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The Open Our Democracy Act: A Proposal for Effective Election Reform

NIEL FRANZESE*

I. INTRODUCTION

On July 31, 2014 Representative John Delaney, a Democrat from Maryland, introduced H.R. 5334 to the House of Representatives.¹ The title of the bill was the “Open Our Democracy Act,”² and he described it as

[a] bill to require all candidates for election for the office of Member of the House of Representatives to run in a single open primary regardless of political party preference, [and] to limit the ensuing general election for such office to the two candidates receiving the greatest number of votes in such single open primary³

This bill represents the latest in a long line of calls for congressional election reform from both Democrats⁴ and Republicans.⁵ The most recent high-profile calls for election reform in the news have focused on campaign finance reform,⁶ but Representative Delaney’s bill turns its attention to three less-often discussed proposals. His three proposals are first, implementing open primaries for House elections; second, making

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¹ H.R. 5334, 113th Cong. (2d Sess. 2014).

² *Id.* Throughout this Comment, H.R. 5334 will be referred to interchangeably as “the Open Our Democracy Act,” “the bill,” and “the Act”.

³ H.R. 5334.

⁴ Ari Berman, *Election Reform Should Be a Top Priority for the New Congress*, NATION (Jan. 23, 2013), <http://www.thenation.com/blog/172385/election-reform-should-be-top-priority-new-congress> [<http://perma.cc/6CZL-CM4D>] (“On two major occasions—during his election-night speech and second inaugural address—President Obama has highlighted the need for election reform.”).

⁵ *Endorsers of Instant Runoff Voting*, CTR. FOR VOTING & DEMOCRACY, http://www.fairvote.org/reforms/instant-runoff-voting/endorsers-of-instant-runoff-voting/#.Uba5_kcezl [<http://perma.cc/Y7RY-TDV7>] (last visited Oct. 25, 2015) (listing members of Congress from both parties who support adopting Instant Runoff Voting systems, including Republican Senator John McCain).

⁶ See Robert Kelner & Raymond la Raja, *McCain-Feingold’s Devastating Legacy*, WASH. POST (Apr. 11, 2014), http://www.washingtonpost.com/opinions/mccain-feingolds-devastating-legacy/2014/04/11/14a528e2-c18f-11e3-bcec-b71ee10e9bc3_story.html [<http://perma.cc/S38N-EK7J>] (discussing calls for change after the Supreme Court’s decisions in *McConnell v. FEC*, 540 U.S. 93 (2003), and *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014), after the 2002 Bipartisan Campaign Reform Act).

Election Day a federal holiday; and third, beginning the process of redistricting reform.⁷ In an op-ed for the Washington Post, Representative Delaney highlighted the need for congressional election reform: “Representative democracy is in crisis in the United States. One of the three pillars of our system of government—the legislative branch—is failing.”⁸ He cited problems with the current Congress, including the federal government shutdown, minimal legislative activity, a struggling middle class, and the unaddressed problem of aging infrastructure as examples of the dysfunction in Congress.⁹ Sharing the frustrations of the approximately 80% of Americans who disapprove of Congress,¹⁰ he wrote, “we can’t let 535 people continue to limit the progress of a nation of more than 300 million.”¹¹ He was motivated to propose his package of election reforms after considering the structural issues in the electoral process that have “created perverse incentives that have warped our democracy and empowered special interests and a vocal minority.”¹² He cites this dysfunction as the “logical result”¹³ of closed partisan primaries, a surplus of gerrymandered districts that ensure the election of the same party year in and year out, and low voter turnout.¹⁴

His first proposal—single open primaries in which all voters can participate, regardless of party affiliation—is aimed at giving independent and moderate voters a larger voice than they presently have.¹⁵ Under this system, candidates for office are selected by all eligible voters, and the top two vote-getters advance to the general election.¹⁶ Representative Delaney says that high levels of dissatisfaction in the electorate should not be surprising when candidates are selected using “a partisan primary filter”¹⁷ that creates low voter turnout and results in “an incentive to appeal only to the most committed—and ideological—voters.”¹⁸ With open primaries, the ability to win votes outside of a narrow, ideologically committed base becomes more important, even in districts where the top two candidates are likely to come from the same political party.¹⁹

The second proposal is simply aimed at making it easier to vote.²⁰

⁷ John K. Delaney, *How to Fix Congress*, WASH. POST, Sept. 3, 2014, at A15.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

Representative Delaney cited early poll closing times creating difficulty for working parents “who have to commute from work to day care to home to a polling place”²¹ as his primary motivation, but other issues, such as long stretches of waiting in line to vote,²² could also be remedied by this proposal.

The third proposal, redistricting reform, is intended to remedy the problems that have resulted from partisan gerrymandering.²³ Redistricting for congressional elections occurs every ten years after the national census is taken and congressional representation numbers are calculated, as required by the Constitution.²⁴ The States have varying methods of redistricting,²⁵ and, over the years, repeated redistricting has resulted in the creation of districts that are stretched over odd boundaries in an attempt to ensure that one party is guaranteed election by creating districts with unbeatable majorities.²⁶ These “one party enclaves”²⁷ make it so that Representatives’ “main concern is making the most rabid faction of their parties happy.”²⁸ “According to the Cook Political Report, only 16 percent of House districts are competitive.”²⁹ In Representative Delaney’s experience, Representatives from these competitive districts have been much more likely to work towards compromises on a bipartisan basis.³⁰ Representatives from heavily gerrymandered districts do not feel the same incentives to compromise since they do not have to act on behalf of their entire district, but only on behalf of those who will guarantee their reelection.³¹ The Open Our Democracy Act calls for the Comptroller General,³² a member of the Government Accountability Office,³³ to “examine the feasibility of national standards for drawing district lines,”³⁴

²¹ *Id.*

²² Phillip Bump, *Planning to Vote? Here’s How Long You Could Wait*, WASH. POST (Nov. 3, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/11/03/planning-to-vote-tomorrow-it-should-take-15-minutes/> [<http://perma.cc/QVV8-ABQQ>].

²³ Delaney, *supra* note 7.

