	34.75%	34.40%
Eight	37.58%	41.28%
Ninth	27.40%	31.58%
Tenth	32.15%	34.20%
Eleventh	37.36%	42.34%
Twelfth	27.03%	34.77%
Thirteenth	33.53%	36.22%
Fourteenth	35.63%	42.59%
Fifteenth	45.15%	45.15%
Sixteenth	47.19%	47.19%

Just as it is for states attempting to attract candidates, the media, or campaign dollars, the sequence of contests seems to matter. If a state is interested in providing its citizens with a larger slate of candidates or a more competitive contest, a state would be wise to hold its contest as early as possible in the nomination cycle.

4. Political Interests

The political interests of states are hard to quantify, and yet they play a substantial role in the minds of leaders who set contest dates. It is thought that candidates will be more apt to reach out to voters of a state with influence and support programs of local importance.⁹⁴ Some have argued that due to its privileged role in the presidential nomination system, Iowa farm subsidies are well provided for and protected.⁹⁵ In my review of the public record, 9% of decision makers

94. See BUTLER, *supra* note 67, at 18.

95. MAYER & BUSCH, *supra* note 1, at 27-30.

purported to move a primary to advance state political interests, and an additional 6% moved up due to regional interests.⁹⁶ Sometimes, state leaders were surprisingly up front in detailing the political commitments and favors they hoped to secure from candidates including policy considerations,⁹⁷ the ability to extract campaign promises,⁹⁸ and even gaining cabinet posts for state leaders.⁹⁹

Some might find counting the benefits of political pandering wrongheaded. It seems an even more substantial criticism of the nomination process grows out of the observation that because a few states have a privileged place in the sequence of contests, the same states walk away with political favors and thereby lock in benefits from this part of the political system.

State leaders might also move a contest date not to help their state but instead to give a boost to a particular candidate or type of candidate.¹⁰⁰ In creating Super Tuesday, for example, many of the leaders of the southern states who moved up their contest dates cited the desire to help moderate and conservative candidates.¹⁰¹ It has also been suggested, for example, that Illinois moved up its primary due to the desire of many state leaders to help Barack Obama¹⁰² and that Massachusetts moved its date to help Hillary Clinton.¹⁰³ Generally, helping a particular candidate entails moving nomination contests earlier in the election cycle.¹⁰⁴

96. See *supra* Table 1.

97. See *Early Primary Remains*, ABERDEEN AM. NEWS, Jan. 25, 1997, at 6A ("I want those folks (presidential candidates) talking about agriculture If South Dakota abandons their early primary, they won't be talking about it." (internal quotation marks omitted)).

98. See *Ohio Primary Election Being Moved*, *supra* note 58 ("If we've got these presidential candidates in here crawling around they're going to be making all kinds of promises.").

99. See John Chalfant, *Earlier Primary on Tap Move Aims To Give Ohio More Clout*, CLEVELAND PLAIN DEALER, Sept. 30, 1993, at B5 ("Name me a prominent Ohioan in the Clinton administration. After you go blank there, take it to all the Republican administrations, then go to the Carter administration, and then go to the Nixon administration. . . . You'll find that mostly because they owed us nothing . . . we got nothing.").

100. MAYER & BUSCH, *supra* note 1, at 23-24.

101. See NORRANDER, *supra* note 79, at 1-2; Harold W. Stanley & Charles D. Hadley, *The Southern Presidential Primary: Regional Intentions with National Implications*, 17 PUBLIUS 83 (1987); Jim Nesbitt, *Would Megaprimary Help or Hurt South?*, ORLANDO SENTINEL, Apr. 20, 1986, at H1.

102. Rick Pearson, *Candidates, Start Your Engines for Primary*, CHI. TRIB., Aug. 4, 2009, § 1, at 9.

103. See Dan Ring, *Senate Moves Up Primary a Month*, REPUBLICAN, Nov. 16, 2007, at A1.

104. However, this does not need to be the case. There is evidence that a state moved back its primary because state leaders disapproved of a candidate its voters chose. Yet, if this

The thought that the sequence of when contests are held actually has a bearing on the result may seem troubling. Troubling as it may be, there is little doubt that the sequence of voting can alter political outcomes.¹⁰⁵ While this might just be part of the landscape of a staged nomination, what seems particularly troubling here is not that sequence matters but that again, those at the front of the line tend to keep the privileged position with little thought to how this impacts who finally emerges as nominees.

Each of the parochial interests that states seek through the nomination commons provides higher payoffs when states move up their contests. And, those states at the very front of the line absorb much larger portions of the commons than do the other states. This Part has identified the motivations driving states. The next Part looks at how these motivations play out in the system as a whole.

III. TRAGEDY OF THE PRESIDENTIAL NOMINATION COMMONS

Having identified the presidential nomination system as a commons resource, the Article now explores the extent to which the presidential nomination system suffers from the commons' most vexing problem—the tragedy of the commons. This Part discusses the tragedy of the commons and a slight variation of that problem, resource races. After I discuss each of these, I then apply them to the presidential nomination system and discuss how many of the nomination system's problems are just symptoms of underlying commons problems.

A. *Tragedy of the Commons and Resource Races*

When we see a commons resource under pressure from the demands of appropriators, there is a good chance that the resource may suffer from what is known as the tragedy of the commons. Reduced to its simplest form, the tragedy of the commons is simply the traits of a commons resource working against each other. On one hand, the commons resource is consumed when used and, on the other, its traits make it difficult to exclude those who want to consume it. Particularly

is a problem, it is undoubtedly a rarity because states only rarely move back their contests. See discussion *supra* Part II.B.

105. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 38-39 (1991); Shepsle, *supra* note 4, at 241-44. See generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

when appropriators perceive the commons resource as worth their while, appropriators consume the commons resource to its limits.¹⁰⁶

Like commons resources, examples of the tragedy of the commons are found in many situations ranging from crashing fish and wildlife populations¹⁰⁷ and excesses of climate changing greenhouse gases in the Earth's atmosphere¹⁰⁸ to the telemarketers who unrelentingly call us¹⁰⁹ and the number of appeals pending in the American judicial system.¹¹⁰ In each of these cases, individuals do what makes sense for them and at the same time undermine society's broader interests—the pursuit of individual interests creates collective calamities.

Closely aligned to the problem of the tragedy of the commons is the problem of resource races. In a resource race, potential commons appropriators are held at bay for a season but then allowed to participate in a free-for-all that is cabined off by time. Consider a few examples. In fisheries and hunting grounds, we often see appropriation limitations take the form of seasons. While a season of appropriation can limit appropriation, it can also lead hunters and fishers to make investments to compete (that is, better gear or a faster boat or all-terrain vehicle); it might create gluts of the resource on the market during the season; and it rewards fishers and hunters who take imprudent risks in pursuit of the resource during the season.¹¹¹

In extreme versions of resource races, we have seen fishing seasons, for example, start as a "fishing derby" and stop almost as soon as they have begun. In the United States, the Alaskan Halibut annual fishing season has been reduced to two twenty-four hour periods, each separated by six months.¹¹² Looking internationally, the most startling example of a fishing derby is that of British Columbia's 1995 roe herring fishing season, in which fishing vessels hauled in the

106. See generally Hardin, *supra* note 1 (explaining the tragedy of the commons).

107. See H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954); Hardin, *supra* note 1, at 1244.

108. See Thompson, *supra* note 51, at 253-55.

109. See Ian Ayres & Matthew Funk, *Marketing Privacy*, 20 YALE J. ON REG. 77, 87 (2003).

110. See A.C. Pritchard, *Auctioning Justice: Legal and Market Mechanisms for Allocating Criminal Appellate Counsel*, 34 AM. CRIM. L. REV. 1161, 1167-68 (1997).

