

**Two Birds, One Stone: Reversing “Frontloading”
by Fixing the Presidential Public Funding System**
By Matthew T. Sanderson

Every four years, the campaign for the American presidency becomes increasingly “frontloaded”—more states move their primaries and caucuses earlier in the election year. A front-heavy, endless campaign pads political commentators’ and consultants’ pocket books, but harms nearly everyone else by making the campaign season longer and costlier, by disenfranchising voters in later-voting states, and by diverting focus and resources to an incessant campaign rather than governance. States would be collectively better off under a less frontloaded calendar, but individual states follow the irresistible impulse to move their contests earlier in self-interested pursuit of greater influence over the presidential nomination process. This race to the front has truly become a race to the bottom.

Frontloading occurs because of the current presidential nomination process’s built-in incentives. States are assured an edge over their competitors by moving up their nomination contests. Individual states have no reason to move their nomination contests later because no advantage is achieved through delay. So long as this is the case, America’s frontloading problem will persist and perhaps worsen.

Enter the now-defunct presidential public funding system (the “System”). The System is reeling after the 2008 general election. Barack Obama’s blockbuster fundraising and an increasingly long campaign calendar make the System’s public-funds-for-spending-limits tradeoff an untenable scheme in future elections. But the System need not be discarded, as some suggest. The System can pivot away from its existing structure and be retooled to combat frontloading. By delaying the System’s “matchable contribution” and disbursement dates, and by

instituting other reforms, a revamped System could induce candidates to not compete in states with early contests. States would respond by delaying their contests because the extra electoral influence they crave is wholly dependent upon candidates competing in their elections and caucuses. In short, a revamped System would shift the incentives that cause frontloading, giving states motivation to hold later contests. Restructuring the System is therefore a way to “kill two birds with one stone”—a single reform package that reverses frontloading and gives the System renewed purpose. This Article explains the need for, and potential influence of, this proposed System in two Sections. Section I examines the causes and consequences of frontloading. Section II introduces and defends specific reforms to the System that will help reverse frontloading of the presidential nomination calendar.

I. UNDERSTANDING FRONTLOADING

Each major political party’s presidential nomination process culminates at a national party convention, held in late summer, where the party selects presidential and vice-presidential nominees.¹ Delegates selected from each state attend the national conventions to pick the nominees.² These delegates are chosen through each state’s primary election or caucus, meaning that “nominations are typically won and lost well before the summer of the election year.”³

Historically, states’ nomination contests were spread evenly over a five-month period leading up to each party’s national convention. In 1960, for example, the nation’s first primary

¹ For an interesting discussion on the nomination process and, particularly the “pre-election” nomination phase of that process, see MICHAEL J. GOFF, *THE MONEY PRIMARY: THE NEW POLITICS OF THE EARLY PRESIDENTIAL NOMINATION PROCESS* (Rowman & Littlefield, 2007).

² Marty Cohen, et. al., *The Invisible Primary in Presidential Nomination, 1980-2004* in *THE MAKING OF THE PRESIDENTIAL CANDIDATES 3* (William Mayer, ed.) (Rowman & Littlefield, 2008). Delegates from the District of Columbia and Unites States territories.

³ Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 *YALE L. & POL’Y REV.* 331, 334 (1996).

was held in New Hampshire on March 8th.⁴ The next five primaries were organized over four weeks in April; only one-third of all delegates were selected by the nomination-contest calendar's eighth week.⁵ In 1976, the New Hampshire primary was held on February 24th and only six states held delegate-selection contests before the end of March.⁶ Jimmy Carter did not clinch the Democratic Party's nomination until June and Gerald Ford did not fend off Ronald Reagan until just before the Republican National Convention.⁷

Today's nomination process is much more frontloaded, meaning that state contests both start earlier and cluster toward the beginning of the nomination process.⁸ The 2008 presidential campaign's nomination calendar was frontloaded to an unprecedented extent. The New Hampshire primary was held five days after the January 3rd Iowa caucuses, the earliest-ever dates for both contests.⁹ In 2008, California's traditional June primary moved up to February 5th, with absentee voting beginning on January 7th.¹⁰ In all, Democrats held 46 delegate-selection contests before the end of March¹¹ and Republicans held 44 contests during the same period.¹² Forty-six of these ninety contests were held by the two parties on a single day, February 5th.¹³ Perhaps most strikingly, the Democratic Party chose 88 percent of all pledged delegates by

⁴ WILLIAM G. MAYER AND ANDREW E. BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* 4 (Brookings Institution Press, 2004).

⁵ WILLIAM G. MAYER AND ANDREW E. BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* 4 (Brookings Institution Press, 2004).

⁶ COMMITTEE FOR ECONOMIC DEVELOPMENT, *BUILDING ON REFORM: A BUSINESS PROPOSAL TO STRENGTHEN ELECTION FINANCE* 23 (2005), available at http://www.ced.org/docs/report/report_cfr2005.pdf.

⁷ Michael J. Malbin, *A Public Funding System in Jeopardy: Lessons from the Presidential Nomination Contest of 2004*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 220-221* (Michael J. Malbin, ed.) (Rowman & Littlefield, 2006).

⁸ Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 *YALE L. & POL'Y REV.* 331, 342 (1996).

⁹ New York Times, Online Election Guide, at <http://politics.nytimes.com/election-guide/2008/primaries/democraticprimaries/index.html> (last visited Apr. 18, 2008).

¹⁰ CALIFORNIA SECRETARY OF STATE, *SUMMARY OF PRESIDENTIAL PRIMARY ELECTION CALENDAR—PRESIDENTIAL CANDIDATES I* (2007), available at http://www.sos.ca.gov/elections/election_2008/calendar/section5.pdf.

¹¹ New York Times, Online Election Guide, at <http://politics.nytimes.com/election-guide/2008/primaries/democraticprimaries/index.html> (last visited Apr. 18, 2008).

¹² New York Times, Online Election Guide, at <http://politics.nytimes.com/election-guide/2008/primaries/republicanprimaries/index.html> (last visited Apr. 18, 2008).

¹³ Ken Herman & Scott Shepard, *Super Tuesday Primer*, *HOUSTON CHRONICLE*, Feb. 3, 2008 at 6.

March 11th, compared with just 41 percent of pledged delegates by the end of March in 1992.¹⁴ And Republican John McCain effectively clinched his party's nomination when Mitt Romney withdrew on February 7, 2008—a month sooner than the previous record.¹⁵ This Section explores frontloading by explaining some of its consequences and its origins.

A. Consequences of Frontloading

Frontloading has many consequences for the individuals, institutions, and systems involved in the presidential nomination process.¹⁶ These consequences include longer and more costly presidential campaigns, voter disenfranchisement, and a diversion of focus and resources to a never-ending campaign rather than governance.

1. Frontloading Forces Candidates to Run Longer, More Expensive Campaigns that Produce No Material Benefits for the Public

On October 30, 2006, then-Chairman of the House Armed Services Committee Congressman Duncan Hunter called a press conference. He was not introducing new legislation to enlarge the United States military; nor was he fighting for his congressional seat in an election year that favored Democrats. Congressman Hunter held a press conference over a week before the 2006 mid-term elections to announce that he would seek the presidency in 2008.¹⁷ Political

¹⁴ Dan Balz & Anne E. Kornblut, *Democrats in Duel, McCain Scores Key Wins*, HOUSTON CHRONICLE, Feb. 6, 2008 at 1.

¹⁵ Dana Milbank, *Exit, Stage Right*, THE WASHINGTON POST, Feb. 8, 2008 at A1. David Jackson, *McCain Could Clinch As Soon As March 4*, USA TODAY, Feb. 19, 2008, at 6A (“John McCain is positioned to clinch the Republican presidential nomination at the earliest point in modern GOP history.”). John McCain mathematically clinched the GOP nomination on March 4, 2008.

¹⁶ Some possible consequences of frontloading not analyzed in this Article include “voter fatigue” and the effects of long campaigns on candidates' physical conditions.

¹⁷ Sonya Geis, *Rep. Hunter to Explore White House Bid*, THE WASHINGTON POST, Oct. 31, 2006 at A3.

pundits claimed that Hunter’s announcement was ridiculously early.¹⁸ In reality, though, the 2008 presidential campaign was already well underway by October 2006—the first major contender had dropped out,¹⁹ a fatal gaffe had been made,²⁰ and several presidential hopefuls’ “leadership” PACs had already spent months laying the groundwork for ‘08 bids.²¹ By the end of January 2007, 18 of the 20 major 2008 presidential candidates had formed presidential campaign committees (Republicans Ron Paul and Fred Thompson would form committees later).²²

It was not always this way. Ted Kennedy did not announce his candidacy for the 1980 Democratic nomination until November 1979.²³ In the 1992 presidential cycle, New Hampshire primary-winner Paul Tsongas formed a campaign committee in April of 1991 and was the only Democratic candidate to set foot in New Hampshire before July 1991.²⁴ Eventual Democratic nominee Bill Clinton did not formally declare his candidacy until October of 1991.²⁵ However,

¹⁸ See, e.g., Chris Cillizza, *Duncan Hunter for President*, Washington Post’s The Fix Blog (Oct. 30, 2006 4:46 EST), available at http://blog.washingtonpost.com/thefix/2006/10/duncan_hunter_for_president.html (remarking that Duncan Hunter’s announcement was “one of the strangest political decisions in recent memory.”).

¹⁹ Liz Sidoti, *Warner Won’t Be Candidate in Race for the White House*, Associated Press, Oct. 13, 2006.

²⁰ During an event for California gubernatorial candidate Phil Angelides, John Kerry said “You know, education, if you make the most of it, you study hard, you do your homework and you make an effort to be smart, you can do well. If you don’t, you get stuck in Iraq.” The public backlash was severe and Kerry was forced from contention for the Democratic Party’s nomination in 2008. Andrew Ryan, *Kerry Says He ‘Botched Joke’ and Lashes Out at GOP*, THE BOSTON GLOBE, Oct. 31, 2006 (page number unavailable online), available at http://www.boston.com/news/globe/city_region/breaking_news/2006/10/kerry_says_he_b.html.

²¹ See, e.g., Judy Holland, *Sen. Clinton Leads in Luring Dollars*, TIMES UNION (Albany, NY), Sept. 10, 2006 at A6 (describing the raising and spending of money by 2008 candidates through their leadership PACs).

²² Democrats Hillary Clinton, Barack Obama, Evan Bayh, Joseph Biden, Christopher Dodd, John Edwards, Dennis Kucinich, Bill Richardson, and Tom Vilsack and Republicans John McCain, Jim Gilmore, Rudolph Giuliani, Mike Huckabee, Duncan Hunter, Mitt Romney, Tom Tancredo, and Tommy Thompson all formed campaign committees in 2007 or January 2008.

²³ Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 YALE L. & POL’Y REV. 331, 351 (1996).

²⁴ Public Citizen, *Challenges in the Presidential Public Financing Program* (July 26, 2007), available at <http://www.whitehouseforsale.org/problem.cfm>.

²⁵ Public Citizen, *Challenges in the Presidential Public Financing Program* (July 26, 2007), available at <http://www.whitehouseforsale.org/problem.cfm>.

since then, candidates have been forced to respond to the frontloading trend by initiating increasingly early and intense starts.²⁶

Duncan Hunter and the crowd of other 2008 candidates sprinted from their starting gates because the 2008 nomination-contest calendar presented a daunting gauntlet of over 30 separate contests²⁷ for delegates on or before February 9, 2008.²⁸ Since candidates were not disadvantaged by starting early, they used every available method to gain an initial competitive edge. They signed talented consultants and staffers.²⁹ They lavished attention on voters in critical early-state contests (all major Democratic candidates spent a total of 89 days in New Hampshire in the first six months of 2007—far more than 1992’s candidate field).³⁰ Full-scale ballot-access and voter-outreach efforts were carried out for most of 2007.³¹ Mitt Romney, a 2008 Republican presidential contender, even started running television ads in February 2007.³² Although the nomination process’s starting point was moved up, the ultimate Election Day finish line remained the first Tuesday in November.³³ The 2008 Republican and Democratic nominees therefore conducted an intense two-year campaign for the presidency—a prolonged process that fatigued voters and candidates alike.³⁴

²⁶ Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 YALE L. & POL’Y REV. 331, 349-351 (1996).

²⁷ Thirty-two contests were held during this time for Republicans and thirty-four for Democrats. The two extra Democratic Party contests were the result of the Party allowing American Samoa and Democrats living outside of the United States to select delegates to the Democratic National Convention.

²⁸ New York Times, Online Election Guide, at <http://politics.nytimes.com/election-guide/2008/primaries/democraticprimaries/index.html> (last visited Apr. 18, 2008).

²⁹ See, e.g., Joan Vennoch, *McCain’s Mitt Strategy*, THE BOSTON GLOBE, Jan. 25, 2007 (describing the competition for staffers and consultants between John McCain and Mitt Romney).

³⁰ George Washington University, *Candidate Visits to New Hampshire—First Half of 2007*, at <http://www.gwu.edu/~action/2008/chrnnewh08.html>.

³¹ Trevor Potter & Marianne Viray, *Barriers to Participation*, 36 U. MICH. J.L. REFORM 547, 560-562 (2003) (noting candidates’ necessity of conducting campaign operations in a frontloaded contest).

³² Adam Nagourney, *Romney Mounting an Early Presidential Ad Campaign*, NEW YORK TIMES, Feb. 21, 2007 at A19.

³³ See Trevor Potter & Marianne Viray, *Barriers to Participation*, 36 U. MICH. J.L. REFORM 547, 560-562 (2003) (stating that “Frontloading also extends the general election campaign season for months”).

³⁴ Karl Rove, *The Endless Campaign*, WALL STREET J. Dec. 20, 2007, at A17 (“The first problem is the overall length of the campaign. There are few more demanding physical activities than running for president, other than

Frontloaded, protracted campaigns make today's presidential races increasingly expensive. In 2004, total candidate spending reached \$845 million,³⁵ a drastic increase from 1976 when candidates spent \$385 million in inflation-adjusted 2004 dollars.³⁶ Candidate spending again broke records in 2008. Presidential candidates raised, and largely spent nearly \$1.5 billion during the 2008 election cycle.³⁷ To be sure, rising campaign costs are not due solely to frontloading. Inflation and inflated advertising and consulting costs have made candidate spending climb.³⁸ But frontloading has increased spending in at least three ways. First, candidates campaigning in early states that hold contests right after New Year's Day must pay top dollar for TV ads to elbow out retailers during the Holiday season.³⁹ Second, if multiple state contests are compressed into a few short weeks, candidates must spend more to be heard. Instead of "retail" campaigning for a week in a few states, candidates must frantically fly to multiple locations, while also relying more heavily on expensive paid media advertising to convey their messages.⁴⁰ Third and most important, conducting significant campaign activity over a long period consumes large amounts of money.⁴¹ Candidates select key staff members, plan strategy,

military training or athletics at a very high level--and this will be the longest presidential contest on record. . . . So next fall we'll elect a president who's spent two years rocketing around the country in an aluminum tube and sleeping in strange hotel rooms on a brutal, exhausting campaign trail.")

³⁵ Kelly D. Patterson, *Spending in the 2004 Election*, in FINANCING THE 2004 ELECTION 132 (David Magelby, ed.) (Brookings Institution Press, 2006).

³⁶ HERB ALEXANDER, FINANCING THE 1976 ELECTION 171-172 (Cong. Q. Press, 1979).

³⁷ Campaign Finance Institute, *Individual Contributions (Not Aggregated) to Presidential Candidates through August 31, 2008* (2008), available at http://www.cfinst.org/president/pdf/Table1_DonorsNov08.pdf. Barack Obama's general-election fundraising total of nearly \$300 million should be added to the \$1.168 billion listed in the Campaign Finance Institute report.

³⁸ See CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 4 (2003), available at <http://www.cfinst.org/president/Participation.aspx> (discussing inflationary forces and campaign spending).

³⁹ David Pitt, *Candidates, Retailers Vie for TV Time*, ASSOCIATED PRESS, Nov. 25, 2007 ("Moving the caucuses up 11 days to Jan. 3 also will force candidates to pay top dollar for TV ads over the holidays. . . . Television stations must provide air time to federal election candidates beginning 45 days before an election. If candidates pay top rate, they can grab a specific time slot and bump other advertisers who had the space reserved.")

⁴⁰ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 15 (2003), available at <http://www.cfinst.org/president/Participation.aspx>.

⁴¹ Another potential consequence of frontloading is that it could effectively double contributors' normal limit. See Jim Kuhnenn, *Early Primaries Equals More Fundraising?*, Associated Press, Aug. 24, 2007 ("Under federal law, candidates can raise up to \$2,300 [the legal maximum to federal candidates during the 2008 election cycle] from

and drum-up media coverage during the pre-election year to gain an advantage during the short, dense season when nomination contests are held.⁴² The longer and more heated the pre-election year jockeying is, the greater the amount a candidate will “burn” before the contest is cut down to two presumptive major-party nominees. To illustrate, candidates spent \$92.5 million in 1995, \$136 million in 1999, \$155 million in 2003, and \$486 million in 2007.⁴³ These large sums are not indicative of candidates building large “war chests” of reserve funds before election contests. Rather, the \$486 million spending total, for example, represents 89 percent of all primary-election money raised during 2007.⁴⁴ Pre-election year battles are thus becoming longer and more intense, requiring candidates to spend around 90 percent of their fundraising proceeds even before any nomination contests are held. The campaign season’s early start and its daunting fundraising demands combine to effectively preclude many candidates from entering the race.⁴⁵ Those that enter the race are often forced to exit prematurely because of an inability to raise the massive amounts needed to continue their candidacies.⁴⁶ To let the “money primary” thin the field of candidates in this manner prefers contributors over voters and favors candidates able to

donors for primary elections and another \$2,300 for the general election. Because the presidential nominating process requires numerous state primaries and caucuses, federal law states: ‘All elections held in any calendar year for the office of the president of the United States (except for the general election for such office) shall be considered to be one election.’ In short, a strict reading of the law means the contribution limits apply only to primaries and caucuses held in 2008. If a state moves its primary or caucus to 2007, it could mean a whole new cycle.”).

⁴² See THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21, PRESIDENTIAL PUBLIC FINANCING: REPAIRING THE SYSTEM CONFERENCE REPORT 15 (2005), available at <http://www.campaignlegalcenter.org/attachments/1614.pdf> (quoting Anthony Corrado as saying that “The front-loading of the presidential process has increased the demand for early campaigning.”).

⁴³ Campaign Finance Institute, *Primary Money Raised and Spent Through December 31st Odd Years of Presidential Elections, 1995-2007* (2008), at http://www.cfinst.org/president/pdf/Pres08_YE_Table3.pdf.

⁴⁴ Campaign Finance Institute, *Primary Money Raised and Spent Through December 31st Odd Years of Presidential Elections, 1995-2007* (2008), at http://www.cfinst.org/president/pdf/Pres08_YE_Table3.pdf.

⁴⁵ Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 YALE L. & POL’Y REV. 331, 352 (1996).