²⁴ *Congressional Redistricting*, FAIRVOTE.ORG, <http://archive.fairvote.org/redistricting/redistricting.htm> [<http://perma.cc/S2QE-C5QS>] (last visited Oct. 25, 2015).

²⁵ *Redistricting Commissions: Legislative Plans*, NAT’L CONFERENCE OF STATE LEGISLATURES (June 25, 2008), <http://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx> [<http://perma.cc/3PJC-A6KD>].

²⁶ Christopher Ingraham, *What 60 Years of Political Gerrymandering Looks Like*, WASH. POST (May 21, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/05/21/what-60-years-of-political-gerrymandering-looks-like/> [<http://perma.cc/9KYG-THNM>].

²⁷ Delaney, *supra* note 7.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² H.R. 5334, 113th Cong. (2d Sess. 2014).

³³ Delaney, *supra* note 7.

³⁴ *Id.*

an important first step to determine the best direction for redistricting reform to take. “Let’s examine what works—a number of states provide good examples—and develop a framework,”³⁵ Representative Delaney urges.

The most convincing point made by Representative Delaney in his Washington Post piece was his call to action. “We need to act. Low voter turnout, gerrymandering and non-competitive elections are creating a frightening negative feedback loop. As mainstream voters grow increasingly disgusted and apathetic, only extreme partisans stay interested, creating more race-to-the-base contests, which then turn off more moderates and on and on.”³⁶

This Comment examines the current state of the problems that each of these three reforms seeks to address and how the Act seeks to solve the problem. Ultimately, it argues that the three reforms in concert would have a greater effect than each would alone. Part II discusses single open primaries for congressional elections. Part III considers Election Day as a federal holiday, and Part IV discusses congressional redistricting reform. Finally, Part V discusses the Open Our Democracy Act as a coherent package of reforms and argues in support of Representative Delaney’s statement that “[e]ach of the reforms in the Open Our Democracy Act, individually, would help counteract the dysfunction that has broken Congress. Taken together, they can do more than that”³⁷ with the end goal of “mak[ing] the House of Representatives actually representative.”³⁸

II. SINGLE OPEN PRIMARIES FOR CONGRESSIONAL ELECTIONS

Section 2 of the Act is titled “Election of Members of House of Representatives Through Open Primaries.”³⁹ It calls for a single open primary election for each office, followed by a single general election for each office.⁴⁰ The open primary is to be conducted such that “each candidate for such office, regardless of the candidate’s political party preference, shall appear on a single ballot”⁴¹ and “each voter in the State who is eligible to vote in elections for Federal office in the Congressional district involved may cast a ballot in the election, regardless of the voter’s political party preference.”⁴² In the subsequent general election, only the “[two] candidates receiving the greatest number of votes in the single open

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ H.R. 5334, 113th Cong. (2d Sess. 2014).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

primary election[,] . . . without regard to the political party preference of such candidates[,]”⁴³ would appear on the ballot.⁴⁴

Under Article I, Section 4, Clause 1 of the U.S. Constitution, the ultimate power to regulate the times, places, and manner of holding elections for Representatives is reserved to Congress.⁴⁵ The first part of that Clause assigns the power to the States and their respective legislatures, but the second part states that “the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators,”⁴⁶ thus explicitly granting Congress authority to modify existing systems for electing Representatives.⁴⁷

A. *This Proposed Reform Aims to Remove the Incentives to Increase Political Polarization that Are Associated with Current Primary Systems*

Political parties have been around for almost as long as the country has been in existence,⁴⁸ but states did not begin to create legislation providing for primary elections by political parties in order to select candidates for the general election until the 1890s.⁴⁹ “By 1910, 22 states had enacted laws establishing direct primary systems, and by 1916, primaries were being conducted in 26 states.”⁵⁰

1. *In Theory, Currently Existing Closed and Semi-Closed Primaries Incentivize Candidates to Appeal to the Most Extreme Components of Their Parties*

Four general types of primary elections developed in the United States via the experimentation of individual states.⁵¹ These are the closed primary, the semi-closed primary, the open primary, and the blanket primary.⁵² “Primaries exist on a spectrum from closed to open, with the blanket primary being the purest form of an open primary.”⁵³

In the closed primary election system, only party members (who are otherwise eligible to vote) are permitted to vote in a

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ U.S. CONST. art. I, § 4, cl. 1.

⁴⁶ *Id.*

⁴⁷ 160 CONG. REC. H7186 (daily ed. July 31, 2014) (statement of Rep. Delaney).

⁴⁸ Robin Miller, Annotation, *Constitutionality of Candidate Participation Provisions for Primary Elections*, 121 A.L.R. 5th 1 (2013).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Chenwei Zhang, *Towards a More Perfect Election: Improving the Top-Two Primary for Congressional and State Races*, 73 OHIO ST. L.J. 615, 620 (2012).

party's primary election. In the semi-closed primary system, unaffiliated voters (independents) otherwise eligible to vote are permitted to vote in a party's primary election if the party chooses to permit their voting. Otherwise, as in the closed primary, only party members are permitted to vote. In the open primary system, all persons eligible to vote may, regardless of party affiliation, choose the party in whose primary they will vote, although voters are restricted to participating in one party's primary. The blanket primary system, in its partisan version, takes this vision farther and permits each voter to vote in a different party's primary for each office.⁵⁴

Closed and semi-closed primaries have the benefit of promoting "party unity and prevent[ing] nonmembers from 'raiding' a party's election, which occurs when a voter votes for the perceived weakest candidate from the opposing party in an attempt to pit that candidate against his or her preferred candidate."⁵⁵ However, these primaries sacrifice the full participation of voters in a district in order to limit raiding. In the current two-party system, sacrificing the participation of voters outside of the party means that a candidate's best bet in a closed primary is to appeal to his party's most active and loyal voters, who are often the most ideologically polarized.⁵⁶

Open primaries make primaries "conducive to voter participation by more openly welcoming voters who are independent or not decidedly partisan,"⁵⁷ but "may encourage political raiding, which is what the closed primary is designed to prevent."⁵⁸ In blanket primaries "[a]ll candidates from all political parties appear on a single ballot, and the most popular candidate from each party becomes the party's nominee."⁵⁹ Traditional blanket primaries preserve partisan divisions by having the most popular candidate from each party become that party's nominee; the subsequent general election will still have one Republican running against one

⁵⁴ Miller, *supra* note 48.