111. JAMES RASBAND ET AL., NATURAL RESOURCES LAW AND POLICY 450 (2004); Alison Rieser, *Prescriptions for the Commons: Environmental Scholarship and the Fishing Quotas Debate*, 23 HARV. ENVTL. L. REV. 393, 412-13 (1999); Will Walsh, *Fishy Business*, 59 ALA. L. REV. 1661, 1675 (2008).

112. See Rieser, *supra* note 111, at 412-13.

annual quota of 847 tons of herring in eight minutes before the season was called to a stop.¹¹³

We see similar resource races in other contexts, from nations attempting to claim a stake to oil fields below the melting Arctic¹¹⁴ to lawyers attempting to get an advantage by participating in the “race to the courthouse.”¹¹⁵

B. The Presidential Nomination Commons Resource Race

Seeing the benefits extracted from the presidential primary system as a system prone to the tragedy of the commons and resource races makes it easy to see why frontloading occurs. The benefits states seek are up for grabs during periodic episodes prior to primary elections and are, in significant part, overwhelmingly delivered on a first-come, first-served basis. Given this, it is not surprising that states attempt to elbow their way to the front of the line or at least avoid standing in the back of the line. Part II.B argues that as states scramble for influence, we see a resource race, and that through this resource race, the nomination system is compromised.¹¹⁶ However, this rush to vote has been building over time. To understand fully how the resource race has played out in this context and why it is the way it is

113. See RASBAND ET AL., *supra* note 111, at 450.

114. See Beth Gorham, *Muscling in on the Arctic; U.S. Icebreakers Urged To Counter Canadian Flag-Waving*, DAILY HERALD-TRIB. (Grande Prairie, Alberta), Sept. 29, 2006, at 47; James Graff et al., *Fight for the Top of the World*, TIME, Oct. 1, 2007, at 28, available at <http://www.time.com/world/article/0,8599,1663445-1,00.html> (describing how a Russian expedition placed a Russian flag on the seabed underlying the frozen North Pole).

115. See, e.g., James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 916-17 (1996).

116. One might argue that casting the problems of the nomination system as a tragedy of the commons deviates somewhat from the archetypal tragedy of the commons. The argument would go that even if we could find a system that made the states happy in the allocation of the various benefits of the nomination commons, this would not necessarily mean that we have adequately taken into account the national desire to create a nomination system that will serve as a platform to choose nominees of the two major parties. My first response to this sort of objection is a pragmatic one: I think that states maximizing their influence in the aggregate—for example, candidate visits and press attention—would probably translate into a much improved system. It may not be perfect, but it would be much better than the game of primary leapfrog states currently play. Second, while it might be that the problems facing the nomination system are not perfectly encapsulated by Hardin’s fable, in reality very few problems fit perfectly. Take grazing as an example. Managing forage is almost never going to be enough for any real world grazing problem. More often, we would expect that we might not only care about forage but also other concerns ranging from erosion control and wildlife habitat. This means that in the real world, when we talk about the commons, the lens of the tragedy of the commons is often only helpful, not perfect. In my view, there is no reason to believe that the objection is a major problem here.

today, it is important to place the system we see into its historical context.

1. History of the Presidential Nomination Resource Race

From 1830 to 1972, delegates to national party conventions had a lot of autonomy in deciding which candidates to support for the nomination.¹¹⁷ This autonomy explains why we saw a number of candidates emerge from brokered conventions during this period, including some prominent candidates like Abraham Lincoln¹¹⁸ and Franklin Roosevelt.¹¹⁹ This is not to say that the nomination system did not experience any changes from the 1830s to the 1960s. The convention system became more formalized and, particularly on the Democratic side of the ledger, increasingly controlled by political parties.¹²⁰ Yet, the changes to the system were incremental and minor in comparison to the changes that would come.

The 1968 Democratic Convention has a place in history mainly due to the turmoil surrounding it. It came in the backdrop of active civil and women's rights movements and visceral protests of the Vietnam War.¹²¹ President Lyndon B. Johnson had dropped out of the race for the nomination that cycle after an embarrassing loss in New Hampshire. Add to all of this the assassinations of Martin Luther King Jr. and Robert F. Kennedy in April and June of 1968, and it is easy to see why the atmosphere surrounding the convention was electrified.

In this context, President Johnson's Vice President, Hubert Humphrey, delayed his decision to become a candidate for the nomination until just prior to the convention. He did not participate in any of the primaries, and many in the Democratic Party who wanted real change saw Humphrey as a relic of Johnson's administration. As it became clear that those seated in the convention would nominate Humphrey, protests occurring outside the convention became increasingly heated. This episode ended with the Chicago Police Department and protesters engaging in violent skirmishes. Inside the convention hall, perhaps in response to the turmoil going on outside in

117. See CROTTY & JACKSON, *supra* note 67, at 11.

118. See DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 237-56 (2005).

119. See *generally* STEVE NEAL, *HAPPY DAYS ARE HERE AGAIN: THE 1932 DEMOCRATIC CONVENTION, THE EMERGENCE OF FDR—AND HOW AMERICA WAS CHANGED FOREVER* (2004).

120. See CROTTY & JACKSON, *supra* note 67, at 11-22.

121. For a brief historical discussion of this period in the context of reform of the presidential nomination system, see CROTTY & JACKSON, *supra* note 67, at 28-31.

the streets, delegates provided the Democratic Party with a vague mandate: rethink the system, put more power in the hands of the electorate, and by implication, put less power in the hands of political elites.¹²²

One of the committees looking into reform found, "State systems for selecting delegates to the National Convention display considerably less fidelity to basic democratic principles than a nation which claims to govern itself can safely tolerate."¹²³ One of the most significant reforms that came about due to the committee work that followed the 1968 Democratic Convention was that the Democratic Party created a mandate wherein state parties were to certify a slate of delegates that accurately represented the results of each state's nomination contest.¹²⁴ By committing a slate of delegates to the stakes of the nomination contests, the state contests took on much more importance. In substantial part, this reform pushed states towards primaries and caucuses and away from conventions and thereby opened up the modern era of the nomination system.

While the Republican Party has also had a number of commissions that considered reforms, in significant part the Republican Party has taken the approach of encouraging states to reform rather than mandating them to do so.¹²⁵ Still, many state decision makers with control over the form of the Republican Party nomination contest have opted to have the Republican Party follow the Democratic Party's approach. In 1968, only about a third of the states used primaries to select candidates. By 1976, almost 60% of the states had opted to use primaries.¹²⁶ Today, all but a few states use presidential primaries or caucuses.

As soon as states began to opt for primaries and to a lesser extent caucuses, the states began to move up the date that they held their respective primaries and caucuses. A more detailed look at the data over time, like the data illustrating Democratic primaries over the past four decades in Table 8, has some important lessons. First, the most

122. MAYER & BUSCH, *supra* note 1, at 8.

123. MCGOVERN-FRASER COMM'N, MANDATE FOR REFORM: A REPORT OF THE COMMISSION ON PARTY STRUCTURES AND DELEGATE SELECTION TO THE DEMOCRATIC NATIONAL COMMITTEE 14 (1970).

124. See BUTLER, *supra* note 67, at 13; CROTTY & JACKSON, *supra* note 67, at 36; JAMES W. DAVIS, U.S. PRESIDENTIAL PRIMARIES AND THE CAUCUS-CONVENTION SYSTEM: A SOURCEBOOK 22-23 (1997).

125. See CROTTY & JACKSON, *supra* note 67, at 46-49, 61; DAVIS, *supra* note 124, at 41-42.

126. MAYER & BUSCH, *supra* note 1, at 8.

recent cycle is the most front-loaded nomination season over the past four decades. For example, in 2008, more than 80% of the delegates had been selected by the ninth week of the nomination season. No season matches that even though the 2008 cycle dragged on for twenty-two weeks and some other seasons were completed in fifteen weeks. This brings us to the second lesson: even as states have tried to push to the front of the pack, some of those that lag behind have not budged much.¹²⁷ This means that the primary season has grown over time. Third, the number of primaries held each year has grown. In 1968, there were seventeen total primary contests; in 2008, this is the same number of primaries as held during the week of Tsunami Tuesday alone.