⁴⁶ See, e.g., Mike Glover, *Vilsack Drops Out of Presidential Race*, ASSOCIATED PRESS, Feb. 23, 2007.

raise large sums of money over those who might bring other positive attributes to the presidency.⁴⁷

A longer, more expensive political campaign could be a positive development if it helped voters reach more informed decisions. But evidence does not suggest that longer campaigns make for an educated electorate. At the end of 2007, after countless visits and more than a year of intense campaigning, only 38 percent of Republicans and 52 percent of Democrats in Iowa had chosen a 2008 contender.⁴⁸ Only 35 percent of Republicans and 28 percent of Democrats in New Hampshire had settled on a candidate shortly before the Granite State's primary.⁴⁹ Many voters still incorrectly identified candidates' positions.⁵⁰ And generally, voters do not seem more pleased with presidents chosen through prolonged processes—presidential approval ratings have not changed markedly since the frontloading trend began.⁵¹ The increasingly large amounts of time and money spent on American presidential campaigns add little value. A frontloaded campaign calendar is therefore a net negative for American politics: it needlessly swells costs and capriciously thins the field of candidates without offering a discernable offsetting benefit.

2. Frontloading Disenfranchises Voters in Later-Voting States

⁴⁷ CAMPAIGN FINANCE INSTITUTE, SO THE VOTERS MAY CHOOSE: REVIVING THE PRESIDENTIAL MATCHING FUND SYSTEM 2 (2005), available at <http://www.cfinst.org/president/pdf/VotersChoose.pdf>.

⁴⁸ Scott Helman, *Candidate Home in on the Undecided*, The Boston Globe, Dec. 27, 2007 at A1.

⁴⁹ Scott Helman, *Candidate Home in on the Undecided*, The Boston Globe, Dec. 27, 2007 at A1.

⁵⁰ See, e.g., Julie Rovner, *Misperceptions About McCain's Abortion Stance*, National Public Radio (Broadcast Feb. 2, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=18632802>; Press Release, Center for Immigration Studies, *Poll: Voters Unaware of Candidates' Immigration Positions* (Mar. 31, 2008), available at http://www.cis.org/articles/2008/voter_release_08.html; Press Release, The Pew Research Center for the People and the Press, *Thompson Demonstrates Broad Potential Appeal* (June 4, 2007), available at <http://people-press.org/reports/display.php3?ReportID=334> (“Many voters are dimly aware of even heavily covered aspects of the candidates' positions and backgrounds. For instance, just 37% of all registered voters could correctly identify Giuliani as the leading Republican candidate who favors a woman's right to choose when it comes to abortion. Among Republican and Republican-leaning voters, just 43% correctly identified Giuliani.”).

⁵¹ See Wall Street Journal Online, *How the Presidents Stack Up* (2008), at <http://online.wsj.com/public/resources/documents/info-presapp0605-31.html>.

Not all primaries and caucuses are created equal.⁵² Iowa and New Hampshire voters are exposed to a full slate of contenders who campaign intensely.⁵³ Voters in subsequent states invariably encounter fewer candidates.⁵⁴ But the field of potential nominees thins with particular quickness in a frontloaded contest.⁵⁵ Before the frontloading trend began, more candidates went “deeper” into the nomination calendar and nearly all contests were competitive before the race finished.⁵⁶ As Michael Steinberg said, the effect of “earlier states making their political voices more powerful is that later voting states’ voices are muffled if not muted.”⁵⁷ Frontloading thus creates three classes of voters: “those at the beginning of the process who have a full range of choice, those during the middle stages who have a limited range, and those at the end who have no choice at all.”⁵⁸ It is not surprising, then, that fewer voters participate in state contests held later in the year.⁵⁹

⁵² Lisa K. Parshall & Franco Mattei, *Challenging the Presidential Nomination Process: The Constitutionality of Front-Loading*, 26 HAMLINE J. PUB. L. & POL’Y 1, 5 (2004)

⁵³ LARRY M. BARTELS, *PRESIDENTIAL PRIMARIES AND THE DYNAMICS OF PUBLIC CHOICE 4* (Princeton, 1988).

⁵⁴ Trevor Potter & Marianne Viray, *Barriers to Participation*, 36 U. MICH. J.L. REFORM 547, 561 (2003).

⁵⁵ Lisa K. Parshall & Franco Mattei, *Challenging the Presidential Nomination Process: The Constitutionality of Front-Loading*, 26 HAMLINE J. PUB. L. & POL’Y 1, 6-7 (2004) (“Candidates gain momentum’ by winning or by beating the expectations set by pundits or pre-election polls; success in doing so will enhance the perceived viability of some candidates at the expense of other contenders who either fail to live up to expectations or lose a primary (caucus). Facing longer odds, negative media coverage and reluctance among potential contributors, some of these contenders choose to withdraw from the race well before the finish line.”). See also David S. Broder, *Iowa Hogs the Politics*, WASHINGTON POST, Jan. 23, 2000, at B7 (“[W]hat happens in Iowa and New Hampshire is more than conversation; it’s an elimination contest.”).

⁵⁶ Lonna Atkeson & and Cherie Maestas, *Racing to the Front: The Effect of Frontloading on Presidential Primary Turnout 9-10* (Paper presented at the annual meeting of the American Political Science Association, Philadelphia Marriott Hotel, Philadelphia, PA) (Aug 27, 2003) http://www.allacademic.com/meta/p62410_index.html (“Early on in the 1972-76 period all or nearly all of primaries were fought before the race was called.”)

⁵⁷ Michael S. Steinberg, *A Critique of the Current Method of Scheduling Presidential Primary Elections and a Discussion of Potential Judicial Challenges*, 69 GEO. WASH. L. REV. 453, 457 (2001).

⁵⁸ James I. Lingle, *Reforming the Presidential Nominating Process in THE QUEST FOR NATIONAL OFFICE 309* (Stephen J. Wayne & Clyde Wilcox eds., 1992). See also Lisa K. Parshall & Franco Mattei, *Challenging the Presidential Nomination Process: The Constitutionality of Front-Loading*, 26 HAMLINE J. PUB. L. & POL’Y 1, 5 (2004) (“[I]ndeed, several state primaries have no impact on the candidate selection, and in this critical respect they are no different from the national conventions.”).

⁵⁹ See generally, Lonna Atkeson & and Cherie Maestas, *Racing to the Front: The Effect of Frontloading on Presidential Primary Turnout 2* (Paper presented at the annual meeting of the American Political Science Association, Philadelphia Marriott Hotel, Philadelphia, PA) (Aug 27, 2003) http://www.allacademic.com/meta/p62410_index.html. See also Trevor Potter & Marianne Viray, *Barriers to*

During the 2008 primary-election season, many voters were relegated to second- and third-class status. Even though the competition for the Democratic Party's nomination went on for an unusual length of time, voters in pivotal states like Ohio, Pennsylvania, and Texas were limited to choosing between Hillary Clinton and Barack Obama after John Edwards withdrew from the race on January 30th.⁶⁰ More drastically, John McCain effectively locked up his party's nomination before 26 states and territories had held their contests.⁶¹ The role of Republican voters in these 26 jurisdictions was limited to ratifying other states' selection of John McCain as the 2008 GOP nominee.⁶²

3. Frontloading Diverts Attention and Resources from Governance

Presidential campaigns benefit the governance process by, among other things, providing a forum for issue discussion and formulation. However, frontloading can negate these benefits by diverting public attention and resources from governance issues and tasks for a prolonged period. Starting the last week of January 2007, for example, media outlets consistently covered the back-and-forth of the 2008 presidential election more than pending legislation or Bush Administration policies.⁶³ Because media outlets inevitably and overwhelmingly focus on election-related "process" (whether and when individuals will declare their candidacies, verbal gaffes, electoral strategies, and "horserace" polling data), the public's attention was largely fixed on the latest polling numbers and political strategies rather than on newly proposed government reforms

Participation, 36 U. MICH. J.L. REFORM 547, 575 (2003) ("The consequences of frontloading . . . are evident in the significantly lower turnout of primary elections held after March 7th.").

⁶⁰ Peter Whoriskey, *Edwards Exacts Pledge as He Leaves*, WASHINGTON POST, Jan. 31, 2008 at A11.

⁶¹ Dana Milbank, *Exit, Stage Right*, THE WASHINGTON POST, Feb. 8, 2008 at A1.

⁶² See Michael S. Steinberg, *A Critique of the Current Method of Scheduling Presidential Primary Elections and a Discussion of Potential Judicial Challenges*, 69 GEO. WASH. L. REV. 453, 453 (2001) ("The notion that some voters could not exercise their franchise until voters in other jurisdictions had effectively decided the outcome of the race is at odds with the principles of the federal voting rights cases that safeguard the right to vote in this country.").

⁶³ See Project for Excellence in Journalism, *Politics, War, and a Crucial Speech Top the News Index*, Jan. 27, 2007, at <http://www.journalism.org/node/3868>.

throughout the protracted 2008 campaign.⁶⁴ Federal officeholders who run for president are similarly distracted from governance tasks.⁶⁵ During the 23-month 2008 presidential campaign, Barack Obama missed 46.5 percent and John McCain missed 64.5 percent of U.S. Senate votes—far greater rates of absenteeism than they reached during previous years of public service.⁶⁶

In other words, frontloading is problematic because it prolongs a presidential campaign's inevitable distractions and elevates the importance of campaigning so that it becomes an end in itself rather than the means to governmental change. The longer a presidential campaign continues, the longer public focus remains on election-related process rather than governance issues and the longer officeholder-candidates shirk their governance responsibilities. Last presidential election, this period of distraction set in immediately after supposedly "historic" 2006 mid-term elections. For nearly all of the 110th Congress and George W. Bush's last two years in office, the presidential campaign was in full swing. It is perhaps not surprising, then, that the reforms undertaken by Congress and the Bush Administration during 2007 and 2008 were relatively modest. The public's political focus was on the campaign trail, not on Washington, and the nation's capital was missing many influential Members of Congress who typically drive the legislative agenda and help break partisan gridlock. This is not to say that a shorter 2008 campaign would have led to a flood of new, landmark legislation. The point is that barriers to progress and reform—whether they be hyper-partisanship, incompetent leadership, or

⁶⁴ See Press Release, The Lear Center Local News Archive, *Local TV News Ignores Local and State Campaigns*, Oct. 24, 2004, available at <http://www.learcenter.org/pdf/LCLNInterim2004.pdf>.

⁶⁵ See Karl Rove, *The Endless Campaign*, WALL STREET J. Dec. 20, 2007, at A17 ("Candidates would also benefit from having more time to think about the big, important things they want to do for the country. The process side of politics is now undermining the intellectual side.")

⁶⁶ Figures available from Govtrack.us, a civic project to track Congress.

institutional obstacles—are less likely to be manifested or overcome in a political atmosphere where campaigning, not governance, is the central and continual focus.

B. Origins of Frontloading

To mitigate frontloading's effects and ultimately reverse frontloading, it is important to understand why frontloading occurs and why past efforts to combat frontloading have largely failed.

1. The Influence Disparity between Early and Late States Causes Frontloading

Iowa and New Hampshire enjoy a special first-in-the-nation status that they zealously protect and that other states covet.⁶⁷ Despite small populations and relatively insignificant numbers of delegates at national conventions,⁶⁸ Iowa and New Hampshire impact the presidential nomination process because they are its first meaningful contests.⁶⁹ The media focuses more intensely on the Iowa caucuses and the New Hampshire primary than on other states' contests.⁷⁰ Candidates visit Iowa and New Hampshire more than other states.⁷¹ Those

⁶⁷ LARRY M. BARTELS, *PRESIDENTIAL PRIMARIES AND THE DYNAMICS OF PUBLIC CHOICE* 7 (Princeton, 1988). Interestingly, both states stumbled onto this special status without realizing its value. New Hampshire scheduled its election early in the year in 1916 to coincide with the traditional Town Meeting Day as a simple cost-cutting measure. Granite State primary only attained prominence 33 years later when presidential candidates' names were placed on the primary ballot. Iowa Democrats moved their party's caucuses to January in 1972 because of limited meeting space and a new complex, multi-stage delegate selection process. Iowa then caught candidates' attention when the caucuses were instrumental in delivering the 1972 and 1976 Democratic nominations to George McGovern and Jimmy Carter. *A Complete History of the Iowa Caucuses*, Cedar Rapids Gazette Online Blog (Dec. 27, 2006 at 15:54 EST), available at <http://www.gazetteonline.com/apps/pbcs.dll/article?AID=/20061227/IOWACAUCUS03/61227001>.

⁶⁸ For example, Iowa has only 45 pledged delegates of the 2,025 delegates needed to win the Democratic nomination. New Hampshire has only 22. See Thomas Beaumont, *Iowa's Delegate Selection Adds Zing to the Race*, *The Des Moines Register*, Mar. 14, 2008 at A3.

⁶⁹ Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 *YALE L. & POL'Y REV.* 331, 337 (1996).

⁷⁰ See, e.g., Katharine Q. Seelye, *2008 Race Dominated Media Coverage*, *New York Times' The Caucus Blog* (Jan. 15, 2008 11:29 EST), available at <http://thecaucus.blogs.nytimes.com/2008/01/15/2008-race-dominates-media->

candidates who exceed expectations in Iowa or New Hampshire capture momentum for subsequent contests.⁷² Some evidence even suggests that Iowa and New Hampshire receive policy concessions from the federal executive branch as a result of their first-in-the-nation status.⁷³ Without question, voters in these first-in-the-nation states have a unique opportunity to influence, and to be influenced by, potential presidents.⁷⁴

Understandably, other states envy Iowa's and New Hampshire's privileged positions. Some states even attempt to challenge Iowa and New Hampshire directly. Florida was the first. In 1972, Florida moved its primary to the same day as New Hampshire's.⁷⁵ Massachusetts followed suit in 1976.⁷⁶ Other states, like Louisiana and Delaware, then joined the chase.⁷⁷ In 2008, the floodgates opened, as Florida, Michigan, Nevada, South Carolina, and Wyoming, among others, moved their contests earlier.⁷⁸ Because nominee selection has historically been influenced most by early contests, states move up their contests' dates each year "to retain or

[coverage/](#) (remarking that the 49 percent of all media coverage during the New Hampshire primaries was devoted to the presidential campaign).

⁷¹ Democratic and Republican candidates made a combined 410 visits and spent a combined total of 973 days in Iowa during 2007 and early 2008. George Washington University, P-2008 Iowa Caucuses, at <http://www.gwu.edu/~action/2008/chrniowa08.html>. See also GWU's New Hampshire page at <http://www.gwu.edu/~action/2008/chrnnewh08.html>.

⁷² Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 YALE L. & POL'Y REV. 331, 341 (1996).

⁷³ WILLIAM G. MAYER AND ANDREW E. BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* 10 (Brookings Institution Press, 2004) (describing federal project disbursements shortly before the election year from the George H.W. Bush and Jimmy Carter administrations).

⁷⁴ Michael S. Steinberg, *A Critique of the Current Method of Scheduling Presidential Primary Elections and a Discussion of Potential Judicial Challenges*, 69 GEO. WASH. L. REV. 453, 457 (2001) ("To the extent that voters of a state may influence their prospective nominees, it seems that the voters of early primary states have a greater chance to influence their prospective nominees than do voters from later voting states.").

⁷⁵ WILLIAM G. MAYER AND ANDREW E. BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* 10 (Brookings Institution Press, 2004).

⁷⁶ WILLIAM G. MAYER AND ANDREW E. BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* 11 (Brookings Institution Press, 2004).

⁷⁷ Bruce E. Cain & Megan Mullin, *The Role of State Parties in Presidential Nominations*, in *THE PARTIES RESPOND: CHANGES IN AMERICAN PARTIES AND CAMPAIGNS* 110-111 (L. Sandy Maisel, ed.) (Westview, 2002).

⁷⁸ New York Times, Online Election Guide, at <http://politics.nytimes.com/election-guide/2008/primaries/democraticprimaries/index.html> (last visited Apr. 18, 2008).

increase their leverage on the process.”⁷⁹ States that move their contests earlier crave first-in-the-nation-like attention and influence, or, at a minimum, hope to hold more sway than other states. This trend will likely continue despite some pundits’ predictions that the drawn-out 2008 Democratic nomination contest could motivate some states in the future to seek “greater leverage on the process” by moving their contests later.⁸⁰ Campaigns in recent history have all ended early and the race for the 2008 Democratic nomination probably would have been effectively over on January 8th if Barack Obama had garnered support from an additional 3 percent of New Hampshire voters.⁸¹ In addition, many voters in post-Super Tuesday states had little effect on both parties’ nomination processes—Republicans simply endorsed the earlier states’ choice of John McCain and Democratic voters were limited to choosing between two candidates. Moving earlier remains a state’s surest bet to garner increased influence for a broad swath of its citizens.

Iowa and New Hampshire protect their status as the nation’s first true nomination contests by: (1) moving their contests even earlier; and (2) persuading candidates to not compete in earlier contests.⁸² The Iowa Code requires that caucuses are held “at least eight days earlier than the scheduled date for any meeting, caucus or primary which constitutes the first

⁷⁹ Lisa K. Parshall & Franco Mattei, *Challenging the Presidential Nomination Process: The Constitutionality of Front-Loading*, 26 *HAMLIN J. PUB. L. & POL’Y* 10 (2004). See also BARBARA NORRANDER, *SUPER TUESDAY: REGIONAL POLITICS AND PRESIDENTIAL PRIMARIES* (Univ. of Kentucky, 1992) (“One of the reasons behind the push [to move primaries earlier] is the increased influence and perceived importance of going early”).

⁸⁰ Chris Cillizza, *GOP Weighs Calendar Changes for 2012*, Washington Post’s The Fix Blog (Apr. 2, 2008 at 14:28 ET), available at http://blog.washingtonpost.com/thefix/2008/04/republicans_weigh_calendar_cha.html (noting that, in the future, states may wish to follow the lead of Indiana and North Carolina, who held late nomination contests).

⁸¹ Marcella Bombardieri, *Her Victory Puts Clinton Back on Track, For Now*, *BOSTON GLOBE*, Jan. 9, 2008, at A9.

⁸² Note, *Underenfranchisement: Black Voters and the Presidential Nomination Process*, 117 *HARV. L. REV.* 2318, 2323 (2004) (“Iowa and New Hampshire have maintained their primacy not because other states willingly defer, but because their legislatures have passed statutes requiring them to kick off the caucus and primary season. New Hampshire and Iowa risked party sanctions to hold their events first and thus avoid sharing the political spotlight with other states.”)