⁵⁵ Zhang, *supra* note 53.

⁵⁶ See *Section 1: Growing Ideological Consistency*, PEW RESEARCH CTR., <http://www.people-press.org/2014/06/12/section-1-growing-ideological-consistency> [<http://perma.cc/X9SQ-LQGE>] (last visited Oct. 26, 2015) (combining data from five Pew Research Center surveys to demonstrate in an infographic that "as ideological consistency has become more common, it has become increasingly aligned with partisanship"); *Section 5: Political Engagement and Activism*, PEW RESEARCH CTR., <http://www.people-press.org/2014/06/12/section-5-political-engagement-and-activism/> [<http://perma.cc/TE65-DALN>] (last visited Oct. 26, 2015) (concluding based on the same data that the most polarized voters are the most politically active in primaries).

⁵⁷ Zhang, *supra* note 53, at 621.

⁵⁸ *Id.*

⁵⁹ *Id.*

Democrat, even if those two candidates were not truly the two most popular.

2. *A Single Open Primary Will Incentivize Candidates to Appeal to the Center*

The system proposed by Representative Delaney differs slightly from these four general categories. Generally, in an open primary, each eligible voter chooses which party's primary he or she will vote in.⁶⁰ This description assumes that each political party is still conducting a separate primary to choose its own candidate to be presented in the general election. In Representative Delaney's formulation, there is a "single open primary,"⁶¹ meaning that all candidates are included together in one primary, regardless of party, and all voters participate in that single primary election to choose candidates to move on to the general election. This system has also been described as a "top-two primary,"⁶² a "nonpartisan blanket primary,"⁶³ and a "Jungle Primary."⁶⁴ The unifying theme is that these "primaries are . . . multipartisan: the top two vote getters, regardless of party affiliation, face off against each other in the general election."⁶⁵ This system is derived from the blanket primary,⁶⁶ but "departs from the blanket primary because the top two vote-getters go on to the general election, regardless of political party."⁶⁷ This system converts the purpose of the primary election from selecting the nominee for each party into "winnow[ing] the list of candidates for the general election."⁶⁸

Representative Delaney is not alone in thinking these systems may "actually create[] an electoral system that favors centrists rather than politicians who play to their party's base;"⁶⁹ Senator Chuck Schumer wrote a July 2014 op-ed in the *New York Times* stating his case for "a national movement to adopt the 'top-two' primary (also known as an open primary), in which all voters, regardless of party registration, can vote and the top two vote-getters, regardless of party, then enter a runoff."⁷⁰ This system "essentially converts a traditional primary into a general election,

⁶⁰ Miller, *supra* note 48.

⁶¹ H.R. 5334, 113th Cong. (2d Sess. 2014) (emphasis added).

⁶² Joe Klein, *California's New Jungle Primary System*, TIME (May 15, 2014), <http://time.com/100556/the-jungle-primary/> [<http://perma.cc/DNX8-335H>].

⁶³ Miller, *supra* note 48.

⁶⁴ Klein, *supra* note 62.

⁶⁵ *Id.*

⁶⁶ Zhang, *supra* note 53, at 621.

⁶⁷ *Id.*

⁶⁸ *Id.* at 622.

⁶⁹ Klein, *supra* note 62.

⁷⁰ Charles E. Schumer, *End Partisan Primaries, Save America*, N.Y. TIMES, July 22, 2014, at A0.

and a traditional general election into a runoff election.”⁷¹

B. *Empirical Studies on the Limited Data Available Have Found Little if Any Effect of the Openness of Primary Elections on the Extremity of the Politicians They Produce*

Despite the intuitive appeal of the theory that open primaries will have a moderating effect on the candidates that are ultimately elected, analysis of available data on legislators’ ideological positions and the primary systems that elected them has failed to show this relationship, and in some cases has even shown that more open primaries elect legislators who are more extreme.⁷² A study led by Eric McGhee at the Public Policy Institute of California looked at data from most states for the years from 1992 to 2010 to test for a “selection effect”—that is, whether or not different primary systems encourage more moderate legislators to run and whether they help the ones who do run win more often.⁷³ This “selection effect” is contrasted to a “conversion effect,” which is a measure of whether or not incumbent legislators change their issue positions to reflect the changing incentive structure of a new primary system.⁷⁴ Studies on the conversion effect have found that “incumbents rarely change their minds [in these situations], and when they do, that change is limited.”⁷⁵ As for the selection effect, McGhee found that levels of polarization were mostly constant for both major parties across different types of primary election systems.⁷⁶ However, McGhee concluded that the study’s “findings generally fail to reject the null hypothesis of no effect from primary systems.”⁷⁷ Notably, this study was constrained by the limitation that not all states had adopted different primary systems in the time frame analyzed.⁷⁸ However, McGhee noted that some studies had found an effect of nomination systems on polarization in the state of California,⁷⁹ one of the few states that had implemented an open primary similar to the one contemplated by the Act, before concluding that “analysis shows that concluding much from this relationship would be premature.”⁸⁰

⁷¹ Zhang, *supra* note 53, at 617.

⁷² Eric McGhee et al., *A Primary Cause of Partisanship? Nomination Systems and Legislator Ideology*, 58 AM. J. POL. SCI. 337, 337–38 (2014).

⁷³ *Id.* at 341.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 343.

⁷⁷ *Id.* at 347.

⁷⁸ *Id.* at 334. The information in these graphs is limited because it does not account for relevant variation between states. Some states have changed their primary systems, and others are not present in early or late years of the data set, so the precise group of states in each category is not constant.

⁷⁹ *Id.* at 349 (“Indeed, California is virtually the *only* state where a change in primary system has produced the expected moderating effect.”).