127. See discussion *supra* Part II.B.3.

Table 8.
Number of Primaries and Cumulative Percentage of
Delegates Selected Each Week by Primaries for the
Democratic Party (1972-2008 Nomination Seasons)

	1968	1972	1976	1980	1984	1988	1992	1996	2000	2004	2008
<i>Number of Primaries Held During Each Week of the Nomination Season</i>											
1	1	1	1	1	1	1	1	2	1	1	1
2	0	1	1	1	0	1	1	0	0	6	1
3	0	1	1	3	5	0	4	9	0	2	1
4	1	0	1	1	1	16	8	7	0	1	1
5	0	1	1	2	1	1	2	3	0	1	17
6	0	0	0	3	1	0	1	1	14	9	2
7	1	0	2	0	1	1	0	0	6	4	2
8	1	2	0	0	0	1	3	0	1	1	0
9	4	6	0	1	0	0	0	0	0	0	4
10	2	2	2	0	3	1	0	1	2	0	1
11	0	2	4	4	4	1	1	0	0	0	0
12	2	2	2	2	2	3	3	3	0	0	0
13	3	0	2	1	0	2	2	2	0	0	0
14	1	4	6	3	0	1	1	1	3	1	0
15	1	0	3	8	5	0	2	1	2	2	0
16		1	3			0	6	4	1	2	1
17						4			2	3	0
18									0	1	2
19									5	3	2
20										2	2
21											1
22											2
<i>Cumulative Percentage of Primary Delegates Selected Each Week</i>											
1	2	1	1	1	1	1	1	1	1	1	1
2	2	5	5	6	1	1	1	1	1	13	5
3	2	14	9	14	18	1	9	26	1	18	7
4	8	14	17	22	27	42	31	46	1	20	12
5	8	17	19	36	29	49	41	60	1	21	61
6	8	17	19	43	41	49	43	74	47	56	66
7	15	17	35	43	49	51	43	74	65	71	70
8	22	30	35	43	49	54	56	74	71	76	70
9	43	50	35	51	49	54	56	74	71	76	82
10	49	53	47	51	56	63	56	81	79	76	83
11	49	62	55	61	74	70	62	81	79	76	83
12	58	65	57	64	77	79	68	87	79	76	83
13	84	65	66	66	77	81	70	89	79	76	83
14	89	86	73	70	77	83	72	91	86	80	83
15	100	86	76	100	100	83	75	92	88	85	83
16		100	100			83	100	100	89	87	88
17						100			92	92	88
18									92	92	93
19									100	96	95
20										100	98
21											99
22											100

Table is based on a similar table found in MAYER AND BUSCH, *supra* note 1, at 6, Table 2-2. Data from 1972-2000 is from MAYER & BUSCH, *supra* note 1, at 6, Table 2-2. Data from 2004 and 2008 is from www.greenpapers.com.

Over the past few decades, states have increasingly joined the race to appropriate benefits from the nomination commons. We see states voting earlier and increasingly opting to hold contests that involve the electorate—particularly primaries. The reasons for this, as discussed in Part I, are summed up in the states' desire to gain more parochial benefits from the commons. The question surrounding all of this is whether or not states seeking these benefits have come at a cost. Below I discuss how the costs of this resource race manifest themselves.

2. Costs of the Nomination Influence Resource Race

Resource races often come at a price.¹²⁸ In the case of fisheries, for example, the price is overcapitalization in equipment, glutting the market with the catch, and an increased incentive for fishers to take imprudent risks.¹²⁹ Certainly, there are some advantages of the current presidential primary system over that of the closed door dealing that occurred prior to the party reforms implemented during the 1970s. Yet, the move from conventions to primaries and caucuses, in some ways, has come at a cost. That cost is most clearly manifested in the trend of front-loading. Below, I provide a brief overview of the major criticisms aimed at front-loading the nomination commons.

a. Mathematical Disenfranchisement

The United States has a long history of both the disenfranchisement of voters and the enactment of reforms to address such disenfranchisement. The obvious examples of this are the constitutional amendments prohibiting voting discrimination against women and people of color.¹³⁰ It is also the theme of the one-person, one-vote jurisprudence,¹³¹ limitations on gerrymandering,¹³² and a major concern addressed in the Voting Rights Act of 1965.¹³³

Front-loading introduces three risks that might water down the impact of a particular primary voter, caucus participant, or convention delegate. First, the candidate selection contest in states that do not

128. See discussion *supra* Part III.A.

129. See RASBAND ET AL., *supra* note 111, at 450; Rieser, *supra* note 111, at 412-13; Walsh, *supra* note 111, at 1675.

130. U.S. CONST. amends. XV, XIX.

131. See *Beer v. United States*, 425 U.S. 130, 140-41 (1976); *Reynolds v. Sims*, 377 U.S. 533, 558 (1964); *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

132. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

133. 42 U.S.C. § 1973 (2006).

hold election contests early in the season could be held after a particular candidate mathematically secures his or her party's nomination.¹³⁴ From 1992 to 2008, eighty-one state contests fit this description.¹³⁵ Of course, a nomination battle might feel like it is over well before a race is actually mathematically secured, and under measures I employed above, this could double or triple the number of states mathematically disenfranchised by the effect on the minds of voters.¹³⁶ As front-loading becomes more entrenched, candidates have the opportunity to sew up the nomination earlier in the cycle.

Second, even if a state has not been reduced to mathematical insignificance, because candidates drop out as time goes on, voters from later states often have a narrower range of choices than those of the states at the head of the line. This is discussed in greater length above in Part II.C.3.

Third, some voters are disenfranchised by the actions of their state leaders. In this past cycle, in a rush for the presidential primary limelight, Michigan and Florida bucked the parties and set primary dates prior to when they were allowed to do so under party rules.¹³⁷ After a long drawn out drama—particularly in the Democratic Party where it seemed Hillary Clinton's candidacy hung in the balance—the Democratic Party opted to only count half of those state's delegates as a penalty for noncompliance of the political leaders of those states.¹³⁸ Because it is always tempting for those scheduling contests to break into the ranks of the elite states that vote first, political leaders have to weigh the benefits of jumping in the fray or showing restraint. In fact, reports suggest that major players in Florida undertook this sort of analysis. One of the party leaders is on the public record, saying of the threatened loss of delegates, "I guess we will have to assess the loss of delegates versus the attention it will focus on the state."¹³⁹ Additionally, given that the desires of voters and those setting contest dates will not always mirror each other, there are reasons to be skeptical that voters' desires will be given proper weight; this is particularly the case when

134. BUTLER, *supra* note 67, at 24.

135. *See supra* Table 2.

136. *See supra* Table 2.

137. *See* Peter Wallsten, *McCain Has Edge over Democrats*, L.A. TIMES, Feb. 27, 2008, at A1.

138. *See* Katharine Q. Seelye & Jeff Zeleny, *Democrats Approve Deal on Michigan and Florida: In Blow to Clinton, Each Delegate To Get Half a Vote*, N.Y. TIMES, June 1, 2008, at A1.