See, e.g., Emmett H. Buell, Jr., *First-in-the-Nation: Disputes over the Timing of Early Democratic Presidential Primaries and Caucuses in 1984 and 1988*, 4 *J.L. & POL.* 311, 317-339 (1987) (describing New Hampshire’s reaction to the Democratic National Committee’s attempt to schedule Vermont’s primary on the same day New Hampshire’s primary).

determining stage of the presidential nominating process in any other state.”⁸³ New Hampshire law also requires its primary to be held “on the Tuesday at least 7 days immediately preceding the date on which another state . . . hold[s] a similar election.”⁸⁴ In 2008, the Iowa caucuses were originally scheduled for January 14th and the New Hampshire primary was slated for January 23rd.⁸⁵ But when Michigan scheduled its primary on January 15th, Iowa and New Hampshire responded by moving to January 3rd and 8th, respectively.⁸⁶ New Hampshire even threatened to move its primary to early December, if necessary.⁸⁷ Iowa took a different approach in 1996 when Louisiana scheduled its Republican caucuses for February 6th, six days before Iowa’s.⁸⁸ Instead of moving to an earlier date, Iowa Republicans successfully de-legitimized the contest by persuading nearly all major candidates to not participate.⁸⁹ New Hampshire pursued a similar course when Delaware moved up its primary in 1996 and 2000.⁹⁰

This “bitter jostling among states at the head of the line” drives the frontloading trend.⁹¹ As the “head of the line” moves earlier, states with later contests are compelled to follow.⁹²

⁸³ Iowa Code Ann. § 43.4.

⁸⁴ N.H. Rev. Stat. Ann. § 653:9

⁸⁵ Peter Slevin, *Mich. Primary Move Splits Democrats*, WASHINGTON POST, Oct. 9, 2007 at A6.

⁸⁶ Mark Preston, *Iowa Caucus Move Could Scramble Primaries*, CNN Politics Blog (Oct. 17, 2007 19:11 EDT), available at <http://www.cnn.com/2007/POLITICS/10/17/primaries/>.

⁸⁷ Stephen Ohlemacher, *GOP Punishes Five Early Voting States*, ASSOCIATED PRESS, Nov. 8, 2007 (“New Hampshire Secretary of State William Gardner met a legal deadline this week that allows him to schedule the primary in early December if necessary. The state is required to start distributing absentee ballots bound for overseas 30 days before the election. ‘We have met the 30 days,’ he said. ‘That leaves early December open.’”).

⁸⁸ Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 YALE L. & POL’Y REV. 331, 354 (1996).

⁸⁹ *Louisiana GOP Moves Caucus Date Nine Days Before Iowa’s*, CNN All Politics Blog (Oct. 21, 1999 11:34 EDT); Bruce Alpert, *GOP Learns from ’96 La. Caucus Candidates Are Dropping By*, ASSOCIATED PRESS, July 27, 1998 at A1.

⁹⁰ Bruce E. Cain & Megan Mullin, *The Role of State Parties in Presidential Nominations*, in THE PARTIES RESPOND: CHANGES IN AMERICAN PARTIES AND CAMPAIGNS 110-112 (L. Sandy Maisel, ed.) (Westview, 2002).

⁹¹ Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 YALE L. & POL’Y REV. 331, 354 (1996).

⁹² Michael S. Steinberg, *A Critique of the Current Method of Scheduling Presidential Primary Elections and a Discussion of Potential Judicial Challenges*, 69 GEO. WASH. L. REV. 453, 458 (2001) (“The reason states continue to jockey to have early presidential primary elections is simple; they believe it increases their ability to influence who will be the major party nominees for President.”).

The cumulative effect is a presidential nomination process that starts earlier, grows more condensed, and produces a presumptive nominee at an earlier date than ever before.

2. Past Efforts to Combat Frontloading Have Failed Due to Political Pressure and Ill-Crafted Penalties and Incentives

National parties have repeatedly tried to reverse the frontloading trend by imposing schedules that would even-out states' influence on the presidential nomination process.⁹³ Before the 1980 election, the Democratic National Committee ("DNC") adopted Rule 10A, which required all states, except for Iowa and New Hampshire, to hold contests between mid-March and mid-June.⁹⁴ In 1984, the DNC significantly tightened this three-month "window" by requiring Iowa and New Hampshire to hold their contests just seven and 15 days, respectively, before the second week in March.⁹⁵ However, when Vermont scheduled a non-binding primary for early March, Iowa and New Hampshire scheduled still earlier dates in contravention of DNC rules.⁹⁶ The DNC threatened to not seat the Iowa and New Hampshire delegations at the national convention.⁹⁷ But this had little effect after the two states secured pledges of support from all but one presidential candidate.⁹⁸ These candidates, understandably, did not want to risk antagonizing Democrats in Iowa and New Hampshire by refusing to make the pledge.⁹⁹ Candidates

⁹³ See Thomas J. Schwarz & Joseph C. Spero, *Revision of the Presidential Primary System*, 10 N.Y.U. REV. L. & SOC. CHANGE 9, 16 (1981) (concluding that from 1911 until 1979, "every Congress . . . entertained proposals to regulate the presidential nominating process", but "no bill [had] ever passed either house of Congress.").

⁹⁴ WILLIAM G. MAYER AND ANDREW E. BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* 51 (Brookings Institution Press, 2004).

⁹⁵ WILLIAM G. MAYER AND ANDREW E. BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* 143 (Brookings Institution Press, 2004).

⁹⁶ Emmett H. Buell, Jr., *First-in-the-Nation: Disputes over the Timing of Early Democratic Presidential Primaries and Caucuses in 1984 and 1988*, 4 J.L. & POL. 311, 317 (1987).

⁹⁷ Lisa K. Parshall & Franco Mattei, *Challenging the Presidential Nomination Process: The Constitutionality of Front-Loading*, 26 HAMLINE J. PUB. L. & POL'Y 10 (2004).

⁹⁸ WILLIAM G. MAYER AND ANDREW E. BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* 143 (Brookings Institution Press, 2004).

⁹⁹ Note, *Underenfranchisement: Black Voters and the Presidential Nomination Process*, 117 HARV. L. REV. 2318, 2323 (2004).

campaigns heavily in Iowa and New Hampshire that year and the DNC ultimately relented by seating the two states' delegations.¹⁰⁰ In subsequent election cycles, Minnesota, South Dakota, and Delaware held their contests earlier than the DNC-prescribed "window" and simply accepted a cut in their convention delegations as a sanction.¹⁰¹ The DNC lacked an effective enforcement mechanism to hold states back. Because of this and because many Democrats felt that a frontloaded schedule would help their eventual nominee compete against George W. Bush,¹⁰² the DNC fully capitulated to state parties' wishes in 2004 by moving the beginning of the "window" up to the first week in February.¹⁰³

The Republican National Committee's ("RNC") first real attempt at reversing frontloading came in 1996, when it offered "bonus" delegates to states that held later contests closer to the national convention.¹⁰⁴ Despite these incentives, frontloading continued unabated because the delegate-based incentives were "simply not sufficient to outweigh all the benefits that states believed they would obtain by moving their primaries or caucuses to the front of the calendar."¹⁰⁵ In 2000, a rigid nomination-contest calendar called "the Delaware Plan" was proposed and even initially approved by the RNC. However, like Democrats four years later, the

¹⁰⁰ WILLIAM G. MAYER AND ANDREW E. BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* 143 (Brookings Institution Press, 2004).

¹⁰¹ Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 *YALE L. & POL'Y REV.* 331, 358-359 (1996).

¹⁰² Lonna Atkeson & Cherie Maestas, *Racing to the Front: The Effect of Frontloading on Presidential Primary Turnout* 9 (Paper presented at the annual meeting of the American Political Science Association, Philadelphia Marriott Hotel, Philadelphia, PA) (Aug 27, 2003) (stating that many Democrats wanted a frontloaded calendar so that Democrats could better challenge George W. Bush).

¹⁰³ Trevor Potter & Marianne Viray, *Barriers to Participation*, 36 *U. MICH. J.L. REFORM* 547, 560-562 (2003) (describing the 2004 primary-election calendar and stating that "national political parties have perpetuated [frontloading] by approving earlier and earlier primary election and caucus windows.").

¹⁰⁴ Finaly Lewis, *GOP Panel Oks Rewarding States That Hold Later Primaries*, *SAN DIEGO UNION-TRIBUNE*, Aug. 10, 1996 at A10.

¹⁰⁵ WILLIAM G. MAYER AND ANDREW E. BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* 115 (Brookings Institution Press, 2004). *See also* Lisa K. Parshall & Franco Mattei, *Challenging the Presidential Nomination Process: The Constitutionality of Front-Loading*, 26 *HAMLINE J. PUB. L. & POL'Y* 10 (2004) ("Demonstrating just how difficult it is to regulate presidential primary scheduling . . . states chose to hold their primaries earlier, even in the face of party incentives that would have increased the number of delegates the state could send to the convention.").

RNC ultimately abandoned the Delaware Plan because many Republicans felt that producing a nominee later in the year would give the opposition a competitive advantage.¹⁰⁶

These historical patterns of state ambition and impotent party governance continued in 2008. The RNC halved the number of convention delegates for states that held delegate-selection contests before February 5th—New Hampshire, Wyoming, South Carolina, Michigan, and Florida.¹⁰⁷ But these states had a significant impact on the nomination process, despite the RNC penalty.¹⁰⁸ They offered vital momentum-building victories rather than large delegate blocs. Winning New Hampshire sparked John McCain’s dramatic comeback despite it offering a smaller number of delegates than any other state.¹⁰⁹ And a Florida victory vaulted McCain to the GOP nomination despite yielding fewer delegates than ten other contests.¹¹⁰ Also in 2008, the DNC, as expected, initially stripped Michigan and Florida of delegates for scheduling primaries earlier than party rules permitted.¹¹¹ This penalty, by itself, was not expected to undermine the political influence of the Michigan and Florida Democratic contests.¹¹² In fact, Michigan and

¹⁰⁶ WILLIAM G. MAYER AND ANDREW E. BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* 147 (Brookings Institution Press, 2004). *See also* Craig Gilbert, *GOP Won't Change Presidential Primaries*, MILWAUKEE JOURNAL SENTINEL, July 29, 2000, at 8A.

¹⁰⁷ Stephen Ohlemacher, *GOP Punishes Five Early Voting States*, ASSOCIATED PRESS, Nov. 8, 2007.

¹⁰⁸ *See, e.g., McCain's Big S.C. Boost*, THE POST AND COURIER [Charleston, S.C.], Jan. 20, 2008, at A8; Scott Helman & Michael Levenson, *Romney Bounces Back in Mich.; Easily Beats McCain to Cloud GOP Picture Heading into S.C.*, BOSTON GLOBE, Jan. 16, 2008 at A1.

¹⁰⁹ Sarah Liebowitz, *GOP Rules Panel Enshrines Primary; Republicans Endorse NH's First-Place Role*, CONCORD MONITOR (N.H.), Apr. 5, 2008 (page number unavailable).

¹¹⁰ Carla Marinucci, *Florida Win Puts McCain Atop GOP Field*, SAN FRANCISCO CHRONICLE, Jan. 30, 2008 at A1.

¹¹¹ Mark Preston, *Democrats Vote to Strip Michigan of Its Delegates*, CNN Political Ticker Blog (Dec. 1, 2008 at 6:51 EST), available at <http://politicalticker.blogs.cnn.com/2007/12/01/democrats-vote-to-strip-michigan-of-its-delegates/> (reporting that the DNC stripped Michigan and Florida of delegates).

¹¹² Without support from the 2008 presidential candidates, the DNC would likely have capitulated to Florida’s and Michigan’s wishes because of otherwise overwhelming political pressure. Reid Wilson, *Primary Pain: Why Any Effort to Reform the Primary Process is Doomed*, THE NEW REPUBLIC, Nov. 5, 2007 (“The Democrats' efforts have gotten more attention, in large part because Florida's senior senator, Bill Nelson, has accused his party of disenfranchising the four million Democratic voters in his state, and is involved in a lawsuit forcing the DNC to seat the state's delegates. But the RNC has been hurt as well; just last week New Hampshire Senator Judd Gregg pulled out of a fundraiser with RNC Chairman Mike Duncan after Duncan expressed support for the sanctions.”).

Florida moved their primaries *expecting* to lose their delegates, at least temporarily.¹¹³ They were dealt a blow only when all of the major Democratic candidates pledged, under pressure from the four DNC-sanctioned early states (Iowa, New Hampshire, Nevada, and South Carolina), not to campaign in Michigan and Florida.¹¹⁴ Hillary Clinton left her name on Michigan's ballot and campaigned "under the radar" in Florida despite her earlier pledge. But she gained only a hollow victory in both states because she received no delegates (at first) and, more importantly, defeated no competitors.¹¹⁵

So despite the national political parties' efforts, frontloading has continued. If reformers hope to reverse frontloading, they should distill three ideas from past efforts' failures: (1) anti-frontloading mechanisms should be insulated from politics; (2) methods to combat states' frontloading motives deserve more attention; and (3) any new reform measure must do more than mete out delegate-based penalties and bonuses.

i. Anti-Frontloading Mechanisms Should Be Insulated from Politics

Any mechanism meant to combat frontloading should be insulated as much as possible from the political forces that encourage frontloading. The national parties have often been unwilling to ultimately impose penalties on states for scheduling early contests. This hesitancy was caused either by political pressure from powerful constituencies or by a desire to gain a

¹¹³ See, e.g., Peter Slevin, *Mich. Primary Move Splits Democrats*, WASHINGTON POST, Oct. 9, 2007 at A6 ("We are going January 15," Dingell, a Democratic national committeewoman and the wife of Rep. John D. Dingell (D-Mich.), declared after a fiery speech here Friday. "No matter what, people are going to pay attention to what happens on January 15 . . . even if it's a beauty contest.").

¹¹⁴ Perry Bacon, Jr., *Democrats to Avoid Fla., Mich.; Four Early-Primary States Get Candidates to Sign Pledge*, WASHINGTON POST, Sept. 2, 2007 at A4.

¹¹⁵ Mike Glover, *Hillary Wins No-Delegate Contest*, ASSOCIATED PRESS, Jan. 30, 2008; John Nichols, *Michigan Win is No Victory for Clinton*, MADISON CAPITAL TIMES, Jan. 17, 2008 at A10.

political advantage by producing an early nominee.¹¹⁶ Housing an anti-frontloading tool in a non-partisan or governmental body could ensure its more consistent application.¹¹⁷

ii. Methods to Combat States' Frontloading Motives Deserve More Attention

Reform efforts should focus less on the nomination-contest calendar configuration. The pros and cons of national, regional, time-zone, post-convention, and other calendar arrangements have been discussed at length. Scheduling a less-frontloaded calendar is important, to be sure. It attempts to level the aggregate influence imbalance among states.¹¹⁸ However, scheduling contests according to a later, evenly spaced timetable does nothing to alter any state's individual interest in moving a primary or caucus earlier.¹¹⁹ States still have an unencumbered motive to schedule an earlier contest in search of increased influence. For example, the Republican Party recently ratified a nomination-contest calendar for 2012 that permits Iowa, New Hampshire, and South Carolina to hold their contests only after the first Tuesday in February and allows other states to schedule contests only after the first Tuesday in March.¹²⁰ Although this plan, if kept intact, would create a less frontloaded calendar, it does not counteract any of the forces that have previously laid waste to the major parties' best-laid plans. States still have incentives to move their contests forward. Florida, Michigan, and others will still challenge first-in-the-nation states to boost the candidacy of a "favorite son" or to bolster their influence over the nomination

¹¹⁶ See, e.g., Lonna Atkeson & Cherie Maestas, *Racing to the Front: The Effect of Frontloading on Presidential Primary Turnout* 9 (Paper presented at the annual meeting of the American Political Science Association, Philadelphia Marriott Hotel, Philadelphia, PA) (Aug 27, 2003) (stating that many Democrats wanted a frontloaded calendar so that Democrats could better challenge George W. Bush).

¹¹⁷ It is acknowledged, however, that housing the anti-frontloading mechanism in a government body may raise constitutional issues if not structured in a non-compulsive manner. This issue is discussed below at greater length.

¹¹⁸ WILLIAM G. MAYER AND ANDREW E. BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* 129 (Brookings Institution Press, 2004).

¹¹⁹ WILLIAM G. MAYER AND ANDREW E. BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* 130 (Brookings Institution Press, 2004).

¹²⁰ Glen Johnson, *GOP Adopts Rules, Platform on Both Sides of McCain*, ASSOCIATED PRESS, Sept. 1, 2008.

process.¹²¹ The remaining states will still move their contests earlier in the year to try to make their voices heard before a nominee is effectively chosen for them. And the Republican Party will still either watch powerlessly as states frontload, or tacitly consent to states moving forward to aid a nominee facing an unchallenged incumbent in the general election. A primary calendar's particular configuration does nothing to stop the race to the front that inevitably follows *any* schedule's initial launch. Reformers should therefore devote more energy to crafting mechanisms that counteract each state's individual frontloading motives.

iii. Reformers Should Move Past Delegate-Based Penalties and Bonuses

To offset individual states' frontloading propensities, an anti-frontloading mechanism must move beyond delegate-based penalties and bonuses. National political parties have repeatedly tried to reverse frontloading by adding to and subtracting from states' delegate counts. But delegate penalties and bonuses have not and will not discourage states from scheduling early contests for two reasons. First, delegates themselves are relatively unimportant to states. As a former South Carolina Republican Party Chairman said, losing delegates is "nothing compared to 600,000 or 700,000 people getting their voices heard around the world."¹²² States do not frontload to accrue delegates. States move their contests earlier because they want what Iowa and New Hampshire have: clout.¹²³ And Iowa and New Hampshire have clout because they host the

¹²¹ See, e.g., Danny Reiter, *Will Maryland GOP Be First in the Nation?*, PolitickerMD.com Blog (Dec. 8, 2008 at 16:05 ET), available at <http://www.politickermd.com/danielreiter/4280/will-maryland-gop-be-first-nation> (reporting that Maryland's Republican Party has formed a committee to determine whether it can hold a "pre-primary caucus" before Iowa and New Hampshire).

¹²² Stephen Ohlemacher, *GOP Punishes Five Early Voting States*, ASSOCIATED PRESS, Nov. 8, 2007

¹²³ Lisa K. Parshall & Franco Mattei, *Challenging the Presidential Nomination Process: The Constitutionality of Front-Loading*, 26 HAMLIN J. PUB. L. & POL'Y 10-11 (2004).

nation's first fully competitive races, not because they sponsor large convention delegations.¹²⁴ Holding a consequential contest depends mostly on attracting major candidates to compete because early voting states cannot influence the nomination process if candidates refuse to participate in their contests. This principle is illustrated by some first-in-the-nation states' direct appeals to candidates not to participate in new early contests. Iowa, New Hampshire, Nevada, and South Carolina minimized the influence of Delaware, Florida, Louisiana, Michigan, and others by turning these states' contests into one- or two-candidate competitions that had little effect on the nomination process. These first-in-the-nation states use marginalization tactics to entrench frontloading, but these same tactics also offer a clue as to how to reverse frontloading. Any reform hoping to reverse frontloading should undermine a state's ability "to retain or increase their leverage on the process" by moving its contest earlier.¹²⁵ To take away states' motivation to frontload, contests that are held too early must become inconsequential one- or two-candidate competitions. Frontloading can only be reversed if candidates' incentives to participate in early contests change, as candidates—not delegates—are the proper lever to change states' incentives.¹²⁶

Second, delegate penalties and bonuses cannot reverse frontloading because they do not significantly alter candidates' incentives to participate in early contests. Delegates are not wholly unimportant—they remain a candidate's procedural path to victory. But experience has shown that reducing or eliminating a state's delegation is a blunt and ineffective tool for convincing

¹²⁴ Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 YALE L. & POL'Y REV. 331, 337 (1996).

