

# The Democratic Party Primary Process: Can Dispute System Design Principles Provide Hope for Reform?

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## I. INTRODUCTION

Controversy plagued the 2008 Democratic Party primary process because the Democratic National Committee (DNC) reduced Michigan and Florida delegate votes by 50% at the 2008 nominating convention. The dispute over delegate votes began in late 2007, when Michigan and Florida announced that they would hold their primary contests earlier than the DNC rules allowed.<sup>1</sup> The DNC's initial response was to disallow Michigan and Florida's delegates to be seated at the nominating convention,<sup>2</sup> but the decision was challenged and the DNC eventually decided to seat all Michigan and Florida delegates and to give them half a vote each.<sup>3</sup>

Michigan and Florida decided to move their primary contests earlier in the process, in part, to "get some of the attention lavished on little Iowa and New Hampshire"<sup>4</sup>—or, simply put, to gain political relevance. For over thirty years, the DNC has allowed Iowa and New Hampshire to hold their presidential primary contests before any other state.<sup>5</sup> Frustrated with the privileged status of Iowa and New

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1. Katharine Q. Seelye, *Michigan Joins the Race for a 'Me First' Primary*, N.Y. TIMES, Aug. 22, 2007.

2. Stephen Ohlemacher, *Democrats Strip Michigan of Delegates*, WASH. POST, Dec. 2, 2007; Adam Nagourney, *Democrats Take a Tough Line on Florida Primary*, N.Y. TIMES, Aug. 26, 2007.

3. Katharine Q. Seelye & Jeff Zeleny, *Democrats Approve Deal on Michigan and Florida*, N.Y. TIMES, June 1, 2008.

4. Seelye, *supra* note 1.

5. Elaine C. Kamarck, John F. Kennedy School of Government, Harvard University, *History of the Democratic Party's Rule on Timing: Presentation and Question and Answer Before the Democratic National Committee Commission on Presidential*

Hampshire, Michigan had threatened to hold an early primary for years and, in 2004, Michigan made the decision to hold its primary on the same day as the New Hampshire primary.<sup>6</sup> Before the 2004 primary season began, however, the DNC persuaded Michigan to comply with the rules by promising to appoint a commission to address the dispute.<sup>7</sup>

Indeed, as promised, the DNC passed a resolution at the 2004 nominating convention to address the tension over Iowa and New Hampshire's first-in-the-nation status, calling for the creation of the Commission on Presidential Nomination Timing and Scheduling.<sup>8</sup> This Commission was informally referred to as the Herman-Price Commission, named after Co-Chairs Alexis Herman and David Price. In 2005, the Commission issued its final proposal: to keep the Iowa caucus and the New Hampshire primary as usual, but to add two states to the early primary calendar.<sup>9</sup> Responsible for choosing the two additional states, the DNC Rules & Bylaws Committee chose Nevada and South Carolina from a pool of twelve applicants, which included the State of Michigan.<sup>10</sup>

Once again denied the opportunity to hold an early primary, Michigan responded in 2008 by holding its primary on January 15th, three weeks before the DNC's February 5th start date.<sup>11</sup> Florida held its primary on January 29th.<sup>12</sup> The defection of Michigan and Florida created distress for the Democratic Party and caused uproar in

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Nomination Timing and Scheduling (First Herman-Price Commission Meeting) 3-5 (Mar. 12, 2005), *available at* [http://a9.g.akamai.net/7/9/8082/v001/www.democrats.org/pdfs/20050406\\_presentation1.pdf](http://a9.g.akamai.net/7/9/8082/v001/www.democrats.org/pdfs/20050406_presentation1.pdf).

6. Carl Levin, U.S. Senator for Michigan, Address Before the Democratic National Committee Commission on Presidential Nomination Timing and Scheduling (Second Herman-Price Commission Meeting) 23-26 (May 14, 2005), *available at* [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531\\_0514transcript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531_0514transcript.pdf).

7. *Id.*

8. Resolution Establishing a Commission on Presidential Nomination Timing and Scheduling (adopted July 26, 2004 by the 2004 Democratic Nominating convention) [hereinafter Resolution Establishing Herman-Price Commission], *available at* <http://www.democrats.org/page/s/nominating>.

9. The Democratic Party, Commission on Presidential Nomination Timing and Scheduling, <http://www.democrats.org/page/s/nominating> (last visited June 15, 2008).

10. *Democrats Add Nevada, South Carolina to Calendar*, THE HOTLINE: NATIONAL JOURNAL'S DAILY BRIEFING ON POLITICS, July 22, 2006, *available at* [http://hotlineoncall.nationaljournal.com/archives/2006/07/democrats\\_add\\_n.php](http://hotlineoncall.nationaljournal.com/archives/2006/07/democrats_add_n.php).

11. Michigan Primary Results, Election Center 2008, <http://www.cnn.com/ELECTION/2008/primaries/results/state/#MI> (last visited June 15, 2008).

12. Florida Primary Results, Election Center 2008, <http://www.cnn.com/ELECTION/2008/primaries/results/state/#val=FL> (last visited June 15, 2008).

the political community. Michigan and Florida are traditionally important states for the Democratic Party, constituting almost ten percent of pledged delegates,<sup>13</sup> and the loss of half their delegates was especially troubling given the tight race between Senators Clinton and Obama during the 2008 election cycle.<sup>14</sup>

The question this paper will address is how the Herman-Price Commission could have been designed differently to reduce the chances of Michigan and Florida defecting. Section I will provide a general background about the presidential primary process. Section II will evaluate the Herman-Price Commission, including what kinds of disputes it addressed and which procedures it used to address those disputes. Section III will advance several dispute system alternatives to commissions such as the Herman-Price Commission, and Section IV will conclude with recommendations for the future.

## II. HOW DOES THE PRIMARY PROCESS WORK?

At its nominating convention, the Democratic Party officially nominates its candidate for the Presidency.<sup>15</sup> Candidates campaign for the nomination in a series of state primaries and caucuses, the results of which determine the number of delegates committed to vote for each candidate at the convention.<sup>16</sup> The nominating convention is typically held in July or August of the current election year,<sup>17</sup> and primary elections and caucuses are held sometime between January and June of that year.<sup>18</sup>

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13. Democratic Party Results, Election Center 2008, <http://www.cnn.com/ELECTION/2008/> (last visited June 15, 2008).

14. See John Broder, *Michigan Lawmakers Won't Back a New Primary*, N.Y. TIMES, Mar. 21, 2008; see also John Broder, *Clinton Tries to Keep Plan for Two Revotes Alive*, N.Y. TIMES, Mar. 19, 2008.

15. Democratic National Committee, Call for the 2008 Nominating Convention (Feb. 2, 2007), available at [http://s3.amazonaws.com/apache.3cdn.net/f4225987fd9e438ef7\\_fqm6bev2k.pdf](http://s3.amazonaws.com/apache.3cdn.net/f4225987fd9e438ef7_fqm6bev2k.pdf).

16. Delegate Allocation, <http://www.demconvention.com/web/101/delegate-allocation.html> (last visited June 15, 2008).

17. Democratic National Political Conventions 1832-2008, available at [http://www.loc.gov/rr/main/democratic\\_conventions.pdf](http://www.loc.gov/rr/main/democratic_conventions.pdf) (last visited Mar. 10, 2009).