139. Sebastian Kitchen, *Parties Oppose Primary Date Change*, MOBILE REG. (Ala.), Feb. 16, 2007, at B1 (internal quotation marks omitted).

those setting the contest date align themselves with different political parties than the party attempting to reign in the state (such was the case with the Democratic Party and its attempts to control the Republican-dominated legislatures of Florida and Michigan).¹⁴⁰

b. Increased Uninformed Voting

Critics have charged that the current nomination system leads to uninformed voting.¹⁴¹ Under the current system, this might result for two reasons. First, front-loading requires some voters to go to the polls or caucuses before they form an opinion of the candidates¹⁴² and the campaign schedule often forces those in early states to come to a conclusion about candidates with little, superficial, or otherwise inadequate information.¹⁴³ As one critic charged, “The principal problem with front-loading is that it greatly accelerates the voters’ decision process and thus makes the whole system less deliberative, less rational, less flexible, and more chaotic.”¹⁴⁴ While the campaigns in the public mind may drag on and on, voters—and often a majority of voters—have not obtained an opinion of many major candidates even as their state contests are upon them, despite the vigorous campaigning that occurs before states begin to hold contests.¹⁴⁵ Once states do begin to vote, much of the coverage of candidates focuses on the horserace among the candidates instead of the issues.¹⁴⁶ And once a contest has passed, of course, the system does not allow a voter or caucus participant to reconsider.¹⁴⁷ Additionally, in most nomination

140. See Alan Martinson, *La Follette’s Folly: A Critique of Party Associational Rights in Presidential Nomination Politics*, 42 U. MICH. J.L. REFORM 185, 198 (2008) (discussing Florida’s early primary and the Republican-controlled legislature); John M. Broder, *Florida Won’t Vote Again, Democratic Official Says*, N.Y. TIMES, Mar. 18, 2008, at A18 (noting Michigan’s Republican-controlled Senate); Rachel Kapochunas, *Florida Double-Dares National Parties as Jan. 29 Primary Date Is Enacted*, CONG. Q., May 21, 2007, http://www.cq/2007/05/21/cq_2766.html.

141. See Henry E. Brady & Richard Johnston, *What’s the Primary Message: Horse Race or Issue Journalism?*, in MEDIA AND MOMENTUM: THE NEW HAMPSHIRE PRIMARY AND NOMINATION POLITICS 127, 184 (Gary R. Orren & Nelson W. Polsby eds., 1987); Andrew E. Busch & William G. Mayer, *The Front-Loading Problem, in THE MAKING OF THE PRESIDENTIAL CANDIDATES 2004*, at 1, 21 (William G. Mayer ed., 2004); MAYER & BUSCH, *supra* note 1, at 56–63; Ridout & Rottinghaus, *supra* note 78, at 123.

142. MAYER & BUSCH, *supra* note 1, at 56.

143. See Brady & Johnson, *supra* note 141, at 184.

144. MAYER & BUSCH, *supra* note 1, at 56.

145. *Id.* at 56–63.

146. See JOHN HASKELL, FUNDAMENTALLY FLAWED: UNDERSTANDING AND REFORMING PRESIDENTIAL PRIMARIES 57 (1996); Larry M. Bartels, *Expectations and Preferences in Presidential Nominating Campaigns*, 79 AM. POL. SCI. REV. 804, 814 (1985).

147. Busch & Mayer, *supra* note 141, at 21.

racers, serious candidates exit the race long before many voters even have an impression of them.¹⁴⁸ Given the rush of states voting during this last election cycle and the lack of information about the candidates on the ballot, it should not be surprising that some resorted to calling the first big primary date “Stupor Tuesday.”¹⁴⁹

Second, on the other end of the nomination calendar, some voters tune out before they have the opportunity to vote. Because not all states move up their contests, each time the calendar creeps forward, the nomination season grows. As mentioned above, the calendar of 2008 was almost 50% longer (seven weeks) than that of the 1968 calendar.¹⁵⁰ Longer nomination seasons (particularly in an era of twenty-four-hour television coverage) can lead to voter fatigue.¹⁵¹ While certainly his typical sarcastic tone rang through, consider the following assessment by television commentator and comedian Jon Stewart after the primary season came to an end:

Ladies and gentlemen, we’ve often heard the phrase “all good things must come to an end.” But very rarely do you hear the phrase that “f***ing tedious things must also end.” And last night, after the fifty-third and fifty-fourth episodes of the long-running *Bataan Death March to the White House*, we finally reached our conclusion.¹⁵²

While certainly this sentiment was exaggerated and crass, many spectators of the process would have to agree with the sentiment expressed. Many voters grow tired of the race long before the nomination season ends.

c. Loss of Retail Politics and Increased Prominence of Paid Media

A typical defense of the current nomination system is that the staged contests allow for more of what is known as retail politics—candidates shop their wares at state fairs, at community centers, and by reaching out to voters face-to-face. It is charming and makes for good media. These are some of the reasons that campaigning in Iowa and New Hampshire is covered so closely; however, others would argue

148. MAYER & BUSCH, *supra* note 1, at 60.

149. Editorial, *Race for First Primary Turns Feb. 5 into Stupor Tuesday*, PANTAGRAPH (Bloomington, Ill.), Aug. 20, 2007 [hereinafter *Race for First Primary*].

150. See discussion *supra* Part II.B.1.

151. CROTTY & JACKSON, *supra* note 67, at 67; *Race for First Primary*, *supra* note 149.

152. See *The Daily Show: Headlines—Obama Makes History* (Comedy Central television broadcast June 4, 2008), available at <http://www.thedailyshow.com/watch/wed-june-4-2008/headlines---obama-makes-history>.

that it is critical to the process as well because it provides a window into the candidates that is different from the images candidates project when the message is funneled through campaign consultants and advertising firms.¹⁵³ In organization structure, retail politics requires mobilizing volunteers, whereas wholesale politics requires solid campaign organization. It is thought that this feature of the presidential nomination system gives relatively unknown candidates a prayer of competing with better known or better funded opponents—some time to work up a head of steam.

To the extent that it adds value to stage contests, front-loading is eating into it. Candidates in a front-loaded system are prone to rely more on sound bites on the tarmac and less on grassroots politics.¹⁵⁴ Many have argued that the wholesale politics television and marketing that goes along with front-loading makes candidate communication and campaigning more staged and superficial.¹⁵⁵ Others have noted that a front-loaded cycle deemphasizes the role of volunteers and grassroots organizing.¹⁵⁶

d. Increased Role of Momentum and Diminished Role of Reflection

Staging contests allows momentum rather than reflective choice to carry the campaigns of those candidates who score early wins or exceed early expectations.¹⁵⁷ While momentum is a sword that cuts in many directions, both to candidates' peril and to their benefit, front-loading compounds its role. This is because as candidates win or lose contests, this creates a feedback loop into the nomination race. It impacts the ability of a candidate to get media coverage, mobilize his

153. See HASKELL, *supra* note 146, at 123; MAYER & BUSCH, *supra* note 1, at 63; Paul M. Weyrich, *An Unheralded Value in the Iowa and New Hampshire Caucuses*, ACCURACY IN MEDIA, Jan. 9, 2008, <http://www.aim.org/guest-column/an-unheralded-value-in-the-iowa-and-new-hampshire-caucuses/>.

154. HASKELL, *supra* note 146, at 53-56; MAYER & BUSCH, *supra* note 1, at 44, 63-64.

155. CROTTY & JACKSON, *supra* note 67, at 75.

156. See MAYER & BUSCH, *supra* note 1, at 63; Ronald B. Rapoport & Walter J. Stone, *Testimony Before the RNC Advisory Commission on the Presidential Nomination Process*, reprinted in ADVISORY COMMISSION ON THE PRESIDENTIAL NOMINATING PROCESS, NOMINATING FUTURE PRESIDENTS: A REVIEW OF THE REPUBLICAN PROCESS 139, 145 (2000).