⁸⁰ *Id.*

A different study by Shigeo Hirano at Columbia University found little to no evidence that the threat of primary competition, like the threat that would be present to incumbents in open primaries, had any effect on congressional partisan polarization.⁸¹ Hirano's study was focused on testing whether or not *any* type of primary produces partisan polarization in the Representatives that it elects.⁸² At the outset Hirano noted that "[a]lthough the conventional wisdom suggests that the introduction of primary elections will have a polarizing effect on the positions of members of Congress, there are surprisingly few empirical studies that test this idea directly."⁸³ Hirano went on to test this idea, and found that "even when the ideological composition of the primary electorate appears to be relatively extreme [as theoretically is the case in a closed primary] or when the threat of primary competition appears to be particularly strong [as would be the case in an open primary],"⁸⁴ "various empirical investigations suggest that primary elections do not have a large impact on [Representatives'] roll call voting positions."⁸⁵

Another study by Douglas Ahler at the University of California, Berkeley focused on California's 2012 primaries, noting that they were the first to be conducted under a new top-two format.⁸⁶ In his paper, Ahler cited studies concluding that open primaries do moderate political outcomes, as well as others finding that open primaries failed to moderate politicians.⁸⁷ However, upon conducting his own study, Ahler found that voters failed to distinguish between moderate and extreme candidates under the new primary system.⁸⁸ Ahler attributed this to the fact that voters appeared to know so little about candidates' positions that they could not have intentionally cast ballots for more moderate candidates even if they had wanted to.⁸⁹

⁸¹ Shigeo Hirano et al., *Primary Elections and Partisan Polarization in the U.S. Congress*, 5 Q.J. POL. SCI. 169, 169 (2010).

⁸² *Id.* at 170.

⁸³ *Id.*

⁸⁴ *Id.* at 172.

⁸⁵ *Id.*

⁸⁶ DOUGLAS AHLER ET AL., DO OPEN PRIMARIES IMPROVE REPRESENTATION? 1, <https://www.ocf.berkeley.edu/~glenz/openprimary/openprimary.pdf> [http://perma.cc/UK8V-4VAB] (last visited Apr. 1, 2015).

⁸⁷ *Id.* at 3.

⁸⁸ *Id.* at 1.

⁸⁹ *Id.* at 4.

C. *Despite a Lack of Current Empirical Support for the Proposition that Open Primaries Will Moderate the Political Views of Elected Representatives, Single Open Primaries Are Still Best Suited for Congressional Elections*

As detailed above in Part II.B, empirical studies have been unable to confirm or deny whether open primaries have the moderating effects on candidates that they are theorized to have. While this presents a formidable obstacle for backers of open primaries, as will be discussed below in Part D, it does not mean that a switch to open primaries would not have beneficial effects on the election process. Even without empirically documented proof of moderated political outcomes, ideological support for the moderating effects of open primaries remains strong. With voter participation in elections ranging from about 60% in presidential election years to 40% in midterm election years,⁹⁰ widespread ideological support for open primaries could increase voter participation by decreasing feelings of apathy toward the political process. The prospect of election reform through the adoption of open primaries, coupled with academic theoretical support for the moderating effects of open primaries, could reduce this apathy. Such a situation might motivate voters to participate in primaries that they had not in the past in hopes of taking advantage of a renewed chance to have their voices heard in a new type of primary election. It is quite possible that open primaries have not been adopted in enough jurisdictions to allow the types of studies detailed above to provide a clear picture of their results in practice on a national scale, as is proposed by the Act. Whether or not this possibility is a statistical truth is likely to be unimportant to an average voter during the advent of widespread open primary systems; a lack of conclusive studies with findings undermining the open primary system is reason enough to give the proposed new system a chance.

The fact remains that politics in the United States remains more polarized than ever before.⁹¹ This is the result of many factors, and despite the lack of empirical support, one of the prevailing theories as to a contributing cause continues to be the idea that in closed primaries, candidates are incentivized to appeal to their most extreme constituents.⁹² Commentators observe that when politics are polarized to this extent, both unified and divided forms of government are likely to tend to extreme forms of themselves.⁹³ When the government is divided, that is, when

⁹⁰ Mark N. Franklin, *Electoral Participation*, in *CONTROVERSIES IN VOTING BEHAVIOR* 83 (Richard G. Niemi & Herbert F. Wiesberg eds., 2010).

⁹¹ See sources cited *supra* note 56 (providing findings on polarization in American politics today).

⁹² Zhang, *supra* note 53, at 631.

⁹³ Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 325 (2011).

different parties control either the House, Senate, or Presidency, in a polarized political environment it tends to produce politics of “confrontation, indecision, and deadlock.”⁹⁴ “To the extent anything gets done, diluted, discrete compromises may tend to replace ideologically coherent, large initiatives.”⁹⁵ When the government is unified during highly polarized times, there is an increased risk that the system of checks and balances will break down; “a Congress controlled by the same party as the president is unlikely to be aggressive in overseeing the executive branch’s actions, exposing failings in the president’s administration, or holding the president accountable.”⁹⁶ There is also the risk that “with the minority party removing itself from the legislative process and, in essence, simply opposing all legislative initiatives of the majority, there will be less checking and balancing within the legislative process.”⁹⁷

Richard Pildes has suggested that “[t]he single institutional change most likely to lead to some moderation of candidates and officeholders, across all elections, would be to change the design of primary elections.”⁹⁸ About half of all states use closed or semi-closed primaries.⁹⁹ “The most ideologically committed and hardcore party activists tend to dominate closed primaries even more than they already dominate primaries in general”¹⁰⁰ and, as a result, “closed primary winners are thought more likely to reflect the ideological extremes around which the median party activist centers.”¹⁰¹

Primaries of the type proposed in the Act theoretically have the potential to decrease polarization by encouraging candidates to appeal to the center, shaping the policies enacted by those congressmen once elected. “The top-two primary is designed to increase the chances of election for moderates running for Congress or the state legislature, particularly in election districts that are overwhelmingly dominated by voters affiliated with one party.”¹⁰² The continued academic acceptance of the idea that open primaries carry with them the possibility of a moderating effect on politicians outweighs the mixed findings of some studies indicating this effect would not be realized, and supports the position in the Act that single open primaries should be given a chance on a national scale. If single open primaries turn out to be ineffective or have unforeseen consequences, primary systems could always revert to what they are

⁹⁴ *Id.* at 326 (citation omitted).