18. Democratic National Committee, Delegate Selection Rules for the 2008 Democratic Nominating Convention (Aug. 19, 2006) [hereinafter Delegate Selection Rules], available at <http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/2008delegateselectionrules.pdf>.

State legislatures schedule and fund the majority of primary contests<sup>19</sup> and usually schedule Republican and Democratic contests together to save costs.<sup>20</sup> The DNC has no authority to tell state legislatures when to schedule their contests; its only power is to refuse to seat delegates at its nominating convention if a state's plan violates the delegate selection rules.<sup>21</sup> State parties can also choose to schedule and fund their own primary contests, but primary contests are costly and can significantly drain state party resources.<sup>22</sup>

Under the DNC's current delegate selection rules, states can begin holding primaries or caucuses after the DNC officially "opens the window."<sup>23</sup> In 2008, the window opened on February 5th and closed on June 10th.<sup>24</sup> The delegate selection rules allow certain exceptions to the window rule: in 2008, Iowa, New Hampshire, Nevada and South Carolina were allowed to hold their primaries or caucuses before the window opened.<sup>25</sup> Exceptions for Iowa and New Hampshire have been allowed for over thirty years<sup>26</sup> and both states have statutory provisions in place that dictate this result. A New Hampshire state law states that its primary must be held seven days before any other state primary,<sup>27</sup> and an Iowa state law states that its caucuses must be held eight days before any other state's primary or caucuses.<sup>28</sup> Nevada and South Carolina are recent additions to the pre-window schedule, added in 2008 in response to criticisms that Iowa and New Hampshire were not adequately representative of the population.<sup>29</sup>

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19. State-by-State Process Comparison, *available at* <http://www.democrats.org/page/s/nominating>.

20. Lyn Utrecht, Partner at Ryan, Phillips, Utrecht & MacKinnon, Challenges and Legal Implications: Presentation and Question and Answer Before the Democratic National Committee on Presidential Nomination Timing and Scheduling (First Herman-Price Commission Meeting) 1 (Mar. 12, 2005), *available at* [http://a9.g.akamai.net/7/9/8082/v001/www.democrats.org/pdfs/20050406\\_presentation3.pdf](http://a9.g.akamai.net/7/9/8082/v001/www.democrats.org/pdfs/20050406_presentation3.pdf).

21. Kamarck, *supra* note 5, at 6.

22. State-by-State Process Comparison, *supra* note 19.

23. Kamarck, *supra* note 5, at 3-4.

24. Delegate Selection Rules, *supra* note 18, at 12.

25. *Id.*

26. Kamarck, *supra* note 5, at 3-4.

27. See Phil McNamara, Director of Party Affairs for the Democratic National Convention, Address Before the Democratic National Committee Commission on Presidential Nomination Timing and Scheduling (Second Herman-Price Commission Meeting) 7 (May 14, 2005), *available at* [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531\\_0514transcript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531_0514transcript.pdf).

28. *Id.*

29. See Delegate Selection Rules, *supra* note 18, at 12; The Democratic Party, Commission on Presidential Nomination Timing and Scheduling, <http://www.democrats.org/page/s/nominating> (last visited June 15, 2008).

### III. ANALYSIS OF THE HERMAN-PRICE COMMISSION

The Herman-Price Commission was created in part to address the controversy over the timing of state primaries and caucuses. The framework for diagnosing dispute systems articulated by William Ury in *Getting Disputes Resolved*<sup>30</sup> will guide this analysis of the Herman-Price Commission. In accordance with Ury's framework, this analysis will address "what kinds of disputes occur, what procedures are being used, and why the parties are using one procedure rather than another."<sup>31</sup>

#### A. *Description of the Dispute*

As the 2008 election cycle demonstrated, the current primary system is fraught with controversy. Critics have long argued that the primary process is broken and in need of significant change. TABLE 1 describes the main disputes that have developed in recent years.<sup>32</sup>

The parties most directly affected by the Democratic Party primary process are the DNC, state Democratic parties, Democratic voters, the Republican National Committee, state legislatures, and the candidates themselves. TABLE 2 lists the parties to this dispute and describes some of the interests of these parties.<sup>33</sup>

30. WILLIAM URY, *GETTING DISPUTES RESOLVED* 20-21 (1993).

31. *Id.* at 20.

32. All information contained in TABLE 1 comes from The UVA Center for Governmental Studies, *Presidential Selection: A Guide to Reform*, Presented at The National Symposium on Presidential Selection (2000), available at [http://www.centerforpolitics.org/reform/report\\_nominating.htm](http://www.centerforpolitics.org/reform/report_nominating.htm).

33. The information contained in TABLE 2 comes from a variety of sources:

- DNC—David Price, Co-Chair of the Democratic National Committee, Address Before the Democratic National Committee Commission on Presidential Nomination Timing and Scheduling (Second Herman-Price Commission Meeting) 3-4 (May 14, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531\\_0514\\_transcript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531_0514_transcript.pdf);
- State Democratic Parties—Kamarck, *supra* note 5, at 5. See also Levin, *supra* note 6, at 23 (What is at stake for state Democratic parties "is nothing less than a struggle for political equality and for political relevance.");
- Democratic Voters—The UVA Center for Governmental Studies, *supra* note 32;
- Republican National Committee—McNamara, *supra* note 27, at 9;
- State Legislatures—Utrecht, *supra* note 20, at 1;
- Candidates—Kamarck, *supra* note 5, at 2.

TABLE 1: ADVANTAGES AND DISADVANTAGES OF THE  
2008 PRIMARY PROCESS

<b>Advantages of the 2008 Primary Process</b>	<b>Disadvantages of the 2008 Primary Process</b>
<p><i>Retail Politics.</i> Iowa and New Hampshire “embrace the little guy” because they are smaller states that allow lesser-known candidates, who often have less money, to campaign more effectively. As an example, many in the Democratic Party argue that Jimmy Carter would not have been elected President had it not been for Iowa and New Hampshire.</p>	<p><i>Representativeness.</i> Iowa and New Hampshire hold the first caucus and first primary, respectfully, but are not representative of the population. Both states are overwhelmingly white, more rural, and wealthier than the national average. The addition of Nevada and South Carolina to the pre-window period in 2008 may have helped curtail this critique.</p>
<p><i>Tradition.</i> Iowa and New Hampshire voters are well-informed and expect to be a driving force in the primary process. Likewise, the nation has grown accustomed to looking to Iowa and New Hampshire for guidance.</p>	<p><i>Front-loading.</i> The public generally gravitates toward candidates who perform well in Iowa and New Hampshire. Politicians who do well early on are seen as sure bets to supporters and campaign donors, while those who do not do as well typically see their support wither and funds evaporate. As a result, other states argue that they are left with no voice in the process.</p>
<p><i>Efficiency.</i> Iowa and New Hampshire know how to run primary contests. After years of media attention, newspaper coverage is highly advanced, hotels have learned to cater to the campaign trail, etc.</p>	<p><i>Compression.</i> In 2008, over one-half of the pledged delegates were selected on the first day the window opened. Because the window opened roughly one week after the last early primary contest, candidates had limited time to campaign in participating states. Campaign money was instead spent on national advertising campaigns, leaving little time for meaningful discussion, reflection or debate.</p>