¹²⁵ Lisa K. Parshall & Franco Mattei, *Challenging the Presidential Nomination Process: The Constitutionality of Front-Loading*, 26 HAMLIN J. PUB. L. & POL'Y 10 (2004). See also BARBARA NORRANDER, *SUPER TUESDAY: REGIONAL POLITICS AND PRESIDENTIAL PRIMARIES* (Univ. of Kentucky, 1992) ("One of the reasons behind the push [to move primaries earlier] is the increased influence and perceived importance of going early").

¹²⁶ Lisa K. Parshall & Franco Mattei, *Challenging the Presidential Nomination Process: The Constitutionality of Front-Loading*, 26 HAMLIN J. PUB. L. & POL'Y 10 (2004) ("Indeed, virtually all scheduling changes since 1980 have been driven by the states' attempt to gain clout, often in conjunction with the presidential candidates' search for a political edge over other competitors.").

candidates not to participate in early contests. As discussed above, candidates still converge on states that offer few delegates. A new, more capable mechanism must be found to deter candidates from competing in prematurely-held contests.

II. REFORMING THE PRESIDENTIAL PUBLIC FUNDING SYSTEM TO REVERSE FRONTLOADING

The presidential public funding system is a pool of public money accessible to presidential candidates and national political parties¹²⁷ that receives \$3 (\$6, if a joint tax filing) from the federal budget when an individual taxpayer marks a “check-off box” found on federal income-tax forms.¹²⁸ The System’s funds are disbursed for three separate purposes:¹²⁹ (1) a grant to political parties for their national nominating conventions;¹³⁰ (2) a grant to presidential nominees for general-election campaign expenses;¹³¹ and (3) a primary-election “matching funds” program for presidential candidates that provides \$1 of public money for every \$1 of private contribution money, up to \$250.¹³² To qualify for public funds, a candidate must agree to spending limits¹³³ and either establish that support for his candidacy exceeds a specified threshold (for the primary-election “matching funds”)¹³⁴ or receive his party’s nomination (for the general-election full public grant).¹³⁵ The System was created in 1974 as a response to Watergate and the Nixon Administration’s fundraising scandals.¹³⁶ Congress’s major purposes in

¹²⁷ 26 U.S.C. § 9001, et seq.; 11 C.F.R. § 9001, et seq.

¹²⁸ 26 U.S.C. §§ 6096, 9006.

¹²⁹ For a brief and helpful explanation of the public funding system, see THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21, PRESIDENTIAL PUBLIC FINANCING: REPAIRING THE SYSTEM CONFERENCE REPORT 5 (2005), available at <http://www.campaignlegalcenter.org/attachments/1614.pdf>.

¹³⁰ 26 U.S.C. § 9008.

¹³¹ 26 U.S.C. §§ 9004-9006.

¹³² 26 U.S.C. §§ 9031-9042.

¹³³ Spending limits for the primary election are found at 11 C.F.R. § 9035. For the general election, candidates may spend no more than the amount of their public grant. 11 C.F.R. § 9003.2(a)(1).

¹³⁴ 11 C.F.R. § 9033.4.

¹³⁵ 11 C.F.R. § 9003.1(a).

¹³⁶ See John Samples, *Dean’s Good Public Deed*, NATIONAL REVIEW, Nov. 12, 2003.

establishing the System were to: (1) reduce the influence of large-dollar contributions through spending limits, provision of public funds, and a matching-funds formula that motivated candidates to solicit small-dollar contributions; (2) increase competition among candidates by providing a funding “floor” of public money; and (3) expand citizen political participation through a matching-funds formula that motivates contributors to give small-dollar contributions.¹³⁷

The System has fallen on hard times. Major candidates no longer participate in the System, meaning that it cannot fulfill its three original purposes.¹³⁸ Efforts by campaign-finance reform groups have failed to produce any modernization measures. But not all is lost. The System can, as campaign-finance lawyer Robert Bauer put it, be “reworked and promoted as an opportunity to break with past thinking and to devise a new arrangement that reflects what has changed in Presidential politics and finance since the original system was first proposed and adopted over three decades ago.”¹³⁹ Simply raising the System’s benefits or spending limits are short-term solutions that would do nothing to address the underlying, problematic relationship between frontloading and rising campaign costs. It would also deliver fewer benefits to the public than the current System. As explained below, frontloading is a major obstacle to any System-reform effort’s success, so the System should be revamped to reverse frontloading in a way that fulfills the System’s original purposes: reducing big money’s influence, increasing competition, and promoting political participation. Frontloading helped break the System; now a

¹³⁷ See S. Rep. No. 93-689, pp. 1-10 (1974). THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21, PRESIDENTIAL PUBLIC FINANCING: REPAIRING THE SYSTEM CONFERENCE REPORT 5 (2005), available at <http://www.campaignlegalcenter.org/attachments/1614.pdf> (stating that the original purposes of the presidential public financing system were “limiting the influence of large contributions, increasing the opportunity for presidential candidates to compete, containing the spending arms race, reducing the burdens of fundraising, and increasing the importance of small donors in presidential elections.”).

¹³⁸ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 4 (2003), available at <http://www.cfinst.org/president/Participation.aspx>.

¹³⁹ Robert F. Bauer, *Presidential Public Funding Reform: Letting Go of “Watergate”*, More Soft Money Hard Law Blog (Mar. 13, 2008), at http://www.moresoftmoneyhardlaw.com/updates/election_administration.html?AID=1216.

reformed System can return the favor by altering states' incentives to frontload and by once again inducing lead candidates to accept public funding.¹⁴⁰

A. Frontloading Helped Break the Presidential Public Funding System and Makes the System Unfixable

At its most basic level, the presidential public funding system is a simple tradeoff for candidates. Candidates voluntarily give up their right to unlimited campaign spending in return for public funds.¹⁴¹ Recently, the System has broken down “on both sides of the core tradeoff . . . [as] political dangers for candidates who stay in the system have gone up and the benefits of staying in have gone down.”¹⁴² Because of this altered calculus, most major candidates no longer consider the tradeoff an equitable exchange and therefore decide not to participate in the System.¹⁴³ If major candidates do not participate, the System obviously cannot accomplish its stated purposes, including reducing the influence of private funds on the presidential race and increasing competition among presidential candidates.¹⁴⁴ Some commentators point to

¹⁴⁰ One non-profit organization, Public Campaign, has proposed using public financing as a way to shorten the campaign season. But Public Campaign's proposal differs greatly from the proposal laid out in this article. Public Campaign attempts, as a minor part of its proposal, to impose an election time line on candidates and jurisdictions (i.e. declaring when primary-election campaigns may begin). Because this imposition is paired with spending limits, it is unlikely to attract candidates to the system without offering large sums of money. It is also uncertain whether the federal government can impose a primary schedule on states. *See* Public Campaign, Annotate Model Legislation for Clean Money/Clean Elections Reform § 102(d) (2001), available at <http://www.publiccampaign.org/modelbill>.

¹⁴¹ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 6 (2003), available at <http://www.cfinst.org/president/Participation.aspx>.

¹⁴² CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 6 (2003), available at <http://www.cfinst.org/president/Participation.aspx>.

¹⁴³ COMMITTEE FOR ECONOMIC DEVELOPMENT, BUILDING ON REFORM: A BUSINESS PROPOSAL TO STRENGTHEN ELECTION FINANCE 19 (2005), available at http://www.ced.org/docs/report/report_cfr2005.pdf (“The major problem with the current system is that the tradeoff that forms the basis for the program—public money in exchange for agreeing to spending limits—is no longer regarded as an equitable exchange.”); CAMPAIGN FINANCE INSTITUTE, SO THE VOTERS MAY CHOOSE: REVIVING THE PRESIDENTIAL MATCHING FUND SYSTEM 1 (2005), available at <http://www.cfinst.org/president/pdf/VotersChoose.pdf> (“Since 1974 the federal government has matched the first \$250 that candidates raise from individual donors if the candidates agree, among other things, to limit their spending. But for many candidates, this tradeoff is no longer worthwhile.”).

¹⁴⁴ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 4 (2003), available at <http://www.cfinst.org/president/Participation.aspx>.

unrealistically low spending limits¹⁴⁵ or inadequate public funding¹⁴⁶ as the reason for the System's breakdown. Their diagnosis has merit, particularly in the wake of Barack Obama's emergence in 2008 as history's most productive fundraiser. However, they fail to adequately address or examine another important cause of dysfunction, which lies deeper in the philosophy and assumptions built into the System: frontloading.¹⁴⁷

The System was designed for the elections of the 1970s, which, as this Article has shown, were later-starting and less-condensed affairs.¹⁴⁸ Early on in the System's history, major candidates found the money-for-limits trade to be worthwhile and the System functioned as intended.¹⁴⁹ But in each subsequent election cycle, campaigning started earlier, causing candidates to spend more to compete for their party's nomination.¹⁵⁰ This left nominees with an ever longer period between securing their party's nomination and their party's national

¹⁴⁵ Robert D. Lenhard, *A \$3 Vote for Competitive Elections*, WASHINGTON POST, Mar. 8, 2008, at A15 (“What's behind the current crisis? Spending caps, which are a condition of receiving public financing. This year, those caps come to about \$50 million in the primaries and \$85 million in the general election.”); Norman J. Ornstein, *Presidential Campaign Financing is Broken, But We Can Fix It*, ROLL CALL, Dec. 7, 2005 (page number unavailable online) (stating that the System is broken because “the system, established in 1976 after the Supreme Court's *Buckley v. Valeo* decision, has not adjusted the amounts for inflation since.”); CAMPAIGN FINANCE INSTITUTE, *SO THE VOTERS MAY CHOOSE: REVIVING THE PRESIDENTIAL MATCHING FUND SYSTEM 5* (2005), available at <http://www.cfinst.org/president/pdf/VotersChoose.pdf> (noting that the “general perception is that unrealistically low spending limits are the main force behind the current system's problems”); Press Release, Public Citizen, *Much-Needed Legislation Would Overhaul the Financing of Presidential Campaigns* (Dec. 5, 2007), available at http://www.citizen.org/pressroom/print_release.cfm?ID=2559 (quoting Craig Holman as saying that “The presidential public financing program of 1976 has not kept up with the times The spending ceilings are unrealistically low and don't keep pace with what is being spent.”).

¹⁴⁶ Darryl R. Wold, *The Federal Experience: Paradigm or Paradox*, 34 *Ariz. St. L.J.* 1161, 1173-1174 (2002) (noting the low level of public funding as compared to commercial advertisement spending).

¹⁴⁷ THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21, *PRESIDENTIAL PUBLIC FINANCING: REPAIRING THE SYSTEM CONFERENCE REPORT 1* (2005), available at <http://www.campaignlegalcenter.org/attachments/1614.pdf> (“The current presidential campaign cycle is heavily ‘frontloaded,’ requiring candidates to spend more money much earlier than at the time the public financing system was enacted.”)

¹⁴⁸ CAMPAIGN FINANCE INSTITUTE, *PARTICIPATION, COMPETITION, ENGAGEMENT 4* (2003), available at <http://www.cfinst.org/president/Participation.aspx>.

¹⁴⁹ CAMPAIGN FINANCE INSTITUTE, *PARTICIPATION, COMPETITION, ENGAGEMENT 4* (2003), available at <http://www.cfinst.org/president/Participation.aspx>.

¹⁵⁰ COMMITTEE FOR ECONOMIC DEVELOPMENT, *BUILDING ON REFORM: A BUSINESS PROPOSAL TO STRENGTHEN ELECTION FINANCE 29* (2005), available at http://www.ced.org/docs/report/report_cfr2005.pdf.

convention, when public funding for the general election was disbursed.¹⁵¹ Public funding thus made up progressively less of the total amount required to win a party nomination and compete in the pre-general election period.¹⁵² Spending limits also became more restrictive as the time period to which they applied increased drastically.¹⁵³ Robert Dole, the 1996 Republican Party nominee, was particularly disadvantaged by his participation in the System. Dole clinched the GOP nomination on March 26, 1996 after running against self-financed candidate Steve Forbes (who was not bound by the System's spending limits) in a heavily frontloaded schedule.¹⁵⁴ Dole used up essentially his entire spending limit to gain the nomination, meaning that he could not spend more before he was officially nominated at that year's Republican National Convention.¹⁵⁵ On the other hand, incumbent Bill Clinton ran unopposed and spent very little to gain the 1996 Democratic nomination, meaning that he could still spend 17 times more than Dole without exceeding the System's cap.¹⁵⁶ Dole could only rely on the Republican Party's "soft money" ads to counter Clinton.¹⁵⁷ The 2000 campaign started even earlier and was more frontloaded than

¹⁵¹ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 6 (2003), available at <http://www.cfinst.org/president/Participation.aspx> ("Past nominees could turn almost seamlessly from the nomination, to the convention, and then to the publicly funded general election."); Trevor Potter & Marianne Viray, *Barriers to Participation*, 36 U. MICH. J.L. REFORM 547, 560-562 (2003) (stating that "Frontloading also extends the general election campaign season for months").

¹⁵² CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 4 (2003), available at <http://www.cfinst.org/president/Participation.aspx> ("In contrast, the relative value of the rewards has declined. The amount of public matching funds has not been changed even as the cost of campaigning, and size of the top contribution, have gone up.").

¹⁵³ COMMITTEE FOR ECONOMIC DEVELOPMENT, BUILDING ON REFORM: A BUSINESS PROPOSAL TO STRENGTHEN ELECTION FINANCE 29 (2005), available at http://www.ced.org/docs/report/report_cfr2005.pdf ("Candidates who have won the nomination in competitive primary races have run out of "spending room" as early as the end of April or middle of March. In short, they have essentially disbursed the amounts they were allowed to spend three or four months before the party nominating conventions.").

¹⁵⁴ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 6 (2003), available at <http://www.cfinst.org/president/Participation.aspx>.

¹⁵⁵ *As Convention Nears, Dole Campaign Funds Run Low*, USA TODAY, July 21, 1996 at 8A.

¹⁵⁶ David S. Broder, Ruth Marcus & Barbara J. Saffir, *Campaigns Release Spending Reports*, WASHINGTON POST, July 21, 1996 at A22.

¹⁵⁷ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 6 (2003), available at <http://www.cfinst.org/president/Participation.aspx>.

1996, making public funds less beneficial and spending limits more onerous.¹⁵⁸ This, along with Dole's experience in 1996, shaped George W. Bush's decision in 2000 to forgo public funding during the primary-election period.¹⁵⁹ Bush was the first major-party nominee to do so.¹⁶⁰ Without hope of benefiting from newly banned¹⁶¹ party "soft money" ads in 2004, Howard Dean and John Kerry refused to participate in the System when faced with a free-spending incumbent, George W. Bush, and another endless, frontloaded primary-election season.¹⁶² The System's spending limits and public outlays, designed for a short time period, now govern a candidate for 21 months of campaigning. Unsurprisingly, only one major 2008 presidential contender—John Edwards—participated in the System during the primary election.¹⁶³ Even more than past years, the frontloaded 2008 nomination-contest schedule "raise[d] the pain of [the System's] spending limits" and forced System participants to ration public funds over a longer period.¹⁶⁴

Participating in the System during the primary-election period is thus no longer in the major

¹⁵⁸ COMMITTEE FOR ECONOMIC DEVELOPMENT, BUILDING ON REFORM: A BUSINESS PROPOSAL TO STRENGTHEN ELECTION FINANCE 23 (2005), available at http://www.ced.org/docs/report/report_cfr2005.pdf (discussing the frontloaded 2004 primary-election season).

¹⁵⁹ Mike Glover, *Bush Says He'll Forgo Matching Funds*, ASSOCIATED PRESS, July 15, 1999 ("I'm mindful of what happened in 1996 and I'm not going to let it happen to me," the Texas governor said.).

¹⁶⁰ Alan C. Miller & T. Christian Miller, *Campaign Spending*, MILWAUKEE JOURNAL SENTINEL, Dec. 10, 2000 at 5A.

¹⁶¹ Some claim that the Bipartisan Campaign Reform Act of 2002's increased contribution limit and soft-money ban contributed to the System's collapse. *But see* Thomas E. Mann, *A Collapse of the Campaign Finance Regime?*, THE FORUM, Vol. 6, Issue 1, Art. 1 (2008), available at http://www.brookings.edu/articles/2008/04_campaignfinance_mann.aspx ("Some have even argued that McCain-Feingold is responsible for the collapse of the presidential public financing system by virtue of its doubling and indexing of individual contribution limits. That is preposterous. Many aspects of the public grant program - state and national spending limits, the size of the match, the timing of payments - fell out of date well before the new law was enacted. George W. Bush successfully opted out of the public match program in 2000 and would have done the same in 2004 without any change in contribution limits. The same is true for Dean and Kerry in 2004 and the major presidential candidates in 2008.").

¹⁶² Thomas B. Edsall & Dan Balz, *Kerry to Forgo Public Campaign Financing*, WASHINGTON POST, Nov. 16, 2003 at A12.

¹⁶³ Kenneth Doyle, *FEC Owes \$7.4 Million in Matching Funds Unpaid Due to Lack of Commission Quorum*, BNA Money & Politics Report, Apr. 17, 2008.

¹⁶⁴ Robert F. Bauer, *Misplaced Anguish Over Presidential Public Funding, More Soft Money Hard Law Blog* (Apr. 14, 2005), at http://www.moresoftmoneyhardlaw.com/moresoftmoneyhardlaw/updates/other_related_legal_developments.html?AID=187.

candidates' interests.¹⁶⁵ In fact, opting into the System—once a sign of strength—is now a sign of weakness because only a candidate desperate for funding would accept the heavy burden that accompanies the System's meager benefits.¹⁶⁶ Because top-tier candidates and even middle-tier candidates aspire to avoid participation, the current System has little impact on presidential campaign finance.¹⁶⁷

In the face of a broken System, reformers have offered numerous proposals. The difficulty is, as campaign-finance expert Don Simon put it:

On the one hand, it's imperative to make the system sufficiently attractive to candidates, including and perhaps especially, the top-tier candidates, so that they will voluntarily choose to opt into the system On the other hand, you can't make the system so attractive that it either becomes insupportably expensive as a practical matter, or it imposes so few constraints on the candidates that it fails to achieve its core public policy goals, such as encouraging small contributions or restraining the overall cost of the presidential campaigns.¹⁶⁸

Frontloading has made balancing these conflicting priorities difficult, if not impossible. Making the System a “good deal” for major candidates means upping the System's benefits (e.g., the amount of public funds a candidate may receive), and/or lowering the System's costs (e.g., spending limits and other conditions attached to public money).¹⁶⁹ But because frontloading increases campaign costs and lengthens the pre-convention campaign season to such an extent,

¹⁶⁵ Anthony Corrado, *Public Funding of Presidential Campaigns*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 181 (Brookings, 2005) (“The strategic problems created by the current rules are encouraging candidates, especially those most likely to win their party's nomination, to rethink the value of public funding.”); Michael J. Malbin, *A Public Funding System in Jeopardy: Lessons from the Presidential Nomination Contest of 2004*, in THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 220 (Michael J. Malbin, ed.) (Rowman & Littlefield, 2006) (“[T]he general opinion among political professionals has been that no serious candidate in the future can afford to accept public funding unless the system is changed.”).