⁹⁵ *Id.*

⁹⁶ *Id.* at 327.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 299.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (emphasis omitted).

¹⁰² *Id.* at 302 (citation omitted).

presently through appropriate legislation without any harm done.

D. *Election Reform in the Form of Single Open Primaries Is Likely to Be Challenged by the Political Parties Themselves, but Will Survive These Challenges*

1. *There Are Preexisting Criticisms of Open Primary Systems*

Single open primaries like the one proposed in the Act are not without their criticisms.

Proponents of more open primaries claim that they help produce more moderate candidates, more accurately reflect the median voter's preferences, and encourage more citizen participation. Opponents claim that they take away from political parties' freedom of association, impose more difficulties for minor party candidates to win elections, and that they in fact limit choice.¹⁰³

California, Louisiana, and Washington have used some form of the top-two primary system,¹⁰⁴ and "widespread litigation against the top-two primary is continuously budding."¹⁰⁵ Some of this litigation has made it to the U.S. Supreme Court and "a rather inconsistent and incoherent jurisprudence regarding the law of primaries (which partially stems from its legal uncertainty in defining political parties)"¹⁰⁶ has developed.

Many of the challenges have been based on issues of forced association when parties are not free to exclude participants or control self-designated labels of candidates.¹⁰⁷ The Court has "generally been deferential to political parties' First Amendment rights to freedom of association,"¹⁰⁸ declining to force parties to affiliate with candidates that they reject,¹⁰⁹ and allowing parties to exclude voters from their primaries.¹¹⁰ "On the other hand, there is a competing recognition of stronger state regulatory interests that protect 'the overall integrity of the historic electoral process.'"¹¹¹ Blanket primaries similar to the system suggested by Representative Delaney have been struck down where the top candidates became the official nominees of their respective parties,¹¹² but

¹⁰³ Zhang, *supra* note 53, at 622.

¹⁰⁴ Schumer, *supra* note 70; Zhang, *supra* note 53, at 624.

¹⁰⁵ Zhang, *supra* note 53, at 618.

¹⁰⁶ *Id.* at 622.

¹⁰⁷ *Id.* at 622–23.

¹⁰⁸ *Id.* at 622.

¹⁰⁹ *Id.* at 622–24.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 623.

¹¹² *Id.* at 622–24.

“nonpartisan” blanket primaries where the top-two candidates advanced regardless of political party have been upheld. The rationale behind this distinction is that when the two candidates who move on are not “official” nominees, the impact on associational rights is lessened.¹¹³

Section 3 of the Act, “Ability of Candidates to Disclose Political Party Preferences,” provides:

(a) OPTION OF CANDIDATES TO DECLARE POLITICAL PARTY PREFERENCE.—At the time a candidate for the office of Member of the House of Representatives files to run for such office, the candidate shall have the option of declaring a political party preference, and the preference chosen (if any) shall accompany the candidate’s name on the ballot for the election for such office.

(b) DESIGNATION FOR CANDIDATES NOT DECLARING PREFERENCE.—If a candidate does not declare a political party preference under subsection (a), the designation “No Party Preference” shall accompany the candidate’s name on the ballot for the election for such office.

(c) NO PARTY ENDORSEMENT IMPLIED.—The selection of a party preference by a candidate under subsection (a) shall not constitute or imply endorsement of the candidate by the party designated, and no candidate in a general election shall be deemed the official candidate of any party by virtue of his or her selection in the primary.¹¹⁴

This section alleviates concerns about forced association in violation of the First Amendment, and gives the single open primary the air of nonpartisanship that the Supreme Court has indicated it requires.¹¹⁵ Section 4 of the Act, “Protection of Rights of Political Parties” further emphasizes this point by explicitly stating that

[n]othing in this Act shall restrict the right of individuals to join or organize into political parties or in any way restrict the right of private association of political parties. Nothing in this Act shall restrict a party’s right to contribute to, endorse,

¹¹³ *Id.* at 624. In *Washington State Grange v. Washington Republican Party*, 522 U.S. 442, 458–59 (2008), the Court rejected a challenge to Washington’s newly established blanket primary system as facially violative of political parties’ associational rights because the candidate’s self-identified parties were not forced upon the official parties. Louisiana’s version of the top-two primary was reinstated in 2010, and parties in the State declined to challenge it because it appeared to fit within the nonpartisan nature required by the Court in *Washington State Grange*. Zhang, *supra* note 53, at 617–18, 621–24.

¹¹⁴ H.R. 5334, 113th Cong. (2d Sess. 2014).

¹¹⁵ See *supra* notes 107–13 and accompanying text (detailing the law of primaries that has been developed by the Supreme Court, including that single primaries must be nonpartisan).

or otherwise support a candidate for the office of Member of the House of Representatives.¹¹⁶

To assuage the fears of the parties themselves, the language of the Act allows parties to “establish such procedures as it sees fit to endorse or support candidates or otherwise participate in all elections,”¹¹⁷ and to “informally designate candidates for election to such an office at a party convention or by whatever lawful mechanism the party may choose, other than pursuant to a primary election held by a State.”¹¹⁸ Further, the Act allows a political party to “adopt such rules as it sees fit for the selection of party officials (including central committee members, presidential electors, and party officers), including rules restricting participation in elections for party officials to those who disclose a preference for that party at the time of registering to vote.”¹¹⁹ With these two sections, Representative Delaney made it clear that the single open primary scheme set out in the Act would be nonpartisan and not implicate the concerns of infringing on First Amendment associational rights for which other primary schemes have previously been struck down.