157. See LARRY M. BARTELS, PRESIDENTIAL PRIMARIES AND THE DYNAMICS OF PUBLIC CHOICE 271-93 (1988); DAVIS, *supra* note 124, at 86-87; John H. Aldrich, *A Dynamic Model of Presidential Nomination Campaigns*, 74 AM. POL. SCI. REV. 651 (1980); Barbara Norrander, *Nomination Choices: Caucus and Primary Outcomes, 1976-88*, 37 AM. J. POL. SCI. 343, 343 (1993); Dante J. Scala, *Re-reading the Tea Leaves: New Hampshire as a Barometer of Presidential Primary Success*, 36 PS: POL. SCI. & POL. 187, 190 (2003).

or her base of supporters and volunteers, and haul in donations.¹⁵⁸ Succeeding in a front-loaded process requires more media, more organizational support, and more donations, and at the same time, front-loading gives candidates a much smaller time horizon to deliver all of these.¹⁵⁹ Candidates often have little choice but to drop out if they do not meet expectations.¹⁶⁰

Some have noted that a front-loaded system tends to favor the front-runner. This is because even when a long-shot makes a surprise splash, a front-loaded process does not allow a candidate who makes a surprise showing to prevail, because television buys and grassroots organizing need to occur before a long shot even has a chance to stage an upset.¹⁶¹

e. Increased Probabilities That the Process Will Allow for Mistakes

The reason to worry about any of the concerns cited above is that in the aggregate, they add up to an increased probability that the process will allow candidates to emerge as nominees without adequate scrutiny from the electorate. This opens the possibility that a deficiency in the system—not the voters—will enable less qualified candidates to beat out more qualified candidates.

The process itself deserves our attention and warrants precaution because it is the vehicle used to weed out the many down to two nominees each representing one of the major political parties. The current process is far from optimal and while we may never have a perfect system, it is easy to imagine creating a much better one than we have. Our current system fosters competition among states to get what they can out of the nomination process; what we need is a system that allows the United States to secure the best candidates possible to fill its most important office.

158. DAVIS, *supra* note 124, at 83-86; MICHAEL J. GOFF, *THE MONEY PRIMARY: THE NEW POLITICS OF THE EARLY PRESIDENTIAL NOMINATION PROCESS* 17 (2004); MAYER & BUSCH, *supra* note 1, at 64-79; GARY R. ORREN & NELSON W. POLSBY, *New Hampshire: Springboard of Nomination Politics*, in *MEDIA AND MOMENTUM: THE NEW HAMPSHIRE PRIMARY AND NOMINATION POLITICS* 1, 6 (1987).

159. DAVIS, *supra* note 124, at 102-03; Randall E. Adkins & Andrew J. Dowdle, *Break Out the Mint Juleps?: Is New Hampshire the "Primary" Culprit Limiting Presidential Nomination Forecasts?*, 28 AM. POL. Q. 251, 255 (2000); Scala, *supra* note 157, at 191.

160. HASKELL, *supra* note 146, at 53.

161. MAYER & BUSCH, *supra* note 1, at 67-79.

IV. CRAFTING A COMMONS SOLUTION FOR THE NOMINATION COMMONS

Influence works as a commons resource within the presidential nomination system. The system also displays problems endemic in the commons. Understanding how the commons relates to the presidential nomination system can also help in shaping reforms to the system. This Part emphasizes the practical lessons the commons offers in how we might improve governance of the presidential nomination system.

A. *End the Resource Race*

In the race to appropriate benefits, states maximize local benefits received from the nomination system while ignoring the larger interests of the country. We need to refocus the system to its proper aims: creating the best platform possible for winnowing down the candidates for the country's highest political office. As a hard-hitting ad ran by Hillary Clinton's campaign reminds us, the person occupying the White House is the person who can receive that 3:00 a.m. phone call—and might make quick judgments with potentially dire consequences.¹⁶² The nomination system cries out for reform: we should not allow local concerns about which state gets media attention or campaign revenue to trump the nation's vital interest in creating a sensible system to select presidential candidates.

The resource race among states reflects inadequate governance of the nomination commons. We have seen in various contexts that the race to commons resources presents problems. In the beginning of the twentieth century, a race to produce oil compromised and depleted oil fields.¹⁶³ Races continue to crash fisheries around the world.¹⁶⁴ In wildlife, races have led some species to the brink of extinction and others to be hunted out of existence.¹⁶⁵

Nevertheless, troubled commons resources have often been restored with changed institutions. For example, at one time in Yellowstone Park, the bison, grizzly bear, and wolf were nearly gone or actually gone. Yet today, all of these species call Yellowstone home and are doing well despite competing interests that the park management takes into account. Similarly, the Fish and Wildlife

162. See Hillary Clinton Ad—3 AM White House Ringing Phone, <http://www.youtube.com/watch?v=7yr7odFUARg> (last visited Jan. 16, 2010).

163. See FRED BOSSELMAN ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT 314-20 (2000).

164. See *supra* notes 107-109 and accompanying text.

165. See Daniels, *supra* note 35, at 250-52.

Service has employed the Endangered Species Act to pull species such as the bald eagle back from the brink.¹⁶⁶ Outside the world of natural resources, the radio spectrum, once cluttered with so many users that “nobody could be heard,” is now able to serve society’s demands for radio stations, cell phones, and a growing multitude of other devices.¹⁶⁷

The challenge is substantial and complex. There are formidable political and institutional barriers standing in the way, ranging from the power of states like Iowa and New Hampshire to rally politicians aspiring to be president to the reality that some desirable changes may not pass legal muster: the states, parties, and other political actors may exercise legal rights to block potential changes.¹⁶⁸ If change is to come, it will undoubtedly take work and probably some luck.

However, assuming that change is an option, what sorts of lessons might we glean from the commons? The best place to look for progress in the nomination commons is by recharting the well-marked paths blazed to improve governance of other commons resources.

B. Unitize

The current system of fifty states competing to benefit from the nomination commons is predictably dysfunctional. We do not need fifty state institutions; what we need is one national institution.

The idea of creating institutions that govern commons resources holistically is a typical prescription in the commons. For example, over the past few decades, we have seen wildlife management evolve from focusing on individual animals to taking into account entire ecosystems.¹⁶⁹ Unitization might come in many forms, including legally required cooperation (as it is sometimes for groundwater)¹⁷⁰ or

166. 16 U.S.C. §§ 1531-1544 (2006).

167. *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 212 (1943).

168. *See, e.g., Democratic Party v. La Follette*, 450 U.S. 107, 123-24 (1981) (“A political party’s choice among the various ways of determining the makeup of a State’s delegation to the party’s national convention is protected by the Constitution. And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.” (citation omitted)); *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975) (“The National Democratic Party and its adherents enjoy a . . . right of political association. . . . ‘And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.’” (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968))).

169. *See, e.g., ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* (1949); JOHN COPELAND NAGLE & J.B. RUHL, *THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT* 313-422 (2d ed. 2006); John M. Blair et al., *Ecosystems as Functional Units in Nature*, 14 *NAT. RESOURCES & ENV’T* 150 (2000).

170. *See OSTROM, supra* note 5, at 103-42.

voluntary cooperation (as it is sometimes for privately owned wildlife habitats).¹⁷¹ Examples of needs for unitization run throughout literature on commons resources. These range from confronting urban sprawl by treating the region as a single landscape¹⁷² to managing oil producers by focusing on oil fields.¹⁷³

The simplest way to get to unitization in the presidential primary context is to have a national primary day—meaning all states vote at once rather than in staggered contests. This idea is not without supporters.¹⁷⁴ Some potential advantages of this system include cutting off the ability of states to game the system with contest dates, giving an edge to candidates that are more representative of the country, and putting an end to the trend of front-loading.¹⁷⁵

Yet, looking at the end goal—creating the best process to select nominees for the two major parties—one has to wonder whether this cure would come at too great of a sacrifice. Critics of front-loading, in fact, often argue that the problem with the current system is that we get too many contests too quickly.¹⁷⁶ The barrage of contests is what often prematurely ends campaigns, favors frontrunners, and increases the costs of campaigns.¹⁷⁷ While a national primary day would establish a unitized system, the presidential nomination commons exhibits another trait similar to many commons resources: resource extraction works best when it is done over time in a deliberate manner. Because of this principle, it seems that a truly reformed system would require a deliberate and sustainable method to ward off attempts by the states to appropriate influence from the nomination commons. So, while unitization is a starting point, more is required.