¹⁶⁶ THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21, PRESIDENTIAL PUBLIC FINANCING: REPAIRING THE SYSTEM CONFERENCE REPORT 16 (2005), available at <http://www.campaignlegalcenter.org/attachments/1614.pdf>; Michael Malbin, Are Matching Funds Only ‘For Losers’?, 7-8 (Paper prepared for the Annual Meeting of the American Political Science Association, September 2-5, 2004).

¹⁶⁷ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 4 (2003), available at <http://www.cfinst.org/president/Participation.aspx>.

¹⁶⁸ THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21, PRESIDENTIAL PUBLIC FINANCING: REPAIRING THE SYSTEM CONFERENCE REPORT 35 (2005), available at <http://www.campaignlegalcenter.org/attachments/1614.pdf>.

¹⁶⁹ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 7 (2003), available at <http://www.cfinst.org/president/Participation.aspx>.

reformers trying to make the primary election part of the System a “good deal” for candidates must advocate a new System that would be unrealistically expensive, attach few “strings” to receiving public money, or worse, give away more public funds *and* extract fewer concessions from candidates than the current System.¹⁷⁰ Relenting to the System’s new cost-benefit calculus rather than restoring a less frontloaded nomination calendar would be a mistake. As long as frontloading exists, the System’s money-with-conditions approach must be substantially diluted or abandoned.

B. States’ Incentives to Frontload Would Be Changed by Delaying the System’s Matchable-Contribution and Funds-Disbursement Dates

Currently, during the pre-convention period, a candidate who participates in the System may receive a public-funds match of each eligible private contribution up to \$250.¹⁷¹ To qualify as “matchable”, a private contribution must “be a gift of money made . . . [by] an individual” received by a candidate “on or after January 1 of the year immediately preceding the calendar year of the Presidential election.”¹⁷² For example, a contribution received by John Edwards’ campaign committee in 2006 would not have been “matchable” because it would have preceded the January 1, 2007 “matchable” contribution date. Candidates submit proof of their “matchable” contributions for certification to the Federal Election Commission (“FEC”) and slowly accrue an

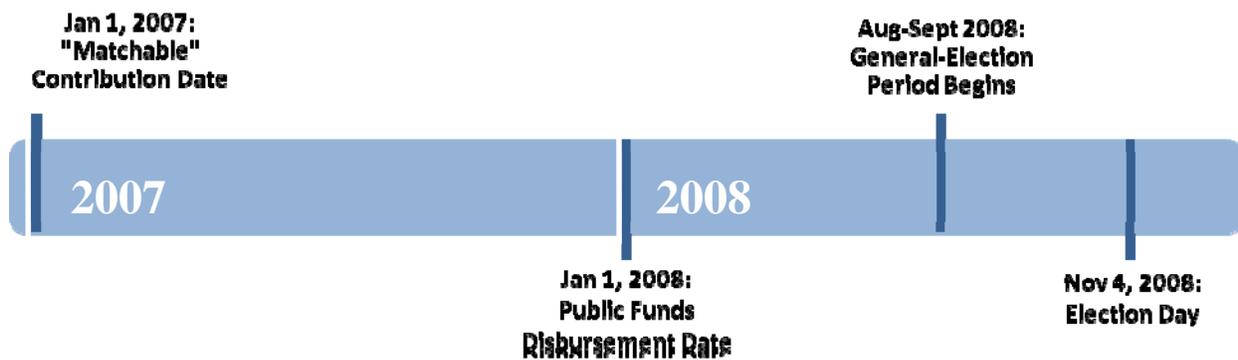
¹⁷⁰ See THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21, PRESIDENTIAL PUBLIC FINANCING: REPAIRING THE SYSTEM CONFERENCE REPORT 25 (2005), available at <http://www.campaignlegalcenter.org/attachments/1614.pdf> (quoting pollster Celinda Lake “The real motivation here for the public is going to be limiting spending. Now, that’s an interesting contradiction, because if we think about the number of the reforms we wanted — we wanted to [increase the public financing matching rate], you want to give [candidates who stay in the system] flexibility — the dialogue of those reforms suggest the removal of limits. The public wants to add limits.”); Wayne P. Steger, Andrew J. Dowdle & Randall E. Adkins, *The New Hampshire Effect in Presidential Nominations*, 57 POL. RES. Q. 375, 375 (2004) (“The more compressed primary schedule and increasing campaign costs make the competition for resources during the pre-primary period more important to winning presidential nominations.”).

¹⁷¹ 11 C.F.R. § 9034.2(a)(2).

¹⁷² 11 C.F.R. § 9034.2(a).

increasingly large total of public-funds matches over the pre-election year.¹⁷³ Disbursement of these public matching funds is scheduled on January 1st of the presidential election year.¹⁷⁴ Candidates often secure private loans in advance of January 1st by using the FEC’s promise of public matching funds as collateral.¹⁷⁵ In 2007, for example, John Edwards’ campaign took out an \$8.8 million loan immediately upon receiving the FEC’s certification of matching funds for the same amount.¹⁷⁶

*Figure A: Current Presidential Public Funding System—Significant Dates*¹⁷⁷



Proposals for System reform nearly all advocate moving the FEC’s disbursement date earlier than January of the presidential election year in order to make public funding more attractive to candidates.¹⁷⁸ A reform package publicized in 2005 and written by then-FEC

¹⁷³ 11 C.F.R. § 9036.

¹⁷⁴ 11 C.F.R. §§ 9036.1(c)(3), 9036.2(c).

¹⁷⁵ See 11 C.F.R. § 100.82 (describing the process by which a committee may pledge its future receipt of funds).

¹⁷⁶ Kenneth Vogel, *Seven Candidates to Receive Matching Funds*, The Politico Blog (Dec. 20, 2007 13:03 ET), at <http://www.politico.com/news/stories/1207/7494.html>.

¹⁷⁷ Please note that the public-funds disbursement date was scheduled for January 1, 2008 but did not occur until later in the year because of a funding shortfall.

¹⁷⁸ THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21, PRESIDENTIAL PUBLIC FINANCING: REPAIRING THE SYSTEM CONFERENCE REPORT 35 (2005), available at <http://www.campaignlegalcenter.org/attachments/1614.pdf> (quoting campaign finance expert Don Simon: “I think, are quite non-controversial. For instance, as several people have mentioned, one problem with the current system is that because the primary season has become so front-loaded, the public funding, the actual distribution of public funds now comes too late — not until January of the election year. It’s simple, and I think not controversial at all, to move up the initial payment of funds to eligible candidates to, say, July of the year before the election, a position that is taken, I think, in all of the proposals that have been offered.”).

Commissioners Michael Toner and Scott Thomas would move the disbursement date to July 1st of the year before the presidential election.¹⁷⁹ The Committee for Economic Development¹⁸⁰ and the Campaign Legal Center¹⁸¹ proposed the same date change. While moving the disbursement date earlier would relieve candidates of one of the System’s burdens, it would only exacerbate the effects of frontloading and hasten the newly reformed System’s demise. Lifting timetable restrictions like the disbursement date “promote[s] a greater lengthening of presidential campaigns by encouraging candidates to start raising money well in advance of the beginning of the election year.”¹⁸² Indeed, providing public funds to candidates “who start early means late entrants have to raise twice as much to catch up to their rivals[,] . . . increas[ing] the pressure on all potential candidates to decide at a very early date whether to mount a presidential campaign.”¹⁸³

Instead, the System’s entire timetable should be moved later in the election cycle. If left unregulated, competitive pressures between candidates and between states create a frontloaded presidential nomination process.¹⁸⁴ To snatch prize consultants, grassroots organizers, and fundraisers before their opponents, candidates start full-scale campaign planning increasingly early.¹⁸⁵ Similarly, states move their primaries earlier to exercise greater influence over the nomination process and to receive more candidate attention at the expense of their sister states.

¹⁷⁹ Thomas B. Edsall, *Top FEC Officials Urge Higher Spending Limit*, WASHINGTON POST, Feb. 10, 2005, at A5.

¹⁸⁰ COMMITTEE FOR ECONOMIC DEVELOPMENT, BUILDING ON REFORM: A BUSINESS PROPOSAL TO STRENGTHEN ELECTION FINANCE 34 (2005), available at http://www.ced.org/docs/report/report_cfr2005.pdf.

¹⁸¹ Meredith McGehee, *Repairing the Presidential Public Financing System*, Campaign Legal Center Blog (Sept. 8, 2006), at http://www.clcblog.org/blog_item-57.html.

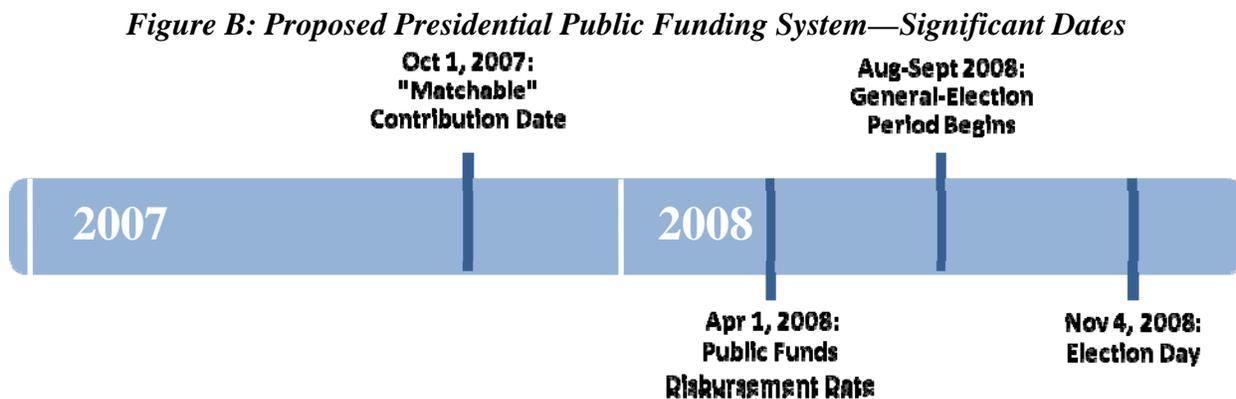
¹⁸² COMMITTEE FOR ECONOMIC DEVELOPMENT, BUILDING ON REFORM: A BUSINESS PROPOSAL TO STRENGTHEN ELECTION FINANCE 34 (2005), available at http://www.ced.org/docs/report/report_cfr2005.pdf.

¹⁸³ Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 YALE L. & POL’Y REV. 331, 353 (1996).

¹⁸⁴ WILLIAM G. MAYER AND ANDREW E. BUSCH, THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS 49 (Brookings Institution Press, 2004).

¹⁸⁵ For example, Governor Mitt Romney reportedly sent Steve Schmidt, who would later join John McCain’s presidential campaign, an antique chair in early 2007 to represent a “seat at Romney’s table.” Lois Romano, *The Silver Bullet*, THE WASHINGTON POST at C1, Aug. 21, 2008.

There is “no countervailing force encouraging, or even permitting, credible new candidates to enter the race at later stages” and influence-seeking states to schedule later nomination contests.¹⁸⁶ But the System can be such a “countervailing force” if its “matchable” contribution and public-funds disbursement dates are delayed.



Delaying the System’s timetable is an attractive method to reverse frontloading because it does not repeat the mistakes of past anti-frontloading efforts discussed in the previous Section.¹⁸⁷ First, a System-based solution would be relatively insulated from pro-frontloading political pressures because the System is administered by the FEC, an independent and bi-partisan federal agency. Second, as explained below, it would focus on preventing states’ frontloading from undermining a nomination calendar rather than fixate on establishing a particular nomination schedule. The System could thus be utilized in tandem with many different nomination-contest

¹⁸⁶ Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 *YALE L. & POL’Y REV.* 331, 353 (1996).

¹⁸⁷ As an additional consideration, the nomination-process and System reform efforts both need more congressional and public support. Members of Congress have proposed more than 300 legislative measures to revamp the presidential nomination process; each failed to pass. Similarly, the System’s proponents have thus far been unable to drum-up enough support to modernize it. Norman J. Ornstein, *Presidential Campaign Financing is Broken, But We Can Fix It*, *ROLL CALL*, Dec. 7, 2005 (page number unavailable online) (noting that the case for reforming the presidential public funding system “is strong—but at this point, the prognosis for action is dim. The party leaders have not focused on this at all.”). Major efforts by reform groups in 2003 and 2005 both produced no tangible legislative progress. If nomination-process and System reform advocates joined forces to promote a single reform package, the resulting synergy could produce the necessary political support to make progress on both fronts.

calendar configurations or with no set schedule at all.¹⁸⁸ Third, unlike past anti-frontloading measures that concentrated on delegate-based penalties and bonuses, delaying the System’s “matchable” contribution and public-funds disbursement dates would shape candidates’ incentives to begin their campaigns and participate in early contests as described below.

1. Moving the “Matchable” Contribution Date from January 1st to October 1st

The “matchable” contribution date should be moved from January 1st to October 1st of the year before the election.¹⁸⁹ Under this proposal, the System would only match money contributed to a candidate by an individual who gives to a candidate (including, to a candidate's "leadership PAC", or to any entity controlled, maintained, or established by a candidate) *for the first time* in the election cycle on or after October 1st. To illustrate, if this reform would have been in effect during the 2008 election cycle, the System would *not* have matched the following contributions given to a presidential candidate’s authorized committee:

- A \$50 contribution given on September 30, 2007;
- A \$50 contribution given on October 1, 2007 if the contributor gave \$5 on September 30, 2007; and
- A \$50 contribution given on October 1, 2007 if the contributor had given \$5 to the presidential candidate’s leadership PAC on January 1, 2007.

¹⁸⁸ Several regional primary proposals exist. Congress has not yet acted on setting a regional primary schedule because of some constitutional concerns. See George F. Will, *Messy, But Not a Mess*, Newsweek, Nov. 5, 2007 (page number not listed online), available at <http://www.newsweek.com/id/62305>; Reid Wilson, *Primary Pain: Why Any Effort to Reform the Primary Process is Doomed*, THE NEW REPUBLIC, Nov. 5, 2007 (“The Supreme Court has taken up several cases in the past decade in which political parties have sued to maintain their control over primary elections. In *California Democratic Party v. Jones*, a 2000 case that tested the constitutionality of the Golden State's so-called "blanket" primary, the Court supported the Party's contention that allowing any voter to cast a ballot in any party's primary violated the party's First Amendment right to free association.”). Regional primaries are very attractive solutions to frontloading if they can work. Karl Rove, *The Endless Campaign*, WALL STREET J. Dec. 20, 2007, at A17 (“If primaries and caucuses were spread out with weeks, not days and hours, between them, then voters in more states could learn more about the candidates. Candidates would have more time to come back from an early loss to a contender who was briefly the flavor of the moment in one state.”).

¹⁸⁹ The Committee for Economic Development recognized that the “matchable” funds date can have an effect on the length of campaigns, though it said that it should remain at January 1st of the pre-election year. COMMITTEE FOR ECONOMIC DEVELOPMENT, BUILDING ON REFORM: A BUSINESS PROPOSAL TO STRENGTHEN ELECTION FINANCE 34 (2005), available at http://www.ced.org/docs/report/report_cfr2005.pdf.

The System *would*, however, have matched contributions given on or after October 1, 2007 if the contributor had not previously given to the candidate or to an entity tied to the candidate.

Delaying the System's matchable-contribution date would reverse frontloading by acting as a "countervailing force encouraging . . . credible new candidates to enter the race at later stages."¹⁹⁰ Late-starting candidates would receive a public-funds "booster" for every contribution received on or after the October 1st "matchable" contribution date. Candidates could, of course, begin a campaign and raise money earlier than October 1st. But for every contribution raised before October 1st of an election year for a campaign entity or leadership PAC, the candidate would leave money on the table. Contributions from individuals who were tapped for contributions before October 1st would not be matched. As long as the System offers a significant public-dollar match amount (a proposition discussed below), candidates would have a strong disincentive to begin large-scale fundraising for any entity too far in advance of October 1st. Without considerable funds, candidates would probably not start major campaign activities long before October 1st. This would encourage a far later campaign starting date than the 2008 election cycle, which began before November 2006.

2. Moving the Public-Funds Disbursement Date from January 1st to April 1st

Public matching funds should be disbursed on April 1st of the election year rather than on January 1st. Presently, the January 1st public-funds disbursement date does not influence the nomination contest calendar. January 1st falls before even the heavily frontloaded first-in-the-nation contests and "little purpose is served by restricting the release of payments" because

¹⁹⁰ Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 *YALE L. & POL'Y REV.* 331, 353 (1996).

candidates are free to take out private loans before the disbursement date using future public funds as collateral.¹⁹¹ The disbursement date should be delayed four months. And more importantly, the System’s private-loan rules should be altered so that candidates may not use, and banks may not accept, public matching funds as collateral to secure loans before the April 1st disbursement date. To ensure this prohibition’s integrity, candidates should also be barred from using public matching funds to repay loans received before April 1st. These provisions will leave each candidate who participates in the System an untapped pool of funds waiting until April 1st of the presidential election year.

Delaying the System’s public-funds disbursement date in this manner would reverse frontloading by acting as a “countervailing force” that encourages states to schedule nomination contests later. As discussed, states move their nomination contests earlier in the year “to retain or increase their leverage on the [presidential nomination] process”—leverage that depends on candidates campaigning in the state.¹⁹² Although states would remain free to hold influential primaries earlier than April 1st since candidates could use private contributions to fund campaign activities in those states, an April 1st disbursement would delay the start of the nomination calendar because: (1) most candidates would be reluctant to compete at less-than-full financial strength in too many pre-April 1st states; and (2) an influx of money on April 1st would make it more likely that a candidate could rebound from an initial loss and compete more effectively in post-April 1st states. Scheduling a primary or caucus before April 1st could imperil a state’s quest for influence if major candidates skip the contest or if a post-April 1st state contest is seen

¹⁹¹ COMMITTEE FOR ECONOMIC DEVELOPMENT, BUILDING ON REFORM: A BUSINESS PROPOSAL TO STRENGTHEN ELECTION FINANCE 34 (2005), available at http://www.ced.org/docs/report/report_cfr2005.pdf.

¹⁹² Lisa K. Parshall & Franco Mattei, *Challenging the Presidential Nomination Process: The Constitutionality of Front-Loading*, 26 HAMLINE J. PUB. L. & POL’Y 10 (2004). See also BARBARA NORRANDER, SUPER TUESDAY: REGIONAL POLITICS AND PRESIDENTIAL PRIMARIES (Univ. of Kentucky, 1992) (“One of the reasons behind the push [to move primaries earlier] is the increased influence and perceived importance of going early”).

as a truer measure of candidate competition. For example, it is unlikely that Iowa caucuses held on January 3rd (as they were in 2008) would be influential on the nomination process when a major payout of public money for major candidates was still four months away. Candidates might skip the expensive caucuses, not wishing to spend so much of their precious pre-April 1st private money on one contest. Even more likely, the January caucuses would be seen as a premature prelude to the consequential nomination contests held around April 1st because the Iowa winner would still face several challengers with millions of dollars “in the bank.” First-in-the-nation states would thus be inclined to schedule their nomination contests on or around April 1st.