TABLE 2: PARTIES TO THE PRIMARY PROCESS DISPUTE

<b>Party</b>	<b>Role</b>	<b>Interests</b>
Democratic National Committee	Selects the Democratic presidential nominee at nominating convention	Nominating the strongest candidate
		Designing a fair and inclusive primary process
		Encouraging party building
State Democratic Parties	Send delegates to the nominating convention to select the Democratic presidential nominee	Gaining political equality and political relevance (ex. Iowa and New Hampshire attempting to preserve their first-in-the-nation status; Michigan challenging Iowa and New Hampshire's privileged status)
		Ensuring their constituencies have a voice in the primary process
		Raising money during the primary process
Democratic Voters	Vote in state primary contests to determine the number of pledged delegates sent to the nominating convention	Learning information about the presidential candidates
		Voicing their concerns to the presidential candidates
Republican National Committee	Selects the Republican presidential nominee at nominating convention	Nominating the strongest candidate
		Encouraging party building
		Coordinating primary contests with the DNC to avoid voter frustration and confusion
State Legislatures	Establish contest dates and provide funding for state-run primaries and caucuses	Scheduling efficient and low-cost primary contests
		Scheduling primary contests to help boost the state economy (ex. strategic timing)
Candidates	Run for their respective party's presidential nomination	Winning their party's nomination
		Gaining exposure to different constituencies to respond to regional concerns and to increase their popularity

Each party to the primary process dispute has more than one interest, and some interests are more important than others. For example, the DNC has repeatedly stated that its main goal is to design a primary process that will produce the strongest candidate.<sup>34</sup> The DNC also deems a fair, inclusive primary process that promotes party building to be important,<sup>35</sup> but many believe that continuing to allow Iowa and New Hampshire to hold the first caucus and primary respectfully directly compromises these latter interests.<sup>36</sup>

Although state Democratic parties are interested in ensuring that their constituencies have a voice in the primary process, during the 2008 election cycle many state parties compromised this interest by moving their primary contests forward. Eighteen states moved their primary contests to February 5th, and a total of 24 states held their primary contests that day compared to only seven states in 2004.<sup>37</sup> While state Democratic parties argued that this move would give their states greater influence over the race,<sup>38</sup> their actions had the exact opposite effect by effectively creating the first quasi-national primary and muffling the voices of their constituencies.<sup>39</sup>

The struggle for political equality and relevance in 2008 animated Iowa, New Hampshire and Michigan's actions as well. Iowa and New Hampshire had an interest in preserving their first-in-the-nation status and implied that they would hold their primary

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34. Price, *supra* note 33, at 3-4; Alexis Herman, Co-Chair of the Democratic National Committee, Address Before the Democratic National Committee Commission on Presidential Nomination Timing and Scheduling (Second Herman-Price Commission Meeting) 12 (May 14, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531\\_0514transcript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531_0514transcript.pdf); David Price, Co-Chair of the Democratic National Committee, Address Before the Democratic National Committee Commission on Presidential Nomination Timing and Scheduling (Fifth Herman-Price Commission Meeting) 15 (Dec. 10, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051210\\_commissiontranscript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051210_commissiontranscript.pdf).

35. Price, *supra* note 33, at 3-4.

36. Tina Abbott, Vice Chair of the Michigan Democratic Party, Address Before the Democratic National Committee Commission on Presidential Nomination Timing and Scheduling (Second Herman-Price Commission Meeting) 22 (May 14, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531\\_0514transcript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531_0514transcript.pdf).

37. Presidential Primary and Caucus Dates, [http://archive.stateline.org/flash-data/Primary/2008\\_presidential\\_primaries.pdf](http://archive.stateline.org/flash-data/Primary/2008_presidential_primaries.pdf) (last visited June 15, 2008).

38. See Danny Hakim, *Albany Expected to Join Rush to Move '08 Primary to February*, N.Y. TIMES, Mar. 6, 2007.

39. Adam Nagourney, *Early Primary Rush Upends '08 Campaign Plans*, N.Y. TIMES, Mar. 12, 2007.



contests first at all costs, even if that meant being stripped of delegates at the nominating convention.<sup>40</sup> Michigan's interest was directly opposed to Iowa and New Hampshire's preservation interest, and it suffered a 50% reduction in delegate votes for challenging Iowa and New Hampshire's premier status.<sup>41</sup>

Similar to the DNC, the Republican National Committee's (RNC) primary goal is to nominate the strongest candidate.<sup>42</sup> The Republicans also have an interest in coordinating their primary process with the Democratic process to avoid voter frustration and confusion, but the Republicans have demonstrated that coordination is a secondary interest. Turmoil arose in 2000 when the Republican Party set its opening date a month ahead of the Democratic window. This created what Democrats thought to be an "unfair, imbalanced, and confusing 2000 nominating calendar,"<sup>43</sup> and in 2004 the DNC was forced to move its opening date one month earlier to match the Republican schedule.<sup>44</sup>

State legislatures have an interest in scheduling efficient, low cost primary contests,<sup>45</sup> and legislatures typically dictate that Democrats and Republicans hold their primary contests on the same day to further that interest.<sup>46</sup> Although state parties are free to schedule and conduct their own primary contests, the disadvantage is that state parties must then fund those contests. Only ten states in 2008 held Democratic and Republican primary contests on different days,<sup>47</sup> and in all ten states, at least one of those contests was funded by its respective state party.<sup>48</sup>

The state legislatures of Iowa and New Hampshire also have a special interest in preserving their first-in-the-nation status, and

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40. Kamarck, *supra* note 5, at 4; Tom Harkin, U.S. Senator for Iowa, Address Before the Democratic National Committee Commission on Presidential Nomination Timing and Scheduling (Second Herman-Price Commission Meeting) 33 (May 14, 2005), *available at* [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531\\_0514transcript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531_0514transcript.pdf); William M. Gardner, Secretary of State of New Hampshire, Address Before the Democratic National Committee Commission on Presidential Nomination Timing and Scheduling (Second Herman-Price Commission Meeting) 43 (May 14, 2005), *available at* [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531\\_0514transcript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531_0514transcript.pdf).

41. Seelye & Zeleny, *supra* note 3.

42. McNamara, *supra* note 27, at 9.

43. Resolution Establishing Herman-Price Commission, *supra* note 8.

44. *Id.*

45. Utrecht, *supra* note 20, at 1.

46. *Id.*

47. Presidential Primary and Caucus Dates, *supra* note 37.

48. State-by-State Process Comparison, *supra* note 19.

these legislatures have employed a pre-commitment strategy to solidify their premier place: Iowa state law says that it must hold the first caucus in the nation and New Hampshire state law says that it must hold the first primary in the nation.<sup>49</sup> Iowa and New Hampshire's formal recognition of these interests in their state laws effectively renders them non-negotiable, because bargaining with these interests would require changes to state law that Iowa and New Hampshire legislatures seem unwilling to make.<sup>50</sup>

Lastly, each presidential candidate's primary goal is to campaign to secure his or her party's nomination. While candidates also value gaining exposure to different constituencies, they are typically satisfied with whichever process gives them the best chance at securing their party's nomination as quickly as possible, to avoid incurring extra costs. Candidates are usually excluded from the primary process timing debate due to the fear that they will try to shape the sequence of the primaries to their advantage.<sup>51</sup>

#### B. *Procedure Used to Address the Primary Process Dispute*

The Herman-Price Commission created to handle the primary process dispute was officially charged with "studying the timing of presidential primaries and caucuses and developing recommendations for the 2008 nominating process."<sup>52</sup> Despite what some claimed to be a narrow mandate, the Commission thoroughly addressed all the contentious issues discussed in TABLE 1.<sup>53</sup> The Commission was an ad-hoc advisory committee and had no rule-promulgating authority.<sup>54</sup> Its final proposal was recommended to the DNC Rules & By-laws Committee, which then decided whether to adopt and

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49. McNamara, *supra* note 27, at 7.