171. See Eric T. Freyfogle, *The Particulars of Owning*, 25 *ECOLOGY L.Q.* 574, 581-82 (1999) (discussing collaborative ecosystem management); James L. Huffman, *Marketing Biodiversity*, 38 *IDAHO L. REV.* 421, 429 (2002) (analogizing the pooling of land for the protection of ecosystems to oil and gas unitization).

172. See ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* (2003); William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 *FORDHAM L. REV.* 57, 86 (1999).

173. Richard J. Pierce, Jr., *Reconstituting the Natural Gas Industry from Wellhead to Burnertip*, 25 *ENERGY L.J.* 57, 77 (2004) (discussing unitization in the oil and gas context).

174. See Thomas E. Mann, *Should the Nominating System Be Changed (Again)?*, in *BEFORE NOMINATION: OUR PRIMARY PROBLEMS* 35, 42 (George Grassmuck ed., 1985).

175. See *id.* at 43.

176. See discussion *supra* Part III.B.2.d.

177. See discussion *supra* Part III.B.2.d.

C. Rethink Regulating the Nomination Commons

Currently, the main (seemingly only) constraints states face as they set their contest dates is the regulatory directives of the national political parties. Particularly in the developed world, regulation is often used to distribute or restrict access to commons resources; regulating the commons is the heart of, for example, the Clean Air Act,¹⁷⁸ the Clean Water Act,¹⁷⁹ the Endangered Species Act,¹⁸⁰ and the National Telecommunications and Information Administration Act.¹⁸¹ In thinking about regulation of the nomination commons, we should think carefully about who does the regulating, and given this, what sorts of regulations are feasible.

1. Assessing Potential Regulators

If the states appropriate the nomination commons, then who regulates it? There are really three possible answers to this. We could say that in setting primary dates, the states largely regulate (or fail to regulate) themselves. Currently, the entities that act most like regulators are the national parties. Additionally, the federal government has played a limited role in regulating the nomination system more generally and has at least considered legislation that would regulate the sequence of contests.¹⁸² As mentioned above, each of these entities probably has a constitutional right, or at least sufficient political clout, to have a degree of influence over the process.

Yet, if we are to continue to rely on regulation as the major way we govern the nomination commons (as we do now), there are reasons to be seriously concerned with each of these entities in the role of regulator. First, we might be skeptical of states because they have proven unable and unwilling to take national interests as seriously as they do issues of local concern, like visits from candidates. In many ways, this seems to be asking the fox to guard the henhouse.

A second alternative would be to rely on the parties. Because nominations decide who represents the parties, they would seem to be the natural regulators for the nomination system. Yet, this raises concerns too. We might worry that parties will prove unable to

178. 42 U.S.C. §§ 7401-7671 (2006).

179. 33 U.S.C. §§ 1251-1375 (2006).

180. 16 U.S.C. §§ 1531-1544 (2006).

181. 47 U.S.C. §§ 901-942 (2006).

182. See generally William G. Mayer & Andrew E. Busch, *Can the Federal Government Reform the Presidential Nomination Process?*, 3 ELECTION L.J. 613 (2004) (discussing several hundred bills aimed at reforming the nomination process).

regulate effectively because they are too conflicted. For example, in 2008 when Michigan and Florida flaunted the parties, it became clear that the parties were not only expected to be line monitors but also faced a reality that regulating required the parties to walk a political tightrope. We might also worry about instituting a regulatory structure that gives the parties more discretion, increasing the potential that parties will reestablish their roots to backroom dealings and king making. Additionally, the national parties themselves have sometimes encouraged front-loading by allowing the nomination season to begin at an earlier time than that of the opposition party.¹⁸³ This makes sense generally: the party that first sews up the nomination contest goes on to win the general election in November.¹⁸⁴

Third, though some have argued that the nomination process should be controlled by the federal government,¹⁸⁵ it may also give some of us pause to trust the federal government as the regulator over a system that churns out Presidents. One could foresee that some in Congress would try to get their states favorable deals and others might try to manipulate the process for their own benefit or the benefit of their political allies.¹⁸⁶ Even if these were not issues, political reality suggests that it is unrealistic for the federal government to completely take over the system traditionally and jealously guarded by states.¹⁸⁷ Many members of Congress have proposed bills attempting to force reforms with the timing of contests in the past, and they have uniformly failed.¹⁸⁸

Regulation would be quite different under each of these regulators. Below I focus on the entities currently doing most of the

183. For example, in 2000, the Democratic Party tried to stick with an open season for primaries that began after the second Tuesday in March. The Republican Party allowed the open primary season to begin on the first Monday in February. See Eric M. Appleman, *The Rest of the Primaries*, <http://www.gwu.edu/~action/2004/chrnthp.html> (last visited Jan. 16, 2010).

184. Michael Baudinet, *Time Is on My Side: The Nomination Gap*, LARRY J. SABATO'S CRYSTAL BALL, June 26, 2008, <http://www.centerforpolitics.org/crystalball/articles/mab200806260>.

185. See generally Larry J. Sabato, *The Current Nomination Process Should Be Replaced*, in *THE PRESIDENTIAL ELECTION PROCESS* (Tom Lansford ed., 2007).

186. In the context of gerrymandering of congressional districts, we have ample evidence that many politicians are willing to manipulate the political system for their own benefit.

187. For example, note the difficulty facing the federal government any time it enters policy areas traditionally handled by states, such as land use planning and education policy.

188. See Nesbitt, *supra* note 101. But the congressional record on regional primaries is dismal. Since 1911, 278 bills have been proposed to consolidate the nation's primaries and caucuses. All have failed.

regulating—the parties. It is worth noting that parties have proven quite ineffective as regulators. It is not unusual to have ineffective regulators in the commons, but generally, when a commons is governed by regulation and the regulator is weak, problems in the commons abound. Examples range from the well-earned reputation of many local governments of being too lenient with developers and fueling sprawl as a result¹⁸⁹ to the lax regulation that has decimated many of the United States coastal fisheries and forest ecosystems.¹⁹⁰

It might be, however, that even if the parties took their role as regulators more seriously, we still would have abuses by states because there is only so much the parties can do. Given the great influence very small states like New Hampshire and Iowa have come to occupy, state leaders may choose to give up a large chunk of its delegates in order to move up in the queue. This is suggested by the fact that Florida and Michigan risked losing all of the delegates to vote earlier.

2. Assessing Our Regulatory Alternatives

The current system relies on a simple rule to demark regulatory boundaries. States may only vote before a certain date if they get permission; otherwise, states must vote sometime after that date. Because it is hard to keep appropriators from consuming the commons, we often see simple regulations that regulate with bright lines. A great example of this is the main rule for allocating surface water in most of the western United States: first in time, first in right. In that context, the regulator just has to play line monitor. The rule used in the nomination system is even simpler than that though. It is more like hunting or fishing seasons where a set period is open for appropriating and another period is regulated closely or even closed for appropriation. In the nomination system, all the parties have to do is set dates and make sure that states comply with the dates. Whether or not front-loading occurs is not really relevant under the current scheme unless it leads to states crossing the line and voting out of the prescribed nomination season.

As we consider what sorts of regulatory changes might improve the system, one concern might be whether we want to trust the parties with a new nuanced scheme. Stepping away from clear-cut rules to more nuanced regulations almost always means more power for the

189. Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1155 (2008).

190. Glen Spain, *Dams, Water Reforms, and Endangered Species in the Klamath Basin*, 22 J. ENVTL. L. & LITIG. 49, 84-85 (2007).

regulator: the more discretion, the more of an opportunity for the regulator to skew the process. Thinking along these lines, it is a bad omen that one of the reasons we have the modern nomination system is a result of public outcry that parties should not be entrusted with much power (that is, discretion) over who becomes a nominee. We might also worry that parties would not stand up well to a stronger regulatory role and attempts of the various vested interests to create a system that works to their benefit. So, it seems logical to assume that we are somewhat limited by the degree we want to trust parties as regulators in creating a more nuanced system.