An April 1st disbursement date would also cause at least some states to schedule their contests in a more evenly distributed pattern and not “load” toward the front of the nomination calendar. Under the current nomination calendar, candidates who are unsuccessful in the first-in-the-nation contests are faced with the daunting task of surviving nearly nine months with scarce human and financial resources. As a result, these low-finishers withdraw from the race quickly.¹⁹³ States respond to this by scheduling ever earlier nomination contests to try to make their voices heard before the field of candidates is so drastically narrowed. But if a later public-funds disbursement date successfully motivated first-in-the-nation states to schedule contests around or after April 1st, candidates would be more likely to stay in the race longer.¹⁹⁴ Even candidates who did poorly in the first-in-the-nation contests would only need to survive a maximum of five months—much less time than a candidate forced to limp through the current

¹⁹³ Lisa K. Parshall & Franco Mattei, *Challenging the Presidential Nomination Process: The Constitutionality of Front-Loading*, 26 *HAMLIN J. PUB. L. & POL'Y* 1, 6-7 (2004).

¹⁹⁴ The goal of reform would thus be to “turn back the clock” to a 1960s-like nomination-contest calendar. Primaries started around March, candidates endured deeper into the summer before withdrawing, and states’ contests were spread more evenly throughout the nomination process. WILLIAM G. MAYER AND ANDREW E. BUSCH, *THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS* 4 (Brookings Institution Press, 2004).

frontloaded nomination-contest calendar. And candidates would receive a significant influx of public money at the beginning of this five-month period, giving at least some a better chance to weather the first wave of contests and survive until the major parties' national nominating conventions. Under this scenario, decisive contests could very well come in the middle or at the end of the presidential nomination calendar. This is not to say that early contests would no longer be important. An April 1st disbursement simply wipes away states' previous assurances that an earlier contest is definitively more consequential. States would therefore likely schedule their nomination contests in a more evenly distributed manner to capture the most influential position available.

C. Frontloading Would Be Reversed By Once Again Inducing Candidates to Participate in the System

Candidate participation in the System is essential to reversing frontloading. The System's delayed matchable-contribution and public-funds disbursement dates can change candidates' incentives and, in turn, states' actions that contribute to frontloading only if a significant number of major candidates accept public funding. Fortunately, a System that also aims to reverse frontloading allows policymakers to induce candidates to participate without "breaking the bank" or failing to extract any concessions. The System's existing benefit-for-burden tradeoff must attract top-flight fundraisers like Barack Obama and be modified in a way that both supplements the proposed public-funding timetable delays and satisfies the System's traditional purposes of reducing large-dollar contributions' influence, increasing competition between candidates, and expanding political participation. In colloquial terms, the System must use a different "stick" and offer a bigger "carrot."

Figure C: Existing System’s Candidate Incentives v. Proposed System’s Candidate Incentives

Existing System	Proposed System
<ul style="list-style-type: none"> • <u>Spending Limits</u> <ul style="list-style-type: none"> • Personal-funds limit of \$50K • State-by-state limit • Aggregate limits covering primary and general elections • <u>Benefits</u> <ul style="list-style-type: none"> • 1-to-1 public match on first \$250 of a contribution • Public grant for general election • No automatic ballot access • <u>Other</u> <ul style="list-style-type: none"> • Primary and general election funding not "linked" • Limits on amount candidate receives in primary and general elections • \$16M grant for party conventions 	<ul style="list-style-type: none"> • <u>Spending Limits</u> <ul style="list-style-type: none"> • Personal-funds limit of \$200K • No state-by-state limit • \$10M limit for spending before Oct. 1st of pre-election year; no overall aggregate limit • <u>Benefits</u> <ul style="list-style-type: none"> • 4-to-1 public match on first \$100 of a contribution • Matching funds for general election • Automatic ballot access • <u>Other</u> <ul style="list-style-type: none"> • Primary and general election funding "linked" • Candidates compete for single funding pool; no guaranteed maximum or minimum • No grant for party conventions

1. A Different Stick: Eliminating or Modifying Spending Limits in Favor of Later Dates for “Matchable” Contributions and Public-Funds Disbursements

Spending limits have historically been the System’s “stick”—the painful part of the System for candidates—meant to reduce large contributors’ influence and equalize resources to promote candidate competition. The existing System imposes three types of spending limits on participating candidates: (1) a ceiling on the amount of personal funds a candidate may spend; (2) a series of limits on the amount a candidate may spend in each state; and (3) an overall cap on the total amount a candidate may spend. In practice, these spending limits now do little to control spending because they greatly deter candidates from participating in the System. Reformers

cannot, then, simply delay the “matchable” contribution and public-funds disbursement dates, as described above, because the additional “cost” to System participants would deter candidates even further. Existing spending limits must be modified. And since the proposed public-funding timetable delays are capable of controlling spending to some degree, existing spending limits should be significantly modified or eliminated as part of a reform package to reverse frontloading.

i. Personal-Funds Spending Limit Should Be Raised

Candidates who accept public funding during either the primary-election period or the general-election period under the current System may not spend more than \$50,000 from “personal funds, or funds of [their] immediate family.”¹⁹⁵ When the System was created, reformers added this limit so that wealthy candidates could not use personal funds to blow through the aggregate spending limit that applied to all candidates.¹⁹⁶ If the System’s matchable-contribution and disbursement dates were delayed as proposed, this limit would also keep candidates on a level playing field by ensuring that wealthy individuals would not enjoy the advantage of starting an early campaign *and* receiving significant amounts of public funds. The personal-funds spending limit should be retained. As a concession to wealthy candidates who use personal funds merely as “seed” money, it may be helpful to raise the limit to \$200,000 and index it for inflation so that the limit maintains its original 1974 value.¹⁹⁷ No candidate who spends more than \$200,000 from personal funds would therefore be eligible for any public funding.

¹⁹⁵ 11 C.F.R. §§ 9003.2(c), 9035.2(a)(1).

¹⁹⁶ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 45 (2003), *available at* <http://www.cfinst.org/president/Participation.aspx>.

¹⁹⁷ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 46 (2003), *available at* <http://www.cfinst.org/president/Participation.aspx>.

ii. State-by-State Spending Limits Should Be Eliminated

Candidates who accept public funds during the primary-election period are subject to limits that govern expenditures in each individual state.¹⁹⁸ The limits are calculated according to state population.¹⁹⁹ These state-by-state limits “set forth complicated formulas that compel candidates to engage in unnecessary accounting” and attempt to “manage the types of expenditures made in election campaigns.”²⁰⁰ They are “irrational [and] serve no anticorruption purpose”, unlike straight-forward aggregate spending limits.²⁰¹ In fact, by deterring candidates from participating in the System, state-by-state limits further an atmosphere of unrestrained spending and promote reliance on large-dollar donors.²⁰² This deterrence effect would also defeat the impact of the proposed public-funding timetable delays described above. The System’s current state-by-state limits should therefore be eliminated.²⁰³

iii. A Short-Term, Pre-October 1st Spending Limit Should Replace Existing Limits That Cover the Entire Election Cycle

¹⁹⁸ 11 C.F.R. § 9035.1(a)(1).

¹⁹⁹ 11 C.F.R. § 9035.1(a)(1) (“aggregate expenditures by a candidate in any one State shall not exceed the greater of: 16 cents (as adjusted under 2 U.S.C. 441a(c)) multiplied by the voting age population of the State (as certified under U.S.C. 441a(e)); or \$200,000 (as adjusted under 2 U.S.C. 441a(c)).”). The state-by-state limits for 2008 are found at the Federal Election Commission’s website, http://www.fec.gov/pages/brochures/pubfund_limits_2008.shtml.

²⁰⁰ COMMITTEE FOR ECONOMIC DEVELOPMENT, BUILDING ON REFORM: A BUSINESS PROPOSAL TO STRENGTHEN ELECTION FINANCE 28-29 (2005), available at http://www.ced.org/docs/report/report_cfr2005.pdf

²⁰¹ THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21, PRESIDENTIAL PUBLIC FINANCING: REPAIRING THE SYSTEM CONFERENCE REPORT 34 (2005), available at <http://www.campaignlegalcenter.org/attachments/1614.pdf>

²⁰² THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21, PRESIDENTIAL PUBLIC FINANCING: REPAIRING THE SYSTEM CONFERENCE REPORT 34 (2005), available at <http://www.campaignlegalcenter.org/attachments/1614.pdf> (quoting Michael Toner “In our view, there’s no anticorruption rationale in maintaining these limits, and quite the contrary, its forcing candidates — it creates an incentive for them not to participate in the system.”).

²⁰³ The consensus among reformers is that these limits should be eliminated. See THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21, PRESIDENTIAL PUBLIC FINANCING: REPAIRING THE SYSTEM CONFERENCE REPORT 35 (2005), available at <http://www.campaignlegalcenter.org/attachments/1614.pdf>.

Candidates who accept public funding are subject to limits on the total amount of their aggregate spending.²⁰⁴ In 2008, the primary-election limit was roughly \$42 million²⁰⁵ and the general-election limit was \$84.1 million.²⁰⁶ As currently structured, abiding by the primary-election limit is seen as political suicide.²⁰⁷ The more generous general-election limit also deterred Barack Obama from accepting public funds in 2008.²⁰⁸

These aggregate limits are the main “costs” to the System that discourage candidate participation.²⁰⁹ Because of this, many past proposals advocate drastically raising the limits to make them less burdensome on candidates.²¹⁰ But in a campaign environment that is frontloaded and populated with “super fundraisers” like Barack Obama, these overarching aggregate limits are inherently flawed. They are either so high that they are irrelevant or so low that major candidates choose not to accept public funding.²¹¹ Even in modified form, election-long limits that aim to control aggregate spending are unsound. One innovative but ultimately flawed

²⁰⁴ 11 C.F.R. § 9003.2(a)(1), 9035.1(a).

²⁰⁵ The limit is effectively higher if exemptions for legal and fundraising costs are figured in. In 2008, for example, a candidate’s true primary-election limit was \$56.7 million. Campaign Finance Institute, *Presidential Public Financing Spending Limits 1974-2008* (2008), available at http://www.cfinst.org/president/PECF_SpendingLimits.aspx.

²⁰⁶ Federal Election Comm’n, *Presidential Spending Limits for 2008* (2008), available at http://www.fec.gov/pages/brochures/pubfund_limits_2008.shtml.

²⁰⁷ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 19 (2003), available at <http://www.cfinst.org/president/Participation.aspx> (“the public funding system cannot remain relevant if the decision to stay in it is equivalent to risking political suicide.”).

²⁰⁸ Shailagh Murray & Perry Bacon, Jr., *Obama to Reject Public Funds for Election*, WASH. POST at A1, June 20, 2008.

²⁰⁹ COMMITTEE FOR ECONOMIC DEVELOPMENT, BUILDING ON REFORM: A BUSINESS PROPOSAL TO STRENGTHEN ELECTION FINANCE 28-29 (2005), available at http://www.ced.org/docs/report/report_cfr2005.pdf (“Stringent spending limits simply serve to convince candidates to eschew public funds, or, even worse, to encourage financial practices and tactics designed to circumvent restrictions and the provisions of the law.”).

²¹⁰ See, e.g., COMMITTEE FOR ECONOMIC DEVELOPMENT, BUILDING ON REFORM: A BUSINESS PROPOSAL TO STRENGTHEN ELECTION FINANCE 28-29 (2005), available at http://www.ced.org/docs/report/report_cfr2005.pdf. See also Thomas B. Edsall, *Top FEC Officials Urge Higher Spending Limit*, WASHINGTON POST, Feb. 10, 2005, at A5. Barack Obama and John McCain raised \$452.9 million and \$204.4 million, respectively, during the record-breaking 2008 pre-convention period. Press Release, Campaign Finance Institute, *Reality Check: Obama Received About the Same Percentage from Small Donors in 2008 as Bush in 2004* (Nov. 24, 2008), available at <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=216>.

²¹¹ CAMPAIGN FINANCE INSTITUTE, SO THE VOTERS MAY CHOOSE: REVIVING THE PRESIDENTIAL MATCHING FUND SYSTEM 6 (2005), available at <http://www.cfinst.org/president/pdf/VotersChoose.pdf> (“In one approach, spending ‘limits’ are set so high that they restrain no one. In the other approach the limit is low enough to restrain spending—but only if it is followed.”) (emphasis in original).

proposal tries to avoid these limits' usual problems by advocating a \$75 million primary-election spending limit with an "escape hatch," meaning that if a non-participating candidate exceeds the spending limit, the participating candidates may spend more than the \$75 million limit.²¹²

Candidates can thus abide by limits that feature an "escape hatch" without committing political suicide.²¹³ Because spending limits are no longer a trap, opting into the System is not as strategically detrimental.²¹⁴ However, escape-hatch spending limits would not control spending because a well-heeled candidate would still have a significant incentive to refuse public funds.²¹⁵ Such a candidate would choose between a campaign where he and his opponents spend roughly equivalent amounts to compete for the nomination due to the spending limit and a limit-free campaign that allows him to fully leverage his fundraising advantage and vastly outspend his competition. A front-running candidate would clearly choose the latter—particularly if the aggregate spending limit was low. The front-runner's opt-out would then allow other candidates who previously accepted the System's limits to spend without restraint and cause the public to receive nothing in return for its outlay of funds.

The System probably could not enforce existing aggregate limits *and* implement the proposed public-funding timetable delays. Both measures are "costs" that would deter candidates from System participation. Imposing both would be too heavy of a cost for most front-running

²¹² CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 19 (2003), *available at* <http://www.cfinst.org/president/Participation.aspx>. It would also allow unlimited coordinated party expenditures in this instance.

²¹³ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 19 (2003), *available at* <http://www.cfinst.org/president/Participation.aspx>.

²¹⁴ CAMPAIGN FINANCE INSTITUTE, SO THE VOTERS MAY CHOOSE: REVIVING THE PRESIDENTIAL MATCHING FUND SYSTEM 6 (2005), *available at* <http://www.cfinst.org/president/pdf/VotersChoose.pdf>

²¹⁵ CAMPAIGN FINANCE INSTITUTE, SO THE VOTERS MAY CHOOSE: REVIVING THE PRESIDENTIAL MATCHING FUND SYSTEM 5 (2005), *available at* <http://www.cfinst.org/president/pdf/VotersChoose.pdf> ("But in 2004, the winning candidates from each party opted out of the system and spent about \$250 million each—more than three times [the Campaign Finance Institute's] proposed limit" of \$75 million.").

candidates. The System must either apply existing aggregate limits or delay the primary-election timetable.

The System should delay the primary-election funding timetable because it would yield the most regulatory value. Existing aggregate limits have no effect on frontloading and, in a frontloaded environment, have little control over spending because few candidates participate in the System. A delayed public-funding timetable, on the other hand, would reverse frontloading *and* control spending by cutting the amount of time spent campaigning. Frontloading has created campaign organizations that retain pricey consultants, fund extensive travel schedules, sponsor voter outreach activities, and air television and radio advertisements at a high intensity level for 23 months. A longer calendar has thus contributed significantly to skyrocketing campaign costs that put candidates increasingly at the mercy of contributors.²¹⁶ By reversing frontloading and, in particular, shortening the campaign season via a delay in the public-funding timetable, the System would lower campaign costs and reduce candidates' reliance on higher-dollar contributors. A truncated campaign season would not change the nature of a campaign's expenses. A shorter-term campaign organization would, however, cost less to operate because it would demand fewer consultant hours and afford fewer opportunities to schedule travel and run advertisements. System reformers should therefore delay the primary-election funding timetable, as proposed, and eliminate existing aggregate spending limits that blanket the entire election cycle.

²¹⁶ Buckley v. Valeo, 424 U.S. 1, 264 (1976) (White, J. dissenting) (“Without limits on total expenditures, campaign costs will inevitably and endlessly escalate. Pressure to raise funds will constantly build and with it the temptation to resort in “emergencies” to those sources of large sums, who, history shows, are sufficiently confident of not being caught to risk flouting contribution limits. Congress would save the candidate from this predicament by establishing a reasonable ceiling on all candidates.”); Marcin Walecki, *Spending Limits as a Policy Option*, IFES Political Finance White Paper Series 2-3 (2007).

Although overarching spending limits would no longer seek to directly control candidate spending in a reformed System, a focused spending limit could still play a narrow role as an anti-frontloading mechanism. A reformed System should limit spending that occurs before the proposed October 1st "matchable" contribution date to roughly \$10 million. Any candidate who spent over \$10 million would thus not be eligible to receive any public funds. Such a limit would reinforce other proposed anti-frontloading measures by preventing candidates from receiving the twofold advantage of starting an early campaign *and* receiving public funds. This limit would also impose fewer "costs" on candidates than the existing aggregate limits because it would not aim to control overall spending. Moreover, it would only cover a relatively brief time period and permit a candidate to establish a limited organization to respond to early campaigning competitors and to prepare for post-October 1st campaigning. This proposed limit would thus deter fewer candidates from System participation than existing aggregate limits. Replacing the existing aggregate limits with a focused, pre-October 1st limit would enable the System to attract front-running candidates and thereby reverse frontloading and accomplish the System's original purposes.

2. A Bigger Carrot: Giving Greater Incentives for Candidates to Take Public Funds

Public money has always been the System's "carrot"—a reward for candidates' participation in the System—meant to reduce large contributors' influence, promote candidate competition by providing a funding "floor", and encourage citizen participation by motivating small-dollar contributions. But frontloading, along with other factors, has made public money less of a draw for front-running candidates. A bigger "carrot" must be offered to such candidates if the System is to be fixed in a way that both reverses frontloading and accomplishes the

System's original goals. And in offering a larger incentive, it is vital that the System remain solvent to meet its increased obligations.

i. Strengthening Incentives for Candidates to Participate

A reformed System can reverse frontloading and accomplish its traditional purposes only if major candidates participate. But the System currently has no leverage over candidates and contests because major contenders do not depend on its benefits. The System must therefore offer more to candidates by linking primary- and general-election funding, eliminating the cap on the total amount of public funding a candidate may receive, presenting unconventional benefits like automatic ballot access, and modifying the public-funds matching formula.

a. LINK PRIMARY- AND GENERAL-ELECTION FUNDING

Under the existing System, candidates that forgo public funding during the primary election may still accept public funding during the general election.²¹⁷ George W. Bush in 2000 and 2004, and John Kerry in 2004, refused primary-election public funding but later received general-election public funding.²¹⁸ John McCain followed the same path in 2008.²¹⁹ The System should take away a candidate's ability to pick and choose the phases of the System in which he will participate. Instead, the System should "link[] the eligibility for general election funding to

²¹⁷ See 11 C.F.R. §§ 9003.1, 9003.2 (explaining the candidate qualification requirements for general-election funding without mentioning the primary-election period).