The Supreme Court has held that all election laws invariably impose some type of burden on individual voters.¹²⁰ Some such laws are subject to strict scrutiny, but in general a more flexible standard in the form of a balancing test applies.¹²¹ “A court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’”¹²²

Because the Supreme Court has previously applied strict scrutiny in cases dealing with statutory burdens of the associational rights of political parties relating to primary elections,¹²³ any challenge to this portion of the Act is likely to allege that an impermissible burden on First Amendment associational rights has been imposed by forcing all parties to compete in a single open primary in order to get strict scrutiny review. Indeed, this is the form that some of the challenges to open primaries in California¹²⁴ and

¹¹⁶ H.R. 5334.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

¹²¹ *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

¹²² *Id.* at 434 (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217–19 (1986)).

¹²³ *Tashjian*, 479 U.S. at 217–19.

¹²⁴ *Field v. Bowen*, 131 Cal. Rptr. 3d 721, 724–25 (Ct. App. 2011).

Washington¹²⁵ have taken.

To defeat these types of challenges, defenders of the Act would have to demonstrate that the portion mandating single open primaries is a narrowly tailored regulation that advances compelling government interests.¹²⁶ Proof that this provision of the Act is narrowly tailored comes from Sections 3 and 4, as discussed earlier in this Part. Concerns about burdens on the right of association caused by misidentification by voters of the parties that candidates belong to, as were put forth in *Tashjian v. Republican Party of Connecticut*,¹²⁷ are addressed in Section 3(c)'s assurances that just because a candidate identifies with a party, official support is not to be implied.¹²⁸ Concerns about burdens imposed on the First Amendment right to expression by choosing a candidate are addressed in Section 4, as it explains that the Act does not interfere with parties' own internal selection and nomination processes.

As explained in Part II.C above, a compelling governmental interest supporting the Act is to reduce polarization and increase the functionality of Congress. As shown above in Part II.B, it will be difficult for defenders of the Act to find empirical support for the proposition that a single open primary will moderate Representatives that are ultimately elected, but they can point to the limitations of studies conducted to date in order to attempt to write them off as inconclusive. Importantly, while these studies do not directly support the moderating effects of open primaries, it can be argued that they are too narrow and not conclusive enough to disprove the theory. Once that argument is addressed, the defenders of the Act can focus, and primarily rely on, policy and theoretical justifications to support their position. These theoretical justifications are supported by academic writing on the subject in the form of articles like those cited above demonstrating first that Congress is dysfunctional in its current state, and second, that, at least in theory, single open primaries could have a moderating effect on which candidates are elected and cause Congress to function more cooperatively and productively. In light of the minimal burdens imposed on the associational rights of political parties, kept to a minimum by the Act itself; the strong theoretical support for the moderating effects of open primaries; and the highly compelling governmental interest in protecting the integrity—and perceived integrity—of the electoral process, this provision of the Act has a fighting chance to survive strict scrutiny. If proponents of the Act are lucky in court, their burden will not be nearly as high; when an election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment

¹²⁵ Wash. State Republican Party v. Wash. State Grange, 676 F.3d 784, 791–92 (2012).

¹²⁶ *Tashjian*, 479 U.S. at 217.

¹²⁷ *Id.* at 210–11.

¹²⁸ H.R. 5334, 113th Cong. (2d Sess. 2014).

rights of voters, the government's important regulatory interests are generally sufficient to justify the restrictions.¹²⁹

III. ELECTION DAY AS A FEDERAL HOLIDAY

Section 5 of the Act is called "Treatment of Election Day in the Same Manner as Legal Public Holiday for Purposes of Federal Employment." It is one of the shorter sections of the Act, and states that for the purposes of federal employment, Election Day should be treated as a legal public holiday as described in 5 U.S.C. § 6103.¹³⁰ It also calls for a Sense of Congress Resolution to be passed regarding treatment of Election Day by private employers, stating: "It is the sense of Congress that private employers in the United States should give their employees a day off on the Tuesday next after the first Monday in November in 2016 and each even-numbered year thereafter to enable the employees to cast votes in the elections held on that day."¹³¹ Congress has the power to regulate the times that congressional elections are held pursuant to Article I, Section 4, of the Constitution, and to make laws under the "necessary and proper" clause of Article I, Section 8.¹³² All that is needed under § 6103 for Congress to create a holiday is that it pass a statute doing so.¹³³

A. *Past Treatment of Election Day*

Though the number of people eligible to vote in U.S. elections has increased since 1789, "throughout American history the number of people who exercise the right to vote has dramatically declined in proportion to the number of people that have the right to vote."¹³⁴ In the earliest years of American history, there were a variety of social forces that compelled eligible voters to cast their votes on Election Day.¹³⁵ Elections for representatives to colonial assemblies were usually treated as major celebrations; people had to travel considerable distances to cast their votes, and once there, congregated in groups to catch up and converse with one

¹²⁹ See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983))).

¹³⁰ H.R. 5334.

¹³¹ *Id.*

¹³² U.S. CONST. art. I, § 4, cl. 1; 160 CONG. REC. H7186 (daily ed. July 31, 2014) (statement of Rep. Delaney).

¹³³ 5 U.S.C. § 6103(b) (2012).

¹³⁴ Christopher W. Carmichael, *Proposals for Reforming the American Electoral System After the 2000 Presidential Election: Universal Voter Registration, Mandatory Voting, and Negative Balloting*, 23 *HAMLIN J. PUB. L. & POL'Y* 255, 264 (2002).