Other simple regulatory systems exist in the commons. Sometimes appropriators of the commons are selected by lottery, as is sometimes the case in the United States with fisheries and hunting permits.¹⁹¹ Some, in fact, have suggested that states rotate from cycle to cycle.¹⁹² Others have advocated that we rely on something akin to a lottery to determine the order in which states would vote.¹⁹³ However, although a lottery is simple to regulate, one wonders whether it really fits the needs of the nomination system. Whereas in hunting and fishing, it makes sense not to care much who gets the kill or fries up the fish, here it seems too important to leave just to chance. Additionally, it seems that a lottery that provides equal footing to all states would cause a revolt among small states paranoid that larger states in the front of the pack would create instant nominees. So while a lottery would help with spacing, it seems that we need a more developed system. Additionally, the challenge of making states vote on an assigned date seems almost insurmountable given that the parties have a hard enough time corralling state contests into a very broad time window.

There are a number of ways to realign the nomination calendar that, in principle, are fairly simple fixes. Some have advocated that we need to decrease the autonomy of states in setting contest dates. For example, state contests might be constrained temporally (that is, no contests before March or no contests on any other day but every other

191. Joseph Little et al., *Uncharted Territory—The Charter Forest Experiment on the Valles Caldera National Preserve: An Initial Economic and Policy Analysis*, 45 NAT. RESOURCES J. 33, 47-48 (2005) (explaining how New Mexico has incorporated a lottery for hunting permits); Editorial Staff, *A Review of Recent Developments in Ocean and Coastal Law*, 12 OCEAN & COASTAL L.J. 365, 375 (2007) (describing fishing permits issued by lottery).

192. See MAYER & BUSCH, *supra* note 1, at 99-105.

193. Charles T. Manatt, *A New Primary System, in BEFORE NOMINATION: OUR PRIMARY PROBLEMS* 116, 118-19 (George Grassmuck ed., 1985).

Tuesday), by quantity (that is, only ten states can hold contests in any given month), by type (that is, only caucuses and conventions but not primaries before March 15th), by size (small states vote first, then big states), or spatially (that is, rotating regional contest dates). Like the lottery, it is hard to see parties forcing this on the states. The idea of governing with a credible threat of regulation does not work so well when the regulator is not willing to pull the trigger, when the regulator can be politically manipulated, or when regulatory targets believe that any punishment they would receive is worth it. While regulation will certainly play a role in whatever institution is formed to handle the nomination commons, it seems that we need to create a system that coaxes states into compliance, not forces them. Given the size of the problem and the size of the regulatory sticks we trust parties or the federal government to carry in this area, there might not be much choice.

D. Getting States To Bind Themselves

There are two ways to control states in the nomination commons or, for that matter, any appropriator in any commons. Both ways are often used in tandem. The first is posing a credible threat that outstrips the benefit states might otherwise gain.¹⁹⁴ This is the tool parties use to try to keep states in line.

Another pathway, and one that is much more emphasized in the commons literature, is that of credible commitments.¹⁹⁵ The key here is to provide appropriators believable guarantees that if they cut back then they will somehow reap the benefit of their own sacrifice.¹⁹⁶ While many have expressed skepticism of the ability of the states to bind themselves, this has not been the case in many commons resources.¹⁹⁷

Through credible commitments, appropriators have often found ways to bind themselves, agreeing to show restraint and develop an

194. THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT*, 12, 15, 22, 160 (1960).

195. OSTROM, *supra* note 5, at 43-45.

196. *Id.*; David M. Kreps, *Corporate Culture and Economic Theory*, in *PERSPECTIVES ON POSITIVE POLITICAL ECONOMY* 90 (James E. Alt & Kenneth A. Shepsle eds., 1990); Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989); Oliver E. Williamson, *Credible Commitments: Using Hostages To Support Exchange*, 73 AM. ECON. REV. 519 (1983).

197. See Robert Schwaneberg, *New Date of Primary a Worry to Reformers*, *STAR-LEDGER* (Newark, N.J.), July 4, 2005 ("There are 50 independent pieces of the puzzle and they're never going to coordinate They're always going to be looking for an edge." (internal quotation marks omitted)).

enforcement scheme in order to rid themselves of the tragedy of the commons. This may include various enforcement mechanisms that the states themselves could control (for example, barring candidates on their ballots if the candidate participates in a contest that was set in violation of the rules). It may also include enforcement devices such as agreeing to be subject to lawsuits and injunctions and giving some independent parties authority to enforce whatever the bargain struck. This might function similarly to the private enforcement rights provided under various citizen suits of major environmental laws in the United States, such as those protecting endangered species,¹⁹⁸ water quality,¹⁹⁹ and air sheds.²⁰⁰

A move in this direction could be initiated from several quarters. The states might come to it themselves. Or, the federal government or the parties could nudge or shove the states down this road by various means ranging from a threat of dictating a solution in the event the states fail to come to an agreement to just providing the forum for the conversation. Assuming that a substantial majority of states agree to improve the primary system but a few states decide to hold out, perhaps the states willing to act could agree to punish states unwilling to do so until they come around.

Interestingly, punishing a state unwilling to back off its primary date is one of the ways New Hampshire has protected its first-in-the-nation primary. At first, New Hampshire just moved its date to protect its contest. So, in the 1972 cycle, Florida tried to hold its primary on the same day as New Hampshire, and New Hampshire just moved up its primary by a week.²⁰¹ Similarly, when New Hampshire's Northeastern neighbors tried to match up their contest date with that of New Hampshire during the 1976 contest, New Hampshire passed a law requiring the state to hold its contest a week before any other primary.²⁰² However, in 1996, Delaware scheduled its primary a few days after New Hampshire, despite the threat that was carried out by the Democratic Party to strip the state of some of its delegates, Delaware did not back off.²⁰³ So, when Delaware appeared to try the

198. Endangered Species Act, 16 U.S.C. § 1540(g) (2006).

199. Federal Water Pollution Control Act, 33 U.S.C. § 1365 (2006).

200. Clean Air Act, 42 U.S.C. § 7604 (2006).

201. MAYER & BUSCH, *supra* note 1, at 10.

202. *Id.*

203. See Dick Polman, *Delaware Dares To Defy N.H. with Own Primary*, RECORD (Bergen, N.J.), Jan. 23, 1996, at A8; Michael D. Shear, *DNC Strips Florida of 2008 Delegates*, WASH. POST, Aug. 26, 2007, at A1. It threatened to do the same when Arizona

same strategy in the 2000 cycle, New Hampshire took action and successfully pressured nearly all the candidates to boycott the Delaware primary unless Delaware backed off—ultimately forcing Delaware to convert its primary into a caucus.²⁰⁴ Perhaps the position New Hampshire forced Delaware into was best explained by the chairman of the Delaware Republican Party: “To continue with a primary that almost every major candidate in both parties is boycotting accomplishes very little Under current law, it is very possible the current front-runner won’t even be on our ballot.”²⁰⁵ And in fact in the 2008 cycle, when it became clear that Michigan and Florida would not conform to the primary schedule set by the parties, Iowa and New Hampshire pressured the candidates not to campaign in either of those states. Many of the candidates did back off, pulling their names off of the ballot in Michigan and not campaigning in Florida. This also opened the door to one of the most surreal moments of the 2008 cycle, when in touting his allegiance to Iowa’s role as the first state in line, candidate Bill Richardson unbelievably said, “Iowa, for good reason, for constitutional reasons, for reasons related to the Lord, should be the first caucus and primary And I want you to know who was the first candidate to sign a pledge not to campaign anywhere if they got ahead of Iowa.”²⁰⁶

Assuming that a large number of states are willing to bind themselves, the states could employ the same methods used by Iowa and New Hampshire. This would provide those states currently with little influence to turn the tables.