50. Utrecht, *supra* note 20, at 1.

51. Kamarck, *supra* note 5, at 1.

52. The Democratic Party, Commission on Presidential Nomination Timing and Scheduling, <http://www.democrats.org/page/s/nominating> (last visited June 15, 2008).

53. *See generally* Commission on Presidential Nomination Timing and Scheduling, Transcripts of First Meeting (Mar. 12, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/www.democrats.org/pdfs/20050406\\_presentation1.pdf](http://a9.g.akamai.net/7/9/8082/v001/www.democrats.org/pdfs/20050406_presentation1.pdf), [http://a9.g.akamai.net/7/9/8082/v001/www.democrats.org/pdfs/20050406\\_presentation2.pdf](http://a9.g.akamai.net/7/9/8082/v001/www.democrats.org/pdfs/20050406_presentation2.pdf) and [http://a9.g.akamai.net/7/9/8082/v001/www.democrats.org/pdfs/20050406\\_presentation3.pdf](http://a9.g.akamai.net/7/9/8082/v001/www.democrats.org/pdfs/20050406_presentation3.pdf); Commission on Presidential Nomination Timing and Scheduling, Transcript of Second Meeting (May 14, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531\\_0514transcript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531_0514transcript.pdf).

54. Resolution Establishing Herman-Price Commission, *supra* note 8.

implement it.<sup>55</sup> Serving on the Commission were forty people appointed by former DNC Chairman Terry McAuliffe, representing the DNC, state Democratic parties including New Hampshire, Iowa, Michigan and Florida, Democratic voter constituencies, state legislatures, and political consultants on behalf of presidential candidates.<sup>56</sup> Every major party to this dispute was represented on the Commission except the Republican National Committee, a result that hindered the decision-making process and that will be discussed more thoroughly in Section III.B.

The Commission met in 2005 for a total of five one-day sessions.<sup>57</sup> The format of the Commission meetings resembled the format of typical legislative body meetings. Co-Chairs Herman and Price were responsible for conducting these meetings, which included calling the meetings to order, introducing speakers, taking questions, granting motions, and generally directing the conversation flow.<sup>58</sup> At the first meeting, Commission members heard presentations by leading academics and scholars in the area of presidential primary timing and scheduling.<sup>59</sup> At the second meeting, Commission members heard specific reform proposals from interested groups, including the Democratic Parties of Iowa, New Hampshire, and Michigan.<sup>60</sup> Both the first and second meetings were held in open sessions with limited time for question and answer.<sup>61</sup> By the third meeting, Commission

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55. Final Report of the Commission on Presidential Nomination Timing and Scheduling to Governor Howard Dean, adopted by the Commission on Dec. 10, 2005, available at <http://www.democrats.org/page/s/nominating>.

56. Press Release, Democratic National Committee, McAuliffe Names 2008 Nominating Calendar Commission (Dec. 10, 2004), available at <http://www.gwu.edu/~action/2008/dnc2008cal1204.html>.

57. The Democratic Party, Commission on Presidential Nomination Timing and Scheduling, <http://www.democrats.org/page/s/nominating> (last visited June 15, 2008).

58. See generally Commission on Presidential Nomination Timing and Scheduling, Transcript of Second Meeting (May 14, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531\\_0514transcript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531_0514transcript.pdf); Commission on Presidential Nomination Timing and Scheduling, Transcript of Fifth Meeting (Dec. 10, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051210\\_commissiontranscript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051210_commissiontranscript.pdf).

59. Commission on Presidential Nomination Timing and Scheduling, Agenda of First Meeting (Mar. 12, 2005), available at [http://www.democrats.org/a/2005/03/march\\_12\\_2005\\_d.php](http://www.democrats.org/a/2005/03/march_12_2005_d.php).

60. Commission on Presidential Nomination Timing and Scheduling, Agenda of Second Meeting (May 14, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531\\_0514agenda2.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531_0514agenda2.pdf).

61. See generally Commission on Presidential Nomination Timing and Scheduling, Transcripts of First Meeting (Mar. 12, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/www.democrats.org/pdfs/20050406\\_presentation1.pdf](http://a9.g.akamai.net/7/9/8082/v001/www.democrats.org/pdfs/20050406_presentation1.pdf), <http://a9.g>

members began evaluating specific proposals.<sup>62</sup> The DNC staff compiled a document listing 10-12 proposals and asked Commission members to rank their top choices.<sup>63</sup> At the beginning of the fourth meeting, the Co-Chairs announced the results of the vote taken at the third meeting and led a discussion about the top proposals.<sup>64</sup> Between the fourth and fifth meetings, the DNC staff drafted the final proposal,<sup>65</sup> which Commission members voted to adopt at the fifth and final meeting.<sup>66</sup>

### C. *Reasons This Procedure Was Used Over Another*

The DNC has traditionally employed ad-hoc commissions when seeking advice on primary process matters.<sup>67</sup> After the contentious 1968 Democratic Nominating convention, the DNC created the first reform commission, the McGovern-Fraser Commission, which laid the framework for the modern primary process.<sup>68</sup> Between 1972 and 1986, the recommendations of four other commissions helped shape the primary process used today.<sup>69</sup>

The format of the Commission meetings was most likely adopted because it generally resembled the legislative format frequently used

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[akamai.net/7/9/8082/v001/www.democrats.org/pdfs/20050406\\_presentation2.pdf](http://akamai.net/7/9/8082/v001/www.democrats.org/pdfs/20050406_presentation2.pdf) and [http://a9.g.akamai.net/7/9/8082/v001/www.democrats.org/pdfs/20050406\\_presentation3.pdf](http://a9.g.akamai.net/7/9/8082/v001/www.democrats.org/pdfs/20050406_presentation3.pdf); Commission on Presidential Nomination Timing and Scheduling, Transcript of Second Meeting (May 14, 2005), *available at* [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531\\_0514transcript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531_0514transcript.pdf).

62. Alexis Herman, Co-Chair of the Democratic National Committee, Address Before the Democratic National Committee on Presidential Nomination Timing and Scheduling (Third Herman-Price Commission Meeting) 4 (July 16, 2005), *available at* [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050815\\_nominationtranscript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050815_nominationtranscript.pdf).

63. Telephone Interview with Phil McNamara, DNC Staff Director (Feb. 28, 2008).

64. David Price, Co-Chair of the Democratic National Committee, Address Before the Democratic National Committee Commission on Presidential Nomination Timing and Scheduling (Fourth Herman-Price Commission Meeting) 7 (Oct. 1, 2005), *available at* [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051001\\_commissiontranscript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051001_commissiontranscript.pdf).

65. Telephone Interview with Phil McNamara, *supra* note 63.

66. Commission on Presidential Nomination Timing and Scheduling, Transcript of Fifth Meeting 164 (Dec. 10, 2005), *available at* [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051210\\_commissiontranscript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051210_commissiontranscript.pdf).

67. ROBERT DiCLERICO & JAMES DAVIS, CHOOSING OUR CHOICES 7-21 (2000).

68. *Id.* at 8-13.