²¹⁸ Ken Fireman, *Bush to Accept Public Funding*, NEWSDAY (N.Y.), Dec. 9, 1999, at A58; Lisa Getter, *Bush, Kerry Raise Record Sums Both Have Short Time to Spend the Cash Before Accepting Public Financing*, LOS ANGELES TIMES, July 21, 2004, at A10.

²¹⁹ Scott Helman & Sasha Issenberg, *McCain Returns \$3M in Checks as He Considers Public Funding*, BOSTON GLOBE, Apr. 4, 2008, at A5.

participation in the primary public matching fund program.”²²⁰ Tying the primary and general elections together strengthens candidates’ incentives to accept public funding.²²¹ It is a cost-free way for the System to offer a bigger “carrot” and thereby bolster its ability to reverse frontloading and accomplish its traditional purposes.

b. NO LIMIT ON THE TOTAL AMOUNT A CANDIDATE MAY RECEIVE

The System currently caps the total amount of public funds a qualifying candidate may receive during the primary and general elections.²²² In 2008, a candidate could only have received just over \$21 million during the primary-election period.²²³ Similarly, John McCain and Barack Obama were each only eligible to receive half of the \$168.2 million set aside for the 2008 general election.²²⁴

These receipt-amount caps should be eliminated. Candidates should compete for a single pool of funds during both the primary and general elections, with no minimum or maximum share guaranteed to any candidate. A candidate would then be enticed by the System’s large *potential* benefit rather than a possibly lesser, capped amount. Such a free-for-all would also give candidates two other incentives to participate in the System. First, a public dollar earned by a candidate would not only benefit him, it would rob his opponents of a dollar they might have

²²⁰ COMMITTEE FOR ECONOMIC DEVELOPMENT, BUILDING ON REFORM: A BUSINESS PROPOSAL TO STRENGTHEN ELECTION FINANCE 36 (2005), available at http://www.ced.org/docs/report/report_cfr2005.pdf.

²²¹ Meredith McGehee, *Repairing the Presidential Public Financing System*, Campaign Legal Center Blog (Sept. 8, 2006), at http://www.clcblog.org/blog_item-57.html.

²²² 11 C.F.R. §§ 9004 (maximum amount received during general election), 9034.1(d) (maximum amount received during primary election).

²²³ Federal Election Comm’n, *Presidential Spending Limits for 2008* (2008), available at http://www.fec.gov/pages/brochures/pubfund_limits_2008.shtml. Under the existing System, the primary-election cap is more symbolic than real—Ronald Reagan is the only candidate since 1976 to run up against the limit. CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 28 (2003), available at <http://www.cfinst.org/president/Participation.aspx>. But with the proposed System's higher-yielding match, the cap could actually limit the amount of funds a candidate receives.

²²⁴ Major-party nominees are only "entitled to equal payments." 11 C.F.R. § 9004.1.

otherwise had. In other words, a candidate who actively seeks public matching funds would simultaneously enlarge his share while shrinking his opponents'. Second, by *not* participating in a cap-less System and competing for its funds, a candidate would allow his opponents access to additional monies. In a world without receipt-amount caps, a candidate who refuses to participate in the System would thus decline the System's potentially large benefit, forgo the opportunity to shrink his opponents' budgets, and open the door for his opponents to receive a greater infusion of public dollars. Without requiring a penny of additional taxpayer money, this proposed package of incentives would likely motivate candidates to participate in the System better than the current System's single incentive of a fixed public-funds amount. For example, Barack Obama chose to forgo public funds during the 2008 general election despite the current System's inducement of a public grant fixed at \$84.1 million—half of the \$168.2 million budgeted for the general-election period. If the System had imposed no receipt-amount cap, Mr. Obama would have been less likely to opt-out because, by doing so, he would have both refused \$84.1 million for himself and paved the way for John McCain to receive all of the \$168.2 million in general-election public funds. A cap-less System would therefore provide more powerful incentives for candidates—even top-tier candidates—to participate in the System and begin fundraising and campaigning at a later date.

c. UNCONVENTIONAL BENEFITS

The System should endeavor to offer new and unconventional benefits that help motivate candidates to participate in the System without costing taxpayers a significant amount of money. Ballot access could be one such unconventional benefit. States impose requirements on presidential candidates who want to appear on a primary-election ballot. Some states' rules are

simple. In Idaho, for example, a presidential candidate is placed on the ballot if he either is “recognized in national news media” or submits a short declaration of candidacy form.²²⁵ In Virginia, though, candidates must enlist registered Virginia voters to collect *verified* signatures from 10,000 registered Virginia voters, including at least 400 from each of Virginia’s 11 congressional districts.²²⁶ Researching and complying with states’ myriad ballot access requirements occupies significant human and financial resources.²²⁷ It would therefore be a great benefit to candidates if they could qualify for the ballot in multiple states through a single process. The System could offer this benefit. Candidates already must show a sufficient level of electoral support to receive public funds during the primary election.²²⁸ The federal government should actively persuade states to qualify presidential candidates for the primary ballot if they are eligible to receive a certain amount of public funding.²²⁹ Delaware could serve as a model. It automatically places candidates on the ballot if they are eligible to receive public funding.²³⁰ This would enhance the advantages of participating in the System for candidates at a negligible cost to the public.

d. A 4-TO-1 MATCH OF CONTRIBUTIONS UP TO \$100
GIVEN BY INDIVIDUALS WHO HAVE NOT
CONTRIBUTED BEFORE OCTOBER 1ST

The public-dollar match of private contributions raised during the primary-election period can serve as an effective enticement for candidates to participate in the System. To reverse

²²⁵ Id. Stat. Ann. § 34-732.

²²⁶ Va. Code § 24.2-545.

²²⁷ See, e.g., Clifford J. Levy, *McCain to Sue for Spot on Primary Ballot*, N.Y. TIMES, Dec. 10, 1999, at B4 (stating that “Steve Forbes, the millionaire publisher, vow[ed] to spend \$750,000 to get on the ballot” in New York in 2000).

²²⁸ 11 C.F.R. § 9033.4.

²²⁹ Because this ballot-access benefit is meant simply as an example of “outside the box” thinking on how to incentivize candidates to participate, this Article does not discuss the potential constitutional issues that would accompany federal legislation that required state ballot access for System-eligible candidates.

²³⁰ Del. Laws § 3184(1).

frontloading, the match must be sufficiently large so that candidates will refrain from large-scale fundraising efforts until after October 1st. To spur broad public participation in campaign finance—one of the System’s original purposes—the match should offer a formula that motivates candidates to solicit, and contributors to give, small-dollar contributions.

The System now offers a one-to-one match on the first \$250 of an individual’s monetary contribution.²³¹ So, for example, if a contributor gives \$50 to a candidate, it is matched with \$50 from the System. Similarly, if a contributor gives \$500, the System matches it with \$250 of public money. The System thus encourages small-dollar contributions, but its effectiveness has been somewhat limited. Larger-dollar contributions still dominate presidential races.²³²

One possible way to improve the current System is to provide a multiple match (two-to-one or greater) of public funds to private contributions.²³³ Under a multiple-match arrangement, the System could more successfully accomplish its goals. A multiple match would more effectively reverse frontloading by making public funds worth the wait—front-running candidates would receive a larger total sum of public money and public funds would make up a greater portion of candidates’ campaign resources.²³⁴ A multiple match’s leveraging effect would

²³¹ 11 C.F.R. § 9034.2.

²³² Even Barack Obama’s 2008 campaign, which was widely heralded for its ability to raise small-dollar donations, still received 47 percent of its contributions from donors who gave \$1,000 or more. Campaign Finance Institute, Reality Check: Obama Received About the Same Percentage from Small Donors in 2008 as Bush in 2008, (Nov. 24, 2008), available at <http://www.cfinst.org/pr/prerelease.aspx?ReleaseID=216>. See also ADAM LIOZ & ALISON CASSADY, U.S. PUB. INTEREST RESEARCH GROUP, THE ROLE OF MONEY IN THE 2002 CONGRESSIONAL ELECTIONS 53-54 (2003) (“A wealthy donor class gives large contributions that constitute the bulk of funding for American politics and determines which candidates will be viable. In the 2002 election cycle, 0.22% of the voting-age population gave contributions over \$200 to federal candidates. This narrow group contributed 76% of the funds given to federal candidates by individuals.”).

²³³ Michael J. Malbin, *A Public Funding System in Jeopardy: Lessons from the Presidential Nomination Contest of 2004*, in THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 232 (Michael J. Malbin, ed.) (Rowman & Littlefield, 2006). (“[T]he candidates’ funding was dominated by only 112,000 mostly well-to-do people who gave \$1,000 each. The funding balance would be shifted radically if even one percent of the voting-age population were to contribute to presidential candidates during the primaries. But it is hard to see how candidates would ever have the resources or incentive to make this happen, as long as the *costs* and *benefits* of raising small versus large contributions remained as they were.”).

²³⁴ COMMITTEE FOR ECONOMIC DEVELOPMENT, BUILDING ON REFORM: A BUSINESS PROPOSAL TO STRENGTHEN ELECTION FINANCE 32 (2005), available at http://www.ced.org/docs/report/report_cfr2005.pdf.

also better encourage small-donor participation by providing candidates with a strong incentive to seek small contributions, and by giving small donors a greater sense of empowerment.²³⁵

Numerous proposals for new matching funds formulas exist: one-to-one on the first \$500, three-to-one on the first \$100, and four-to-one on the first \$250.²³⁶ Any of these proposals would improve the System.²³⁷ An attractive option would be to have a four-to-one match on the first \$100 given by an individual who contributes for the first time on or after October 1st of the year before a presidential election.²³⁸ Under this formula, if a contributor gives \$100, a candidate would receive \$500; if a contributor gives \$25, a candidate would receive \$100; if a contributor gives \$2,400—the legal maximum—a candidate would receive \$2,800. In 2001, New York City shifted from a one-to-one match for the first \$1,000 of a contribution to a four-to-one match for the first \$250.²³⁹ Public funds as a percentage of total dollars available to candidates doubled.²⁴⁰ The number of contributors who gave \$250 or less also doubled.²⁴¹ The New York City Board concluded that:

²³⁵ COMMITTEE FOR ECONOMIC DEVELOPMENT, BUILDING ON REFORM: A BUSINESS PROPOSAL TO STRENGTHEN ELECTION FINANCE 32 (2005), available at http://www.ced.org/docs/report/report_cfr2005.pdf.

²³⁶ Michael J. Malbin, *A Public Funding System in Jeopardy: Lessons from the Presidential Nomination Contest of 2004*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 246* (Michael J. Malbin, ed.) (Rowman & Littlefield, 2006) (describing various matching-funds proposals).

²³⁷ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 28 (2003), available at <http://www.cfinst.org/president/Participation.aspx> (“The under-\$100 donors would thus become almost as important a factor in presidential finance as the large donors. Instead of being outgunned by 333% under BCRA, the small donors would be worth 85%-90% as much as the large ones.”).

²³⁸ Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 111-112 (2004) (advocating a four-to-one match on contributions of \$100 or less, a slightly different formula than that advocated in this Article).

²³⁹ NEW YORK CITY CAMPAIGN FINANCE BOARD, AN ELECTION INTERRUPTED...AN ELECTION TRANSFORMED: THE CAMPAIGN FINANCE PROGRAM AND THE 2001 NEW YORK CITY ELECTIONS 91 (2001), available at http://www.nycfb.info/PDF/per/2001_PER/2001_PER_Vol.1.pdf?zoom_highlight=election+transformed.

²⁴⁰ NEW YORK CITY CAMPAIGN FINANCE BOARD, AN ELECTION INTERRUPTED...AN ELECTION TRANSFORMED: THE CAMPAIGN FINANCE PROGRAM AND THE 2001 NEW YORK CITY ELECTIONS 92 (2001), available at http://www.nycfb.info/PDF/per/2001_PER/2001_PER_Vol.1.pdf?zoom_highlight=election+transformed.

²⁴¹ NEW YORK CITY CAMPAIGN FINANCE BOARD, AN ELECTION INTERRUPTED...AN ELECTION TRANSFORMED: THE CAMPAIGN FINANCE PROGRAM AND THE 2001 NEW YORK

Candidates responded to the new \$4-to-\$1 matching formula by reaching out to contributors of relatively modest means—and not just to more affluent donors. The higher Program participation levels, representing a more diverse group of candidates than ever before, helped to broaden the contributor base and introduce new contributors to the world of New York City politics.²⁴²

More than 17,000 individuals gave \$100 or less to candidates, as compared to 900 who gave more than \$1,000.²⁴³ New York City's experience suggests that a four-to-one match could help reverse frontloading while also encouraging small-dollar contributions. Lowering the proposed matchable maximum from New York City's \$250 to \$100 would reduce costs and promote even lower contribution amounts. Mimicking New York City's four-to-one match on the first \$250 on the federal level would have cost \$264.9 million in 2004, the last year for which complete campaign finance data analysis exists.²⁴⁴ A four-to-one match on the first \$100 would have only cost \$193.6 million in 2004.²⁴⁵ This matching formula would have provided a total of \$52.7 million to Howard Dean and \$40.3 million to John Kerry during the primary-election period in 2004.²⁴⁶ And these significant sums carry even greater value to a candidate because, unlike purely private contributions, the public-funds portion costs nothing to raise. It thus appears that a four-to-one match on the first \$100 would both motivate candidates to raise small-dollar

CITY ELECTIONS 92 (2001), *available at* http://www.nycffb.info/PDF/per/2001_PER/2001_PER_Vol.1.pdf?zoom_highlight=election+transformed.

²⁴² NEW YORK CITY CAMPAIGN FINANCE BOARD, AN ELECTION INTERRUPTED...AN ELECTION TRANSFORMED: THE CAMPAIGN FINANCE PROGRAM AND THE 2001 NEW YORK CITY ELECTIONS 63 (2001), *available at*

http://www.nycffb.info/PDF/per/2001_PER/2001_PER_Vol.1.pdf?zoom_highlight=election+transformed

²⁴³ NEW YORK CITY CAMPAIGN FINANCE BOARD, AN ELECTION INTERRUPTED...AN ELECTION TRANSFORMED: THE CAMPAIGN FINANCE PROGRAM AND THE 2001 NEW YORK CITY ELECTIONS 50 (2001), *available at*

http://www.nycffb.info/PDF/per/2001_PER/2001_PER_Vol.1.pdf?zoom_highlight=election+transformed

²⁴⁴ CAMPAIGN FINANCE INSTITUTE, SO THE VOTERS MAY CHOOSE: REVIVING THE PRESIDENTIAL MATCHING FUND SYSTEM 16 (2005), *available at* <http://www.cfinst.org/president/pdf/VotersChoose.pdf>

²⁴⁵ CAMPAIGN FINANCE INSTITUTE, SO THE VOTERS MAY CHOOSE: REVIVING THE PRESIDENTIAL MATCHING FUND SYSTEM 16 (2005), *available at* <http://www.cfinst.org/president/pdf/VotersChoose.pdf>

²⁴⁶ CAMPAIGN FINANCE INSTITUTE, SO THE VOTERS MAY CHOOSE: REVIVING THE PRESIDENTIAL MATCHING FUND SYSTEM 16 (2005), *available at* <http://www.cfinst.org/president/pdf/VotersChoose.pdf>

contributions and induce candidates to postpone large-scale fundraising efforts until after October 1st of the pre-election year.

ii. Ensuring the Presidential Public Funding System’s Financial Stability

Obviously, the System must remain solvent in order to reverse frontloading and accomplish its traditional purposes. But the System has teetered on the brink of bankruptcy for some time.²⁴⁷ In 1992 and 1996, the System’s post-election balance was only around \$4 million—significantly less than the balances carried after elections from 1976 to 1988.²⁴⁸ Revenues flowing into the System probably would not have covered the System’s obligations in 2000, 2004, and 2008 if all major candidates had accepted public funding during the primary-election period.²⁴⁹ Offering candidates a “carrot” that is bigger and capable of inducing more candidates to participate would only put more strain on the System. But, even with these increased demands, the System’s financial situation can be successfully stabilized by using existing resources more effectively and by increasing and indexing the tax check-off amount.

a. DOING MORE WITH EXISTING RESOURCES

Slashing spending and raising revenues are often presented as the only methods to keep the System fiscally sustainable.²⁵⁰ But the System can also do more with what it has. It can

²⁴⁷ Federal Election Comm’n, Internal Memorandum (Jan. 23, 1998) *available at* http://www.opensecrets.org/2000elect/other/presfund/memo_jan.htm (describing the history of the System’s near-insolvency).

²⁴⁸ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 47 (2003), *available at* <http://www.cfinst.org/president/Participation.aspx>.

²⁴⁹ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 47 (2003), *available at* <http://www.cfinst.org/president/Participation.aspx>.

²⁵⁰ *See, e.g.*, CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 47 (2003), *available at* <http://www.cfinst.org/president/Participation.aspx> (“The only ways to solve this [System insolvency] problem are to cut spending or raise more money.”).

maximize existing resources by focusing funding on its core functions and by better informing the public of its purpose. The following four measures will allow the System to cover greater demands with a less drastic funding increase: (1) eliminating the public grant for political party conventions; (2) replacing the general-election grant with a matching-funds system; (3) increasing the number of people who mark the tax “check-off” box; and (4) raising candidate qualification requirements.

1. Eliminating the Grant for Political Party Conventions

If they agree to limit spending, the Republican and Democratic parties are eligible to receive a grant of public funds to pay expenses related to their national conventions.²⁵¹ In the System’s funding hierarchy, these convention grants are funded before the primary-election matching funds program.²⁵² Grants were originally intended to cover all convention expenses and were established as a response to questionable contributions to the 1972 Republican National Convention in Miami.²⁵³ Both major parties received \$16.35 million for their 2008 national conventions.²⁵⁴

These grants should be eliminated, with the \$32.7 million in savings redirected to inducing candidates to participate in the System.²⁵⁵ Convention grants no longer return a benefit

²⁵¹ 11 C.F.R. § 9008.3. The law also permits minor parties to qualify for funding. 11 C.F.R. § 9008.2(d).

²⁵² 11 C.F.R. § 9037(a).

²⁵³ Among the question contributions was a \$400,000 check given by International Telephone & Telegraph Corporation. Center for Public Integrity, *Hanna Project: Election Year 1971*, http://www.buyingofthepresident.org/index.php/the_hanna_project/year/hanna_1971/.

²⁵⁴ Press Release, Federal Election Comm’n, *Both Major Parties to Receive Public Funding for 2008 Conventions* (June 26, 2007), available at <http://www.fec.gov/press/press2007/20070626conventions.shtml>.