E. Using Market Regulation To Induce State Commitments

A number of states have called for reform or have put their weight behind some sort of solution to the resource race we see now in the nomination commons. States have multiple interests and are likely to see the benefits of the nomination commons differently. Because of this, it might pay to think about whether market regulation would provide more of an inducement for states to agree to cut back than a traditional command-and-control regulation.

considered the same strategy. See William F. Rawson, *Arizona House Tentatively Approves Feb. 27 Date for Presidential Primary*, ASSOCIATED PRESS, Apr. 3, 1995.

204. See Gary Ghioto, *Primary Oath Seeks To Save Status of “First,”* BOSTON GLOBE, Dec. 13, 1998, (N.H. Wkly), at 1; Jill Zuckman, *Delaware Ready To Drop Challenge to N.H. Primary*, BOSTON GLOBE, Aug. 4, 1999, at A14.

205. Zuckman, *supra* note 204 (internal quotation marks omitted).

206. *Richardson Says Remark on God, Iowa Caucuses Was “An Off-the-Cuff Comment,”* BULLETIN’S FRONTRUNNER, Sept. 5, 2007 (internal quotation marks omitted).

Increasingly, particularly where complexity abounds, market mechanisms are used in the commons. For example, the current debate on climate change often centers on using a market mechanism—like the cap-and-trade system—as the primary strategy for limiting greenhouse gases. Additionally, in what is often considered the greatest achievement of domestic environmental law in the 1990s, Congress revised the Clean Air Act to employ a cap-and-trade system to limit the pollutants primarily responsible for causing acid rain.²⁰⁷ Tradeable permits are used to manage many fisheries.²⁰⁸ Recently, when the Federal Communications Commission has had additional bandwidth of the radio spectrum available, it has increasingly turned to auctions rather than regulations to allocate licenses.²⁰⁹ These are only a few examples.²¹⁰

There are some criticisms of using market mechanisms to allocate resources in the commons. These include the failure of taking into account nonmarket values and the creation of unintended externalities through the use of the market mechanism. However, these do not seem extremely relevant in the nomination context. The larger concern is that caution would need to be taken in creating the rules of the game for the market (i.e., regulation) to assure that our national interest in creating a high quality platform to select presidential candidates is not compromised—or, put into the jargon of cap-and-trade: that we get the cap right.

One might imagine, for example, a system where states participate in trading similar to the National Football League Draft. The system could rely on a number of criteria to assign states a place in the queue (such as some of the regulatory options described above ranging from lottery to some sort of equitable allocation). Once political units were assigned places, however, the system could allow trading (e.g., trading a placement in line this cycle for an option to

207. See 42 U.S.C. § 7651b (2006) (establishing the sulfur dioxide emissions trading program).

208. See David A. Dana, *Overcoming the Political Tragedy of the Commons: Lessons Learned from the Reauthorization of the Magnuson Act*, 24 *ECOLOGY L.Q.* 833, 838-40 (1997).

209. Fed. Commc'ns Comm'n, About Auctions, http://wireless.fcc.gov/auctions/default.htm?job=about_auctions (last visited Jan. 18, 2010).

210. See, e.g., William F. Pedersen, *Using Federal Environmental Regulations To Bargain for Private Land Use Control*, 21 *YALE J. ON REG.* 1, 53-54 (2004) (discussing habitat conservation plans and tradable entitlements); Alexandra Teitz, *Assessing Point Source Discharge Permit Trading: Case Study in Controlling Selenium Discharges to the San Francisco Bay Estuary*, 21 *ECOLOGY L.Q.* 79, 95-98 (1994) (explaining the benefits and types of transferable discharge permits for point sources to comply with the CWA).

swap places two of the next three cycles). The trading system might also incorporate provisions to allow for a more equal playing field in any given cycle. One way this could occur is by providing “bonus delegates” to states holding their contests later in the year. In 2000, the Republican Party, in fact, experimented with this; although, it did so limitedly and with limited success.²¹¹ Another possible way to increase the value to the states voting last is to allow states at the back of the pack to use winner-take-all contests while forbidding states voting earlier to do so.²¹² We might also see the parties promising debates as a reward for exercising restraint or perhaps even the ability to host the convention for the state at the back of the line.²¹³ To the extent possible, the system would decouple the benefits of the nomination commons and the sequence of voting and redistribute the bounty in order to reduce the allure of voting first and soften the blow of voting last.

V. CONCLUSION

The nomination system suffers from a resource race rooted in the tragedy of the commons. The system currently encourages states to maximize local interests and neglect the national interests at stake. We may call it selfish, small-minded, or even un-American. But, until we treat the problem as a tragedy of the commons, we can call it a permanent fixture on the political landscape.

Commons problems require commons solutions. This Article draws on lessons learned from the commons to create principles for reforming the nomination commons. Four of the most important lessons include, first, stopping the practice of giving states a time window for voting that spans several months. Instead, we should rely

211. BUTLER, *supra* note 67, at 198-99.

212. The Democratic Party currently forbids states to use winner-take-all contests, and the Republican Party leaves it to the states to decide to use them or not. In fact, the Republican Party originally instituted winner-take-all contests to offset the clout of the states that voted first. Unfortunately, nothing prevented a state from voting early and reverting to a winner-take-all format. KEETER & ZUKIN, *supra* note 72, at 31.

213. Interest groups have increasingly acted as free-riders in trying to suck up benefits from the nomination system. A major way this has occurred is through interest group sponsored debates. The last cycle included twenty-six Democratic debates, most of them hosted by interest groups like labor unions, the NAACP, AARP, and the LGBT Network. Full 2008 Presidential Debate Schedule from DNC and GOP, <http://www.youdecidepolitics.com/2007/06/13/full-2008-debate-schedule-from-dnc-and-gop-vice-mccain-obama-palin-biden-video-democrat-republican/> (last visited Jan. 18, 2010). The Republican Party candidates had twenty-one debates, many of these hosted by interest groups as well, including by the NAACP, Values Voters (a coalition of Christian and religious groups), the Republican Jewish Coalition, and AARP. *Id.*

on a much more constrained, nuanced, and balanced primary calendar. Second, to get states to sign on to such a system, we should rely more on inducing states to bind themselves and less on the parties to act as the enforcer. Inducement could come in the form of attempting to level the nomination calendar by decoupling the benefits provided by the nomination system from the sequence of contests by providing incentives to vote later in the cycle like bonus delegates, the ability to hold contests with all-or-nothing delegate stakes, and the opportunity to host party-sponsored debates. Third, the parties need to get out of the role of enforcers. Instead, once states have agreed to be bound, parties should provide states the legal right to enforce the calendar and the deals struck. Lastly, because the nomination commons is complex and provides multiple benefits, we should employ market-based regulations that allow the states to swap the benefits of the nomination system.

Decades ago, the United States Supreme Court noted that the nomination process “serves the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State.”²¹⁴ While the nomination system’s importance may seem obvious, it is equally obvious that the system currently does not come close to achieving this ideal.

More than fifty years ago, when Garrett Hardin penned his now famous article on the tragedy of the commons, he said, “Ruin is the destination toward which all men rush.”²¹⁵ In the nomination commons, we cannot afford the resource race to push us in that direction. Fifty states clambering for scraps is no way for the *United States* to select candidates for our highest office. We need to rechart our course.

214. *Cousins v. Wigoda*, 419 U.S. 477, 490 (1975); see also HERBERT B. ASHER: PRESIDENTIAL ELECTIONS AND AMERICAN POLITICS: VOTERS, CANDIDATES, AND CAMPAIGNS SINCE 1952, at 1 (1976).

215. Hardin, *supra* note 1, at 1244.