69. *Id.* at 13-21.

by the DNC.<sup>70</sup> Groups and organizations often assume that this formal, motion-driven, majority rule process offers the most appropriate model for groups, and the process employed by the Herman-Price Commission is all-too familiar: a group appoints a chair to moderate and keep order, “the conversation takes on a very formal tone,” people are “forced to frame suggestions in the cumbersome form of motions,” and “ultimately, all-or-nothing votes become the only way the group seems able to make a decision.”<sup>71</sup>

While there are many advantages to more informal processes, it cannot be denied that a formal process can be effective as well. More traditional processes are often familiar to parties in a political setting and may be more effective due to vast institutional knowledge about how those processes work. As a result, the barriers to replacing these traditional processes with more informal, alternative processes are high. To import a different decision-making style into this process would require not only the desire for change, but the knowledge to do so.

#### IV. ALTERNATIVES TO THE CURRENT DISPUTE SYSTEM

The recommendations of the Herman-Price Commission contributed to a Democratic Party plagued by in-fighting, a 50% reduction in Michigan and Florida delegate votes at the 2008 nominating convention, and hundreds of thousands of disenfranchised voters.<sup>72</sup> Furthermore, disputes will undoubtedly arise before the 2012 election cycle commences. The need for internal coordination in the Democratic Party during the 2012 election cycle and all future election cycles demands that alternatives to the decision-making process employed by the Herman-Price Commission be explored.

Parts A, B, and C of this Section advance three alternatives to the decision-making process employed by the Herman-Price Commission. Part A considers creating a similar commission with additional safeguards to give the process more legitimacy, Part B explores creating a commission that employs a consensus building approach, and Part C considers using a hands-off approach to allow for strategic sequencing.

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70. See, e.g., *Democrats in Chicago: The Resolutions Committee* (Aug. 16, 2008), available at [http://www.democrats.org/a/2006/08/democrats\\_in\\_ch\\_4.php](http://www.democrats.org/a/2006/08/democrats_in_ch_4.php).

71. Lawrence Susskind, *A Short Guide to Consensus Building: An Alternative to Robert's Rules of Order for Groups, Organizations, and Ad Hoc Assemblies That Want to Operate by Consensus*, in *THE CONSENSUS BUILDING HANDBOOK* 3, 3-4 (Lawrence Susskind, Sarah McKernan & Jennifer Thomas-Larner eds., 1999).

72. *Disenfranchised Voters Deserve a Do-Over*, SEATTLE TIMES, Feb. 17, 2008.

### A. *Ensure Process Legitimacy*

Basic process choices can significantly affect negotiated outcomes. Procedural justice research has shown that process is important because “fair procedures lead to greater compliance with the rules and decisions with which they are associated.”<sup>73</sup> Essentially, parties to a dispute are not interested in participating in a “sham” process,<sup>74</sup> and sham procedures seldom accomplish the ends they seek to achieve.<sup>75</sup> The recommendations below draw on the Herman-Price Commission’s shortcomings articulated by some Commission members, and they may be useful in helping future reform commissions design a more fair process.

#### *Goals Should be Negotiated*

The resolution establishing the Herman-Price Commission dictated the Commission’s goals to its future members. The resolution articulated two goals for the Commission to accomplish: (1) to design a “presidential nominating process that [was] open and fair to all Democratic candidates and voters” and (2) to design a nominating process “that produce[d] the strongest possible nominee.”<sup>76</sup>

Once the Commission was formed, the Co-Chairs then asked Commission members to use these two goals when evaluating specific proposals.<sup>77</sup> Despite their efforts, however, Commission members joined the Commission with their own goals in mind, and they frequently attempted to redefine the Commission’s goals to their advantage when speaking for or against a proposal. “Producing the strongest candidate” became the goal articulated by advocates of preserving the premier status of Iowa and New Hampshire,<sup>78</sup> while “designing a fair and open nominating process” became the goal articulated by advocates of changing the status quo.<sup>79</sup> The tension

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73. ALLAN LIND & TOM TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 187 (1988).

74. *Id.* at 202.

75. *Id.*

76. Resolution Establishing Herman-Price Commission, *supra* note 8.

77. Price, *supra* note 33, at 3-4.

78. Harkin, *supra* note 40, at 31-32.

79. Levin, *supra* note 6, at 24. After proposing the elimination of Iowa and New Hampshire’s first-in-the-nation status, Senator Levin remarked, “This is an egalitarian party. . . . We call the Republicans the party of privilege.” *Id.*

between these two goals caused Commission members to become adversarial and may also have caused significant participant confusion and frustration.<sup>80</sup>

Furthermore, some believed that the Co-Chairs gave the appearance that one of these goals—electing the strongest candidate—was more important than the other goal of designing a fair and inclusive process. Before the first proposal was heard, Co-Chair Herman reminded Commission members that they had to be “very clear” that the proposals would lead to the “presentation of the strongest possible nominee for our party,”<sup>81</sup> without any mention of designing a fair and inclusive process. Because “producing the strongest candidate” was the goal frequently incited by the “preserve Iowa and New Hampshire” camp, this may also have led to concern that the Co-Chairs were biased towards that position.

Although these two goals might have always remained somewhat in tension, the goals could have been reconciled more effectively. First, competing interests should have been recognized up front and the Commission’s goals should have been negotiated, including which goals were most important. Second, proposals should have been evaluated according to those mutually-decided goals and goal priorities. Following these steps will help gain buy-in from future commission members and may be a less difficult problem to correct. At the very least, adding another meeting dedicated to negotiating goals at the start of a commission’s calendar would significantly help ensure the procedural fairness of the decision-making process.

### *Biases Should be Suppressed*

Bias suppression is a principle of fairness that is used to judge procedural justice.<sup>82</sup>

There are two aspects of the bias-suppression rule—first, that procedures are unfair if the decision maker has a vested interest in any specific decision, and second, that procedures are unfair if the

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80. Maria Echaveste, Senior Fellow at the Center for American Progress, Address Before Democratic National Committee Commission on Presidential Nomination Timing and Scheduling (Third Herman-Price Commission Meeting) 37 (July 16, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050815\\_nominationtranscript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050815_nominationtranscript.pdf). “You just touched on something that’s been troubling me all morning, which is . . . what questions should we be trying to answer? [I]f we understand what question we’re supposed to be trying to answer, [than] we could actually have some impact.” *Id.*

81. Herman, *supra* note 34, at 12.

82. LIND & TYLER, *supra* note 73, at 131.

decision maker is so influenced by his or her prior beliefs that all points of view do not receive adequate and equal consideration.<sup>83</sup>

Some Commission members may have felt that Co-Chairs Herman and Price were biased because adequate and equal discussion time was not given to the possibility of eliminating Iowa and New Hampshire's first-in-the-nation status. By the fourth meeting, discussion was limited to evaluating the top proposals chosen by the Co-Chairs, all of which assumed that Iowa and New Hampshire would continue to hold the first caucus and primary respectfully.<sup>84</sup> The Co-Chairs selected these proposals based on informal conversations with Commission members and a straw vote taken at the third meeting,<sup>85</sup> which was an optional meeting and a late addition to the Commission's calendar.<sup>86</sup>

The top proposal assumed that Iowa and New Hampshire would continue to enjoy their premier status and discussion focused on how many states should be added to the pre-window period.<sup>87</sup> Despite objections, discussion was completely suppressed on the issue of Iowa and New Hampshire.<sup>88</sup> Some Commission members suspected that the Co-Chairs were merely pushing through the DNC's agenda to preserve Iowa and New Hampshire's status, and that the decision to add two additional pre-window states was made before the summit began.<sup>89</sup>

Frustrated by the assumptions that had been made by the Co-Chairs during the fourth meeting, Maria Echaveste made a motion to eliminate entirely the pre-window period, including Iowa and New

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83. *Id.*

84. *See generally* Commission on Presidential Nomination Timing and Scheduling, Transcript of Fourth Meeting (Oct. 1, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051001\\_commissiontranscript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051001_commissiontranscript.pdf).