¹³⁵ *Id.* at 265.

another.¹³⁶ These events were so popular that even large numbers of Americans ineligible to vote attended for the festivities.¹³⁷ “Elections were lively public events, in which ‘amid the continuous electioneering and political arguments, picnics, drinking, and boisterous celebration went on throughout each polling day.’”¹³⁸ Making attendance even more enticing, the events usually ended with celebration feasts.¹³⁹ During the 1800’s, political parties took on the responsibility of “organizing festivities for election day.”¹⁴⁰ This festive atmosphere continued through the nineteenth century, and was at its height for elections involving larger-than-life figures like Andrew Jackson and Abraham Lincoln.¹⁴¹

B. *Modern Changes*

One of the first changes marking the shift from treating Election Day as a public celebration to the “private experience it is today”¹⁴² was the transition to written ballots. Before then, “voting was ... an oral and public act: Men assembled before election judges, waited for their names to be called, and then announced which candidates they supported.”¹⁴³ By 1850 “almost all states had changed over to written ballots.”¹⁴⁴ However, the early process of casting written ballots remained essentially a public act.¹⁴⁵ Political parties were responsible for distributing paper ballots with the names of their candidates on them, and these ballots were distinguishable from one another even when folded for submission.¹⁴⁶ Within the polling place, voters simply placed their ballots into boxes or handed them to election officials in front of others.¹⁴⁷ Further, ballots being marked or printed on distinctive paper ensured that there was no secrecy as to how a person had voted.¹⁴⁸

In the mid-1800’s and earlier, political parties functioned as organizers of elections. They

established permanent premises at locations where “the faithful gathered to talk politics, drink cider, organize parades

¹³⁶ *Id.*

¹³⁷ Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 1 (2011).

¹³⁸ *Id.* at 14.

¹³⁹ Carmichael, *supra* note 134, at 265.

¹⁴⁰ El-Haj, *supra* note 137, at 14.

¹⁴¹ Carmichael, *supra* note 134, at 265–68.

¹⁴² El-Haj, *supra* note 137, at 14.

¹⁴³ *Id.* at 14–15.

¹⁴⁴ *Id.* at 14.

¹⁴⁵ *Id.* at 15.

¹⁴⁶ *Id.* at 15–16.

¹⁴⁷ *Id.* at 15.

¹⁴⁸ *Id.*

and rallies, and read campaign literature.” In election years, these meetings often took place on a weekly basis as party loyalists solicited new members and prepared for festivities by procuring torchlights, uniforms, and fireworks for parades. Political parties also distributed honorific titles and positions—President, Vice President, doorkeeper—to their members, providing incentives to serve the party as well as a sense of solidarity. Most importantly, they mobilized the electorate to come out on election days.¹⁴⁹

Beginning in the late nineteenth century, a significant increase in government control over political parties and elections themselves brought about “the end of election days as boisterous public holidays.”¹⁵⁰ States and municipalities “cracked down on political parties that had, by this time, become notoriously corrupt, particularly in urban areas.”¹⁵¹

Also around this time, in 1845, Congress chose a uniform date for presidential elections. The day for choosing presidential electors was initially set as “the first Tuesday in November,”¹⁵² in years divisible by four.¹⁵³ Subsequently, it was pointed out that, in some years, the period between the first Tuesday in November and the first Wednesday in December, when the electors are required to meet in their state capitals to vote, would be more than thirty-four days, in violation of the existing Electoral College law.¹⁵⁴ To remedy this problem, the date for choosing presidential electors was moved to the Tuesday after the first Monday in November, codifying Tuesday elections.¹⁵⁵

Procedural changes were further exacerbated by dramatic social changes like “the transformed ideal of citizenship embodied by the educated individual voter, the emergence of the expert-run administrative state as a new locus of policy decision making, the rise of interest groups as a means to influence government, [] the breakdown of the gendered construction of citizenship as male,”¹⁵⁶ and the enfranchisement of African American voters.¹⁵⁷ Official ballots, adopted in part to promote transparency and accountability, and in part to act as literacy tests to disenfranchise minority groups,¹⁵⁸ worked to increase the air of formality

¹⁴⁹ *Id.* at 17 (citations omitted).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 22–23 (citations omitted).

¹⁵² *House of Representatives, 28th Congress, 2d Sess.*, CONG. GLOBE 14–15 (1844).

¹⁵³ *Id.* at 14.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ El-Haj, *supra* note 137, at 17.

¹⁵⁷ *Id.* at 18.

¹⁵⁸ *Id.* at 22.

and secrecy surrounding elections.¹⁵⁹ All of these changes throughout the nineteenth century contributed to the transition from Election Day being treated as a national celebration to it being the not particularly exciting event that it has become in modern times.

C. *Benefits of Election Day as a Federal Holiday*

Other industrialized democracies, specifically Finland and Sweden, have had success in moving their election days to holidays or weekends.¹⁶⁰ In the United States, only fifteen states, Delaware, Hawaii, Illinois, Indiana, Louisiana, Maryland, Montana, New Jersey, New York, Ohio, Rhode Island, South Carolina, Texas, West Virginia, and Wisconsin, make Election Day a state holiday.¹⁶¹ The holiday means different things in different states: “[i]n most of these states, state employees do not work and most government offices are closed; only some states close schools.”¹⁶² A national holiday is needed for congressional elections “because this is the only way to ensure that private sector employees get off from work.”¹⁶³

“Without doubt, one of the biggest turnout drains among those who are already registered stems from the simple logistical fact that a good number of people cannot take the time off from a normal working day to vote.”¹⁶⁴ When the voters that are able to make time to vote after they get out of work show up to the polling place, long lines serve as a deterrent.¹⁶⁵ “[V]oting lines are usually busiest after the evening commute.”¹⁶⁶ Political activist groups such as “Why Tuesday?”¹⁶⁷ have picked up on these statistics, advocating weekend voting, and noting that

U.S. Census data has long indicated the #1 reason voters gave for not making it out to the polls was “too busy/couldn’t get time off to vote.” In 2010, 27% of nonvoters gave this answer. After the 2014 midterm elections, a staggering 69% of nonvoters didn’t cast a ballot because they were stuck at school or work, or were too busy, out of town, sick or forgot,

¹⁵⁹ *Id.*

¹⁶⁰ Jason P.W. Halperin, Note, *A Winner at the Polls: A Proposal for Mandatory Voter Registration*, 3 N.Y.U. J. LEGIS. & PUB. POL’Y 69, 101 (1999).

¹⁶¹ *Id.*

¹⁶² *Id.* (citation omitted).

¹⁶³ *Id.* at 101.

¹⁶⁴ *Id.* at 100–01.

¹⁶⁵ *Id.* at 107–08.

¹⁶⁶ *Id.* at 101 (citation omitted); Douglas M. Spencer & Zachary S. Markovits, *Long Lines at Polling Stations? Observations from an Election Day Field Study*, 9 ELECTION L.J. 3, 9–10 (2010).