²⁵⁵ THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21, PRESIDENTIAL PUBLIC FINANCING: REPAIRING THE SYSTEM CONFERENCE REPORT 26-27 (2005), available at <http://www.campaignlegalcenter.org/attachments/1614.pdf> (quoting Linda DiVall “The funding priority is for the system is number one, the general election; number two, the conventions; and number three, the primaries. It seems to me, one conversation we need to have is about the funding of conventions. . . . \$15 million each; that’s \$30 million altogether that could go into either a general election or a primary system.”).

to the public. Grants are supposedly tied to spending limits, but the limits are meaningless due to unlimited individual and corporate contributions tolerated by the FEC.²⁵⁶ For example, the Republicans spent \$57 million and the Democrats spent \$61 million on their 2008 conventions—far in excess of the \$16.35 million legal limit.²⁵⁷ Moreover, the System’s priorities are better accomplished through primary- and general-election programs for candidates than through convention grants. Unlike the candidate programs, convention grants do nothing to reverse frontloading, promote candidate competition, or motivate small-dollar contributions. Because public funds are limited, money should be spent first on programs that would accomplish all of the proposed System’s purposes.²⁵⁸ As an alternative to public grants, perhaps political parties should be allowed to receive limited convention contributions from individuals that do not count toward normal contribution caps.²⁵⁹

2. Replacing the General-Election Grant with a Matching-Funds System

Following his party’s national convention, each major-party nominee receives a public grant under the current System.²⁶⁰ To be eligible to receive public funds, a nominee must limit his spending to the grant’s amount and refuse any private contributions, with limited

²⁵⁶ CAMPAIGN FINANCE INSTITUTE, *THE \$100 MILLION EXEMPTION: SOFT MONEY AND THE 2004 NATIONAL PARTY CONVENTIONS 2-3* (2004), available at http://www.cfinst.org/legacy/eGuide/PartyConventions/financing/pdf/full_partyconventions.pdf.

²⁵⁷ CAMPAIGN FINANCE INSTITUTE, *INSIDE FUNDRAISING FOR THE 2008 PARTY CONVENTIONS: PARTY SURROGATES GATHER SOFT MONEY WHILE FEDERAL REGULATORS TURN A BLIND EYE 2-3* (2008), available at <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=218>.

²⁵⁸ Federal Election Comm’n, Internal Memorandum (Jan. 23, 1998) available at http://www.opensecrets.org/2000elect/other/presfund/memo_jan.htm (“On October 31, 1997, you were provided a forecast of a cash flow shortfall in the Fund for the 2000 election. While not so severe as to reduce the grants for the national party conventions or general election candidates, it did project a scarcity of funds for the public match of individual contributions reported by eligible primary candidates.”).

²⁵⁹ Congress should also consider requiring party convention committees to raise these contributions two years in advance of a presidential election year so that contributions are not considered an attempt to influence the presumptive party nominee for president.

²⁶⁰ 11 C.F.R. § 9004.1.

exceptions.²⁶¹ The grant is a significant amount of money. In 2008, John McCain—the only major-party nominee to participate in the System—received \$84.1 million for the general election.²⁶² Since the general-election grant is financed first, the large set-aside can cause shortfalls in the primary-election matching-funds program.²⁶³

The grant is meant to fully fund a candidate’s general-election campaign.²⁶⁴ But it is an open question as to whether this intention is realistic. Professor Richard Briffault observed: “Public funding will not operate in a vacuum. It will have to co-exist with private funding.”²⁶⁵ Private money has flooded general-election campaigns even when candidates have accepted the full public grant. In 2004—the most recent general election fully funded with public money—outside groups actively campaigned during the general election²⁶⁶ and candidates found a way to tap privately raised political-party contributions through so-called “hybrid” advertisements.²⁶⁷ Even if it were a realistic goal to fund a general-election campaign exclusively with public money, it may not be desirable. Full public grants are incredibly expensive and easily labeled as

²⁶¹ 11 C.F.R. § 9003.1. Candidates may raise limited contributions for legal and accounting compliance purposes. 11 C.F.R. § 9003.3.

²⁶² Federal Election Comm’n, *Presidential Spending Limits for 2008* (2008), available at http://www.fec.gov/pages/brochures/pubfund_limits_2008.shtml.

²⁶³ Federal Election Comm’n, Internal Memorandum (Jan. 23, 1998), available at http://www.opensecrets.org/2000elect/other/presfund/memo_jan.htm.

²⁶⁴ 11 C.F.R. §§ 9003.2, 9004.1 (describing major party nominees’ spending limits and the related general-election grant).

²⁶⁵ Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 587 (1999).

²⁶⁶ So-called 527 organizations raised \$424 million in 2004, a large portion of which was spent for general-election activities. Stephen R. Weissman & Ruth Hassan, *BCRA and the 527 Groups*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 82* (Michael J. Malbin, ed.) (Rowman & Littlefield, 2006). See also Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 587 (1999) (“Turning to private donors will remain an option for candidates, and large donors can find ways of participating in campaigns even if the combination of public funding and spending limits reduces the opportunity for direct donations to candidates. The drafters of a public funding plan will have to think carefully about the relationship between public funding and private funding.”)

²⁶⁷ FEDERAL ELECTION COMM’N, REPORT OF THE AUDIT DIVISION ON BUSH-CHENEY ’04, INC. AND THE BUSH-CHENEY ’04 COMPLIANCE COMMITTEE INC. 10-11(2007), available at http://www.fec.gov/audits/2004/20070322bush_cheney_compliance_04.pdf; FEDERAL ELECTION COMM’N, REPORT OF THE AUDIT DIVISION ON THE KERRY-EDWARDS 2004, INC. AND THE KERRY-EDWARDS 2004 INC. GENERAL ELECTION LEGAL AND ACCOUNTING COMPLIANCE FUND 31-32 (2007), available at http://www.fec.gov/audits/2004/20070531kerry_edwards_genl_acct_fnd.pdf.

“welfare for politicians”, whereas matching funds programs are relatively less expensive and encourage direct citizen participation.²⁶⁸ Full public grants seem to rest on the assumption that *all* private contributions have a corrupting influence. But experience has shown this not to be the case. The System can better leverage public money to “clean” elections by attracting small-dollar contributions rather than attempting to shut out private money altogether.

The general-election grant should be transformed into a matching-funds program. As mentioned above, no minimum or maximum share would be guaranteed to any candidate. Either the two major-party nominees would compete for a single pool of funds or, if only one nominee participated in the System, he would have access to the entire amount budgeted for the general election. To ensure that the candidates could use most of the public funds before Election Day, the general-election program would need to offer a higher "match" amount than the primary-election program (e.g., a \$6 public-funds match for every \$1 in private money for the first \$100 of a contribution). Additionally, by transforming the general-election grant into a matching-funds program, the System can divert some much-needed money to the primary-election program. A matching-funds program for the two-month general election would probably need no more than \$120 million, meaning that the \$48 million “saved” could shore up the incentives offered through the primary-election program.²⁶⁹ This matching-funds arrangement would thus attract top-tier candidates and, in turn, help reverse frontloading and fulfill the System's original purposes of promoting citizen participation and reducing the influence of large-dollar contributions.

²⁶⁸ Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 113-114 (2004).

²⁶⁹ It is impossible to estimate just how much money a general-election matching funds program would cost because major-party nominees have only ever participated in the System's general election program.

3. Increasing the Number of People Who Mark the Public Funding Tax “Check-Off” Box

Funding for the System is entirely reliant on individuals marking a “check-off” box at the top of a federal income-tax form.²⁷⁰ The form invites taxpayers to “Check here if you, or your spouse if filing jointly, want \$3 to go to [the Presidential Election Campaign Fund]” and mentions that checking the box “will not change your tax or refund.”²⁷¹ Internal Revenue Service (“IRS”) instructions explain that the System:

[H]elps pay for Presidential election campaigns. The fund reduces candidates’ dependence on large contributions from individuals and groups and places candidates on an equal financial footing in the general election.²⁷²

Taxpayer participation has fallen steadily, from a high of nearly 29 percent in 1981 to a low of 9.1 percent in 2006.²⁷³ The cause of this drop-off is uncertain,²⁷⁴ but many believe that it is due to the public’s ignorance about the check-off box’s effect and the System’s purposes.²⁷⁵

Evidence supports this claim.²⁷⁶ Even when check-off participation was at its peak soon after Watergate, the public’s level of knowledge about the System was poor.²⁷⁷ Two national surveys conducted in 1979 and 1980 found that fewer than 15 percent of respondents were aware of the

²⁷⁰ Federal Election Comm’n, *Public Funding of Presidential Elections* (2008), available at <http://www.fec.gov/pages/brochures/pubfund.shtml>.

²⁷¹ Internal Revenue Service, Form 1040 (2007), available at <http://www.irs.gov/pub/irs-pdf/f1040.pdf?portlet=3>.

²⁷² Internal Revenue Service, 1040 Instructions 12 (2007), available at <http://www.irs.gov/pub/irs-pdf/i1040.pdf>.

²⁷³ Federal Election Comm’n, *Presidential Fund Incom Tax Check-Off Status 1992-2006* (2007), available at http://www.fec.gov/press/bkgnd/Fund_Status_05_07a.pdf.

²⁷⁴ Robert D. Lenhard, *A \$3 Vote for Competitive Elections*, WASHINGTON POST, Mar. 8, 2008, at A15.

²⁷⁵ COMMITTEE FOR ECONOMIC DEVELOPMENT, *BUILDING ON REFORM: A BUSINESS PROPOSAL TO STRENGTHEN ELECTION FINANCE 30* (2005), available at http://www.ced.org/docs/report/report_cfr2005.pdf

²⁷⁶ See also CAMPAIGN FINANCE INSTITUTE, *SO THE VOTERS MAY CHOOSE: REVIVING THE PRESIDENTIAL MATCHING FUND SYSTEM 19* (2005), available at <http://www.cfinst.org/president/pdf/VotersChoose.pdf> (“We are convinced that the decline in checkoff participation—from over 20% of filers in the late 1970s and early 1980s to 10% in 2004—does not mean that public opinion is hostile to the checkoff. In fact, a CFI analysis of major polls on presidential public financing over the past three decades suggests there is broad support for public financing, in the range of 40-65% range depending upon the precise question asked.”)

²⁷⁷ CAMPAIGN FINANCE INSTITUTE, *PARTICIPATION, COMPETITION, ENGAGEMENT 55-56* (2003), available at <http://www.cfinst.org/president/Participation.aspx>.

System's role in funding elections.²⁷⁸ Focus groups in 1990 similarly found that individuals were unaware of how the System worked.²⁷⁹ Other information suggests that taxpayers mistakenly believe that marking the check-off box will decrease their return or increase their tax burden.²⁸⁰ The public's lack of knowledge about the System is unsurprising, given that approximately two-thirds of the nation's voting age population was not yet 15 years old when the System was established.²⁸¹ Moreover, many taxpayers receive little information about the System because they use computer software or professional accountants to file tax returns.²⁸²

Education programs should be created to inform the public and increase the number of individuals who mark the System's check-off box. Very little effort has been made in the past to educate the public about the check-off box and other aspects of the System.²⁸³ The FEC ran a series of public service announcements on radio and TV in 1991 and 1992.²⁸⁴ But this short-lived educational effort focused mostly on rules for candidates rather than on the System's goals or on

²⁷⁸ Civic Services, Campaign Financing and Other Issues (1979) (survey of 1,659 conducted from March 5 to March 17, 1979); Civic Services, Campaign Financing and Other Issues (1980) (survey of 1,611 conducted from February 1 to February 15, 1980).

²⁷⁹ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 55-56 (2003), available at <http://www.cfinst.org/president/Participation.aspx>

²⁸⁰ Federal Election Comm'n, Internal Memorandum (Jan. 23, 1998) available at http://www.opensecrets.org/2000elect/other/presfund/memo_jan.htm ("You will also see that the participation rate by paper filers increases as the return employed gets more complex -- participation by those filing 1040s is higher than those filing 1040As, and participation among 1040EZ filers is the lowest. This would indicate that more affluent taxpayers are more inclined to check the box 'yes.'").

²⁸¹ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 55-56 (2003), available at <http://www.cfinst.org/president/Participation.aspx>.

²⁸² CAMPAIGN FINANCE INSTITUTE, SO THE VOTERS MAY CHOOSE: REVIVING THE PRESIDENTIAL MATCHING FUND SYSTEM 19 (2005), available at <http://www.cfinst.org/president/pdf/VotersChoose.pdf>. A default "no" answer to the check-off box question on tax preparation software was previously seen as a large obstacle to increasing participation in the System. In 2005, Intuit and H&R Block decided to alter their software to conform with Federal Election Commission and Campaign Finance Institute requests. Press Release, Campaign Finance Institute, Leading Tax Software Firms Alter Their Presidential Fund Check Off Questions to Promote Fair, Informed Choices (Nov. 10, 2005), available at <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=6>.

²⁸³ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 55-56 (2003), available at <http://www.cfinst.org/president/Participation.aspx>.

²⁸⁴ Federal Election Comm'n, *Funding the Program: The \$1 Tax Check-off* (1992), available at <http://www.fec.gov/info/anchor1598055>.

taxpayers' motivations for marking the check-off box.²⁸⁵ The FEC should undertake a renewed, broad effort to educate and re-engage the public.²⁸⁶ A reasonable amount of System funds could finance these activities, with the expectation that more individuals will choose to mark the check-off box once they are informed of the System's purposes.²⁸⁷ The effort should particularly emphasize the System's goals and the fact that individuals' taxes and refunds are unaffected.²⁸⁸ Increasing check-off participation through education efforts is a method to increase the amount of System funding without raising the check-off amount above \$3 per person.

4. Raising Candidates' Qualification Requirements

Because the System's success is contingent on attracting major candidates, its funds should be preserved for serious contenders. Currently, candidates are only required to raise a total of \$100,000—\$5,000 from at least 20 states in \$250 increments—to qualify for public funds in the primary-election period.²⁸⁹ Qualifying for the System was once seen as a sign of organizational strength.²⁹⁰ But because the System's qualification threshold was not indexed for inflation, it is now lower than many state candidates' public-funds qualification requirements.²⁹¹ Although only 4.5 percent of the System's funding since 1976 has gone to so-called "fringe"

²⁸⁵ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 55-56 (2003), available at <http://www.cfinst.org/president/Participation.aspx>. The education program's radio and television scripts are available at <http://www.fec.gov/info/appfive.htm>.

²⁸⁶ THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21, PRESIDENTIAL PUBLIC FINANCING: REPAIRING THE SYSTEM CONFERENCE REPORT 23 (2005), available at <http://www.campaignlegalcenter.org/attachments/1614.pdf>.

²⁸⁷ CAMPAIGN FINANCE INSTITUTE, SO THE VOTERS MAY CHOOSE: REVIVING THE PRESIDENTIAL MATCHING FUND SYSTEM 18 (2005), available at <http://www.cfinst.org/president/pdf/VotersChoose.pdf> ("The Federal Election Commission should be permitted (or directed) to invest a reasonable amount of PECF money for public education to increase use of the checkoff.").

²⁸⁸ Robert D. Lenhard, *A \$3 Vote for Competitive Elections*, WASHINGTON POST, Mar. 8, 2008, at A15 ("This is the only chance you have to decide how the federal government will spend a portion of your tax dollars.").

²⁸⁹ 11 C.F.R. § 9033.2(c).

²⁹⁰ THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21, PRESIDENTIAL PUBLIC FINANCING: REPAIRING THE SYSTEM CONFERENCE REPORT 7 (2005), available at <http://www.campaignlegalcenter.org/attachments/1614.pdf>.

²⁹¹ CAMPAIGN FINANCE INSTITUTE, PARTICIPATION, COMPETITION, ENGAGEMENT 19 (2003), available at <http://www.cfinst.org/president/Participation.aspx>.

candidates, it is important to raise the System’s qualification requirements and reassure the public that increased support for the proposed System will not be squandered on no-shot candidacies.²⁹²

b. INCREASING AND INDEXING THE TAX CHECK-OFF AMOUNT

Under current law, the System’s funding comes exclusively from taxpayers who designate \$3 (\$6 if filing a joint return) for the System by marking the appropriate check-off box on individual income-tax forms.²⁹³ This currently produces an average of \$54.9 million of revenue for the System, meaning that \$219.47 million accumulates for use every four years.²⁹⁴ This Article proposes eliminating political party grants and reducing the cost of the general-election part of the System to roughly \$120 million. It advocates a primary-election program that would have cost \$193.6 million in 2004—the last election year for which complete campaign finance data is available.²⁹⁵ Adjusting solely for inflation, the primary-election program would have cost \$218,768,000 in 2008. This means that, as proposed, the System’s obligations (\$338,768,000) would exceed its revenues (\$219,470,000) by \$119,298,000. Assuming that educational programs do not lead to an increase in the number of taxpayers who mark the System’s check-off box on tax forms, the check-off amount must be raised to cover the entire \$119 million gap. Raising the check-off box from \$3 to \$5 (from \$6 to \$10 for joint filers) would produce an additional \$146,313,333 in revenue, which would fully cover the new four-to-one

²⁹² JOSEPH E. CANTOR, THE PRESIDENTIAL ELECTION CAMPAIGN FUND AND TAX CHECKOFF: BACKGROUND AND CURRENT ISSUES, CONGRESSIONAL RESEARCH SERVICE (1997), *available at* http://www.opensecrets.org/2000elect/other/presfund/CRS_s95-824.htm.

²⁹³ 26 U.S.C. §§ 6096, 9006.

²⁹⁴ Federal Election Comm’n, Presidential Fund Incom Tax Check-Off Status 1992-2006 (2007), *available at* http://www.fec.gov/press/bkgnd/Fund_Status_05_07a.pdf. Average figure provided was calculated from the revenues of 2003-2006, the latest complete years on record.

²⁹⁵ CAMPAIGN FINANCE INSTITUTE, SO THE VOTERS MAY CHOOSE: REVIVING THE PRESIDENTIAL MATCHING FUND SYSTEM 16 (2005), *available at* <http://www.cfinst.org/president/pdf/VotersChoose.pdf>.

match formula. A \$5 check-off is roughly the amount the check-off would be if it had been indexed for inflation beginning in 1974.²⁹⁶ For additional cushion, which will likely be needed to attract candidates after 2008's prolific fundraising pace, an increase from \$3 to \$7 (from \$6 to \$14 for joint filers) may be considered. This would produce an additional \$292.7 million that would help the System better attract front-running candidates and, in turn, improve the System's ability to reverse frontloading and accomplish its original goals of reducing large contributions' influence, increase candidate competition, and expanding citizen political participation.

III. CONCLUSION

Frontloading is a serious problem. It lengthens the campaign season, raises campaign costs needlessly, disenfranchises voters in later-voting states, and distracts the public and candidate-officeholders from governance. Frontloading even helped break the once-valuable presidential public funding system. But the System can return the favor and reverse frontloading in a way that no other reform can. The System can act as a powerful counterweight against candidates' and states' incentives to move our presidential nomination process ever earlier. By delaying the System's "matchable contribution" and disbursement dates and by instituting other reforms that make the System attractive to major candidates once again, the System can successfully reverse frontloading and, in the process, regain purpose and political support. Reformers often cite the frontloaded nomination process and the broken public funding system as two of the largest problems in America's presidential elections. Both concerns should be addressed in a single and straightforward approach: a reformed public funding system that will incent a less frontloaded distribution of state nomination contests and accomplish the original goals of public financing. These two "birds" should be killed with one "stone."

²⁹⁶ CAMPAIGN FINANCE INSTITUTE, *SO THE VOTERS MAY CHOOSE: REVIVING THE PRESIDENTIAL MATCHING FUND SYSTEM* 18 (2005), available at <http://www.cfinst.org/president/pdf/VotersChoose.pdf>.