85. Price, *supra* note 64, at 7.

86. Herman, *supra* note 62, at 4.

87. Alexis Herman, Co-Chair of the Democratic National Committee, Address Before the Democratic National Committee on Presidential Nomination Timing and Scheduling (Fourth Herman-Price Commission Meeting) 16 (Oct. 1, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051001\\_commissiontranscript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051001_commissiontranscript.pdf); Price, *supra* note 64, at 8, 12.

88. Carl Levin, U.S. Senator for Michigan, Address Before the Democratic National Committee Commission on Presidential Nomination Timing and Scheduling (Fourth Herman-Price Commission Meeting) 12 (Oct. 1, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051001\\_commissiontranscript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051001_commissiontranscript.pdf). "I do not think that we should make the assumption that Iowa and New Hampshire are always going to be in the groups that go ahead of the window." *Id.*

89. Telephone Interview with Donald Fowler, Former Chair of the Democratic National Committee (Feb. 21, 2008).



Hampshire's premier status, at the fifth and final meeting.<sup>90</sup> Ms. Echaveste's motion received one-third of the votes,<sup>91</sup> indicating that a large minority of the Commission was dissatisfied with the top proposal and with the dearth of time allowed for discussing the issue of Iowa and New Hampshire. One Commission member remarked,

"I am in agreement with Maria and have been throughout this process. My problem with voting for it in this juncture is that, unlike all of the other points that we have voted for this morning, we have not had a thorough and full discussion of this option . . . this is not something that we in any of our meetings, as late as last night, as late as this morning, have discussed in any detail to really look at it and talk about the ramifications."<sup>92</sup>

One suggestion that may help mitigate bias in decision-making in future reform commissions is to use a single text procedure. Fisher, Ury and Patton in *Getting to Yes* first suggested the concept of a "single text" negotiation.<sup>93</sup> "Rather than having each party propose its own version of an ideal agreement, a neutral party carries a single version of a possible agreement from party to party seeking 'improvements' that will make it acceptable to all [parties]."<sup>94</sup> A single-text procedure may have helped the Herman-Price Commission avoid the controversy raised by Maria Echaveste's proposal. If the one-third of the Commission that voted for Ms. Echaveste's proposal had been able to voice their concerns earlier in the process—and had the power

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90. Maria Echaveste, Senior Fellow at the Center for American Progress, Address Before the Democratic National Committee Commission on Presidential Nomination Timing and Scheduling (Fifth Herman-Price Commission Meeting) 87 (Dec. 10, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051210\\_commissiontranscript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051210_commissiontranscript.pdf). "I will renew my motion that, in light—for the reasons that I stated earlier, that the need to eliminate the privilege of Iowa and New Hampshire and the difficulty that we perceive in doing that as we try to fit in other caucuses or primaries, that perhaps the best solution is in fact to have no pre-window activity and that all the nominating process begin February 5th forward." *Id.*

91. Commission on Presidential Nomination Timing and Scheduling, Transcript of Fifth Meeting 132 (Dec. 10, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051210\\_commissiontranscript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051210_commissiontranscript.pdf).

92. Tina Flournoy, Assistant to the President for Public Policy at the American Federation of Teachers, Address Before the Democratic National Committee Commission on Presidential Nomination Timing and Scheduling (Fifth Herman-Price Commission Meeting) 118 (Dec. 10, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051210\\_commissiontranscript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051210_commissiontranscript.pdf).

93. ROGER FISHER & WILLIAM URY, *GETTING TO YES* (1983). Professors Fisher and Ury refer to a single negotiating text as the "One-Text Procedure." *Id.* at vii.

94. Susskind, *supra* note 71, at 11.

to stop the draft from circulating until their concerns had been addressed—the fourth and fifth meetings may have been more productive and Commission members would have had more time to discuss the various alternatives.

*Authority (or Perceived Authority) is Important*

Reform commissions are typically ad hoc, advisory committees<sup>95</sup> and, as a result, commission members will be less invested in the process if they believe that their ideas will not be implemented or at least taken seriously. For example, the Hunt Commission in 1982 recommended eliminating the pre-window period,<sup>96</sup> but the DNC, responding to special pleas by Iowa and New Hampshire, caved in and allowed them to hold their contests earlier.<sup>97</sup> This created much disappointment among Hunt Commission members.

Again in 2005, the DNC failed to implement a primary recommendation of the Herman-Price Commission, the Fowler-Ickes bonus delegate plan.<sup>98</sup> This plan was designed to encourage states to schedule their primary contests later in the process by rewarding states that moved back and punishing states that moved forward.<sup>99</sup> While the bonus delegate plan may have helped reduce the large number of states that moved their primaries to February 5th in 2008, the DNC adopted a watered-down version that rendered the plan completely ineffective.<sup>100</sup>

Giving reform commissions binding authority to implement changes may help give this process more legitimacy. However, this would require a change to the DNC rules, and it is unlikely that the Rules & Bylaws Committee would be willing to give up such authority. One solution may be to create a joint reform commission for 2012 with binding authority, composed of both voting Rules & Bylaws Committee members and non-voting advisory members.

*B. Adopt a Consensus Building Approach*

There are numerous “interest-based” approaches that could be used to help break impasse in future primary process disputes.

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95. DiClerico & Davis, *supra* note 67, at 7-21.

96. *Id.* at 20.

97. *Id.*

98. Commission on Presidential Nomination Timing and Scheduling, Transcript of Fifth Meeting 7 (Dec. 10, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051210\\_commissiontranscript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051210_commissiontranscript.pdf).

99. *Id.* at 167-68.

100. Telephone interview with James Roosevelt, DNC Rules & Bylaws Committee Member (Mar. 11, 2008).

Given the political nature of these types of disputes, one approach that might be helpful is Professor Larry Susskind's consensus building approach.<sup>101</sup> A core principle advanced by Professor Susskind's approach is that something greater than a bare majority generated through voting can be achieved, and the achievement is almost always more desirable than majority rule. He states:

"[F]ormalism of parliamentary procedure is particularly unsatisfying and often counterproductive, getting in the way of commonsense solutions. It relies on insider knowledge of obscure rules of the game. It does not tap the full range of facilitative skills of group leaders. And it typically involves leaving many stakeholders (often something just short of a majority) angry and disappointed, with little or nothing to show for their efforts."<sup>102</sup>

Consensus building is a process of seeking unanimous agreement. The problems the Herman-Price Commission experienced may have been solved by, or at least mitigated by, employing a consensus building approach. Future reform commissions should strive to develop a proposal that everyone, or nearly everyone, in the room can support to avoid controversies like the one created in 2008 by Michigan and Florida's defection. It is important to make sure that all parties leave satisfied that their opinions have been heard, understood and taken into account.