¹⁶⁷ WHY TUESDAY?, <http://www.whytuesday.org> [<http://perma.cc/N746-9Z9U>] (last visited May 12, 2015).

according to Pew.¹⁶⁸

Surprisingly, almost no studies exist that compare voter turnout rates in states or countries where Election Day has been moved to a holiday or weekend to the turnout rates existing before the switch. However, there is evidence that states and countries with Election Day treated as a holiday or falling on a weekend have higher voter turnout rates than the United States currently does on a national level.¹⁶⁹ Thus, moving Election Day to a weekend or treating it as a holiday does have an association with increased voter turnout, but correlation has not been proven. Even without strong correlative proof, it makes sense in light of the fact that lines at polling stations appear longest before and after work¹⁷⁰ that removing the workday from the equation would allow more voters to access the polls at a steady pace throughout the course of Election Day. It is possible that potential voters would take an Election Day holiday to relax or go on vacation, and still not vote, but that is a slight risk compared to the potentially significant benefit to American democracy of increasing continually diminishing voter turnout.

One of the simplest ways to solve the problem of low voter turnout and to return to having voting on Election Day become a priority for voters as it was at prior times in American history is to make the day something to look forward to. It is unlikely that there would be a challenge to this provision of the Act in the courts, so all that would be needed to enact this reform would simply be to pass it in Congress. Making Election Day a federal holiday as the Act suggests would greatly reduce the cost of voting to individual voters, incentivize voters to go the polls by freeing up dedicated time for the task, and renew interest and participation in elections.

IV. CONGRESSIONAL REDISTRICTING REFORM

Finally, Section 6 of the Act calls for “a study of the feasibility and desirability of enacting national standards and criteria for Congressional redistricting” to be carried out by the Comptroller General and reported to

¹⁶⁸ *FAQ, WHY TUESDAY?*, <http://www.whytuesday.org/faq/> [<http://perma.cc/3VVD-23VZ>] (last visited May 12, 2015).

¹⁶⁹ In the United States, about 60% of the eligible voting population votes during presidential election years, while only about 40% vote during midterm elections. *Voter Turnout*, FAIRVOTE.ORG, <http://www.fairvote.org/research-and-analysis/voter-turnout> [<http://perma.cc/LCJ3-9DNZ>] (2014) (last visited May 12, 2015). In Sweden, voter turnout for lower house elections is about 86%, while in Finland, it is about 78%. Franklin, *supra* note 90, at 83. In 2008, the South Carolina primary, which was held on a Saturday, set a record for voter turnout in the state. Mark Z. Barabak, *Obama Easily Wins Heated S.C. Primary*, L.A. TIMES (Jan. 27, 2008), <http://www.latimes.com/nation/politics/politicsnow/la-na-carolina27jan27-story.html#page=1> [<http://perma.cc/5378-ZT22>].

¹⁷⁰ Spencer & Markovits, *supra* note 166, at 9–10.

Congress within a year of the passage of the Act.¹⁷¹ As a proposal not directly related to the conduct of elections, Congress has the authority for this section under Article I, Section 8.¹⁷²

A. *Redistricting and Gerrymandering*

Article 1, Section 4 of the Constitution delegates the authority for drawing congressional districts from which Representatives are elected to the States.¹⁷³ “[W]hile the clause gives Congress the power to supersede state regulations of congressional elections, Congress has not used this power to divest states of redistricting authority.”¹⁷⁴ Partisan gerrymandering “is the method of creating electoral districts that provide the greatest electoral benefit to the political party drawing the boundaries”¹⁷⁵ and occurs when a political party in control of the state legislature or state redistricting process draws the lines in such a way that one party is guaranteed to win based on the traditional voting preferences of the voters included within the district.¹⁷⁶

Two techniques, “packing” and “cracking,” are used to accomplish gerrymandering.¹⁷⁷ Packing “occurs when the boundaries of an electoral district are changed in order to create an area that incorporates a majority of people who vote in a similar way.”¹⁷⁸ It creates a few districts with huge majorities of like-minded voters, “making it easier for the party in power to win or maintain control in the majority of the other districts.”¹⁷⁹ Cracking occurs “when an area with a high concentration of similar voters is split among several districts, ensuring that these voters have a small minority in several districts rather than a large majority in one, thereby diluting the voting power of the group.”¹⁸⁰ In either method, the outcome “is to draw boundaries in such a way that the groups opposing the new boundaries are concentrated so as to minimize their representation and influence.”¹⁸¹

¹⁷¹ H.R. 5334, 113th Cong. (2d Sess. 2014).

¹⁷² 160 CONG. REC. H7186 (daily ed. July 31, 2014) (statement of Rep. Delaney).

¹⁷³ Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409, 413 (2004).

¹⁷⁴ *Id.* at 413.

¹⁷⁵ Michael Weaver, Note, *Uncertainty Maintained: The Split Decision over Partisan Gerrymanders in Veith v. Jubelirer*, 36 LOY. U. CHI. L.J. 1273, 1277 (2005).

¹⁷⁶ Cox, *supra* note 173, at 413.

¹⁷⁷ Weaver, *supra* note 175, at 1279.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1279–80 (citation omitted).

B. *Problems Arising from Partisan Gerrymandering*

“Gerrymandering is the method of creating electoral districts that provide the greatest electoral benefit to the political party drawing the boundaries.”¹⁸² There are several harms that can result to legislatures from partisan gerrymandering, and all share the common criticism of increasing “the ability of the minority to dilute the will of the majority.”¹⁸³ The practice of redrawing electoral districts in order to gain a political benefit for one party has a long history, but recently it has become more extreme.¹⁸⁴ “For example, in the 2002 Congressional elections, 356 out of the 435 House of Representatives members’ districts were decided by margins of more than twenty percent and only four incumbents who faced non-incumbent challengers were defeated.”¹⁸⁵ Further, “[t]he 2004 election of the House of Representatives was the fourth consecutive election in which the incumbent success rate was at