### *Focus on Interests*

The heart of a consensus building approach is focusing on interests rather than positions. "Interests are needs, desires, concerns, fears—the things one cares about or wants. They underlie people's positions—the tangible items they say they want."<sup>103</sup> The reform proposals heard by the Herman-Price Commission represented stakeholder positions; stakeholders requested tangible items like increased candidate discussion of economic issues,<sup>104</sup> more campaign

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101. See Susskind, *supra* note 71.

102. *Id.* at 5.

103. URY, *supra* note 30, at 5.

104. John Sweeney, President of the AFL-CIO, Address Before the Democratic National Committee on Presidential Nomination Timing and Scheduling (Third Herman-Price Commission Meeting) 19 (July 16, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050815\\_nominationtranscript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050815_nominationtranscript.pdf).

advertisements in Latino communities,<sup>105</sup> and the adoption of a regional primary plan.<sup>106</sup> Yet the underlying stakeholder interests, such as producing the strongest candidate,<sup>107</sup> engaging voters<sup>108</sup> or strategic party building,<sup>109</sup> were not specifically addressed unless those parties chose to discuss their interests while presenting their positions. As a result, stakeholder interests may have been overshadowed by positions and overlooked by Commission members.

One way to identify key interests up front is to prepare a written conflict assessment that represents a summary of the interests of each stakeholder group.<sup>110</sup> By accurately assessing stakeholder interests up front, future commission members may be able to spend more time discussing specific tensions and less time trying to gauge what the competing interests are and which proposals would be acceptable to each of the parties.

### *Invent Options for Mutual Gains*

Creating as much value as possible is a primary goal of a consensus building approach, and the key to creating value is to invent options for mutual gain.<sup>111</sup> The interests of all parties will be best achieved if everyone agrees to work together to make the pie larger instead of giving in to competitive pressures to get the most for one's self. The negative effects that flowed from the creation of a quasi-national primary in 2008 illustrate this principle.

In 2008, 18 state parties hoping to gain political equality and relevance by voting earlier in the process moved their primary contests to Super Tuesday,<sup>112</sup> the first day the window opened. This shift effectively created a quasi-national primary; over half of the delegates

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105. Temo Figueroa, Administrator, AFSCME Council 18, Address Before the Democratic National Committee on Presidential Nomination Timing and Scheduling (Third Herman-Price Commission Meeting) 12 (July 16, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050815\\_nominationtranscript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050815_nominationtranscript.pdf).

106. Jerry Brady, Representative for Democrats for the West, Address Before the Democratic National Committee Commission on Presidential Nomination Timing and Scheduling (Second Herman-Price Commission Meeting) 18 (May 14, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531\\_0514transcript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531_0514transcript.pdf).

107. Sweeney, *supra* note 104, at 19-20.

108. Figueroa, *supra* note 105, at 13.

109. Brady, *supra* note 106, at 17-18.

110. Susskind, *supra* note 71, at 21-22.

111. *Id.* at 28.

112. Presidential Primary and Caucus Dates, *supra* note 37.

were selected that day,<sup>113</sup> resulting in the exact opposite effect state parties had hoped for. By moving their primaries up to February 5th, each state was forced to compete for attention with 23 other states, and each state received less attention than if it had been on its own.<sup>114</sup> This situation resembles a classic prisoner's dilemma.<sup>115</sup> State parties did not recognize, or chose to ignore, that failure to cooperate *decreased* the relevance their states had in the 2008 nominating process.

Giving future commission members more time to brainstorm and to discuss ways to enlarge the pie could invent options for mutual gains. Options like the rotating regional primary plan, which was presented at the second meeting and stressed the importance of cooperation between states,<sup>116</sup> could have been discussed and considered more thoroughly. Now that state parties have experienced the negative effects of a quasi-national primary, hopefully stakeholders will be more willing to cooperate. The parties must realize that it is in their best interests to reach an agreement that everyone can live with.

#### *Barriers to Adopting a Consensus Building Approach*

Although the benefits of a consensus building approach are easily recognizable, the barriers to implementing this approach are high. First, parties may overestimate their ability to get what they want, or a written conflict assessment may determine that there is no zone of possible agreement (ZOPA).<sup>117</sup> For example, in 2008 two very important interests were in direct conflict with one another and could not be resolved. Iowa and New Hampshire had an interest in preserving their first-in-the-nation status and threatened to hold their contests

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113. N.Y. TIMES, Primary Calendar: Democratic Nominating Contests, <http://politics.nytimes.com/election-guide/2008/primaries/democraticprimaries/index.html> (last visited June 16, 2008).

114. Sarah Milnar, *Super Tuesday Hits 24 States*, MARQUETTE TRIBUNE, Feb. 5, 2008.

115. URY, *supra* note 30, at 128. Ury presented the following example of a classic prisoner's dilemma: "The group formed two teams. . . . If both teams cooperated, both won; if neither cooperated, both lost. If one cooperated and the other did not, the noncooperator won and the cooperator lost by a big margin. As might be expected, one team told the other that it would cooperate and then double-crossed it." *Id.*

116. Leslie Reynolds, Executive Director of the National Association of Secretaries of State, Address Before the Democratic National Committee Commission on Presidential Nomination Timing and Scheduling (Second Herman-Price Commission Meeting) 12 (May 14, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531\\_0514transcript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/commission/20050531_0514transcript.pdf).

117. DAVID LAX & JAMES SEBENIUS, 3D NEGOTIATION 88 (2006).

first at all costs,<sup>118</sup> while Michigan and Florida had an interest in challenging Iowa and New Hampshire's status and suffered a 50% reduction in delegate votes for following through with the challenge.<sup>119</sup>

Despite the presence of what may seem to be unsolvable conflicts, a consensus building approach is deemed to be successful if a strong majority of the parties is satisfied.<sup>120</sup> Moving forward, the DNC could simply recognize the spoiler potential of Iowa and New Hampshire and decide to proceed with this approach. Some may argue, however, that proceeding with a consensus building approach under these circumstances would be no better than proceeding under the approach employed by the Herman-Price Commission, which contributed to the defection of Michigan and Florida.

Second, a consensus building approach may not be feasible if all the parties are not represented at the bargaining table.<sup>121</sup> The absence of representatives from the RNC on the Herman-Price Commission severely inhibited the decision-making ability of Commission members.<sup>122</sup> Because the Republicans had already set their 2008 primary schedule before the Herman-Price Commission convened, any discussion of radically changing the schedule was immediately met with resistance to preserve the status quo.<sup>123</sup>

This missing stakeholder thwarted a primary objective the Herman-Price Commission was created to address: timing. The Commission's final report recommended that the DNC meet with the RNC before it voted on its 2012 primary schedule,<sup>124</sup> but no agreement to negotiate was reached and the 2012 Republican primary schedule has already been determined.<sup>125</sup> However, in an unprecedented move at the 2008 Republican National Convention, Republicans

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118. See *supra* note 40.

119. Seelye & Zeleny, *supra* note 3.

120. Susskind, *supra* note 71, at 50. 80% satisfaction is typically required. *Id.*

121. *Id.* at 22.

122. See, e.g., McNamara, *supra* note 27, at 6.

123. See, e.g., Tom Harkin, U.S. Senator for Iowa, Address Before the Democratic National Committee on Presidential Nomination Timing and Scheduling (Fourth Herman-Price Commission Meeting) 14 (Oct. 1, 2005), available at [http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051001\\_commissiontranscript.pdf](http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20051001_commissiontranscript.pdf). "Please be sure today to consider the damage that would result from adopting a calendar that begins differently than that of the Republicans. . . . I believe that if we don't compete in those same states, on those same dates our candidates will lose enormous national exposure by diverting and confusing press attention." *Id.*

124. Final Report of the Commission, *supra* note 55.

125. Jim Geraghty, *The RNC Chair Race's Impact on the 2012 Primary Schedule*, NATIONALREVIEW ONLINE: THE CAMPAIGN SPOT, Dec. 3, 2008.

formed a commission to evaluate possible reforms to the 2012 primary calendar despite the fact that the schedule had already been approved.<sup>126</sup> The formation of this commission will give Democrats, who have also formed a “Change Commission”<sup>127</sup> to evaluate the 2012 primary calendar, an opportunity to negotiate with Republicans. Fortunately, both parties have expressed interest in gaining bipartisan support for primary reform.<sup>128</sup>

### C. *Allow for Strategic Sequencing*

If this dispute is determined inappropriate for a consensus building approach, another alternative process could utilize a hands-off approach to allow for strategic sequencing:

“Some negotiations are best approached by gathering all affected parties together, sharing all information, and brainstorming a solution to the shared problems. In other cases, though, it may be far more promising—for the purposes of at least one player—to carefully separate and sequence the stages of the process, while actively managing and framing the information flow. Carefully deploying these choices can help build support for an ultimate deal; it can also be used to outflank potential opponents.”<sup>129</sup>

The 2008 conflict between Iowa, New Hampshire, Michigan and Florida was at the heart of the dispute that the Herman-Price Commission was created to address. In such a situation, where the only interest that mattered was which states held the first primary contests, no options for mutual gains may have existed. Through effective sequencing moves away from the table, though, the parties may have been able to negotiate a deal by gaining support from other interested parties and using key relationships to their advantage.<sup>130</sup>

For example, Iowa and New Hampshire signaled to their fellow 48 states that they would never surrender their first-in-the-nation status; both states used pre-commitment strategies by enacting state laws<sup>131</sup> and by threatening to violate any DNC rule and surrender

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126. *Id.*

127. Resolution Establishing the Democratic Change Commission (adopted Aug. 25, 2008 by the 2008 Democratic National Convention), *available at* <http://www.democrats.org/page/content/changecommissionresolution>.

128. *See, e.g.*, National Caucus for 2012 Reform Yields New Bi-Partisan Agreement, NATIONAL PRESIDENTIAL CAUCUS, Aug. 20, 2008, *available at* <http://www.nationalcaucus.org/blog/2008/08/20/%2526quot%3Bnational-caucus-2012-reform%2526quot%3B-yields-new-bi-partisan-agreement>.

129. LAX & SEBENIUS, *supra* note 117, at 105.

130. *Id.* at 100, 104.

131. *See* McNamara, *supra* note 27.

their delegates in order to uphold those laws.<sup>132</sup> Iowa and New Hampshire's position assumed, however, that they would be able to push their contests forward if another state threatened their premier position—a tactic that both states have used over the past 45 years.<sup>133</sup> If Michigan and Florida had been able to gain credible commitments from other states to hold their primaries on the same day as New Hampshire and spoil its primary, New Hampshire may have been more willing to negotiate.

The essence of strategic sequencing is to figure out who influences whom, who defers to whom, and to make a deal “yes-able” by getting the right players on board at the right times through a carefully sequenced process.<sup>134</sup> Backward mapping is a useful tool for implementing strategic sequencing.<sup>135</sup> The first step in backward mapping is to “map the relationships between the parties,”<sup>136</sup> and the second step is to “[m]ap backward from the key players who are critical to the deal. With respect to the target player, ask which prior agreements among which of the other players might help the target to say yes. Keep working backwards in this fashion until you have found the most promising path through the cloud of possibilities.”<sup>137</sup>

TABLE 3 provides a hypothetical illustration of how Michigan could have used backward mapping to build powerful alliances and to break the impasse with New Hampshire.

Despite the advantages of strategic sequencing, this type of dispute resolution process may not be the best alternative for future reform commissions. To proceed effectively, the parties must have a clear sense of the target deal,<sup>138</sup> but because the target deal is stakeholder-dependent, a reform commission should not have any such clear sense; the DNC should remain neutral to avoid jeopardizing process legitimacy. As a result, strategic sequencing can only work if the DNC takes a hands-off approach to decision-making by giving parties time to design and implement their own strategic sequencing. This strategy may increase the likelihood that parties will reach informal agreements before formal deliberations begin, which could then result in a more efficient process at the bargaining table.

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132. See *supra* note 40.

133. See Brian Mooney, *He's N.H.'s Secret to Primary Primacy*, THE BOSTON GLOBE, July 9, 2007, at A1.

134. LAX & SEBENIUS, *supra* note 117, at 104.

135. *Id.*

136. *Id.* at 116.

137. *Id.*

138. *Id.* at 233.



TABLE 3: USING BACKWARD MAPPING TO BREAK IMPASSE

<b>MICHIGAN'S ACTION</b> Identify New Hampshire's key relationships.	<b>MICHIGAN'S ACTION</b> Meet with Delaware and New York to identify their interests.	<b>MICHIGAN'S ACTION</b> Negotiate with Delaware and New York to spoil New Hampshire's primary.	<b>MICHIGAN'S ACTION</b> Negotiate with New Hampshire to adopt rotating regional primary plan.
<b>RESULT</b> Discover New Hampshire has key relationships with Delaware (because many NH corporations are incorporated there) and New York (because many New Yorkers have NH summer homes).	<b>RESULT</b> Discover that Delaware and New York are dissatisfied with the current primary process, especially New Hampshire's elite status.	<b>RESULT</b> Get commitments from Delaware and New York to hold their primaries on the same day as NH.	<b>RESULT</b> New Hampshire may be more willing to say yes to negotiated agreement if Michigan, Delaware and New York are firmly committed to spoiling its primary.

V. RECOMMENDATIONS FOR FUTURE REFORM COMMISSIONS

All three alternatives explored in this paper have the potential to guide future reform commissions in designing a process to handle the next primary process dispute. The first alternative is to create a commission similar to the Herman-Price Commission but to take active steps to give the process more legitimacy. This may be accomplished by allowing commission members to negotiate goals early in the process, suppressing biases through the use of a single-text procedure, and giving the commission more authority by forming a joint commission with the DNC Rules & Bylaws Committee.

A second alternative is to create a different type of commission that employs consensus building. Focusing on interests rather than positions and striving to invent options for mutual gains may engender this approach. Barriers include interests that cannot be reconciled, as was the case in 2008 with Iowa, New Hampshire, Michigan and Florida, and missing stakeholders, such as the Republican Party. Thus, before a consensus building approach is attempted, the DNC must ensure that competing interests are negotiable and that all parties are represented at the negotiating table.

A third alternative is to allow parties time for strategic sequencing. Because strategic sequencing is largely an informal, stakeholder-driven process, one challenge to this alternative is that it

requires a hands-off approach by the DNC to ensure process legitimacy.

The principle that underlies all three recommendations is simple: fair processes lead to better negotiated outcomes. When disputes arise that affect our political process in such a profound way, extra care must be taken to ensure that fair procedures are in place to effectuate agreement between the parties. As the dust of the 2008 election cycle settles and attention is turned toward the 2012 primary process, hopefully Democrats and Republicans will keep this guiding principle in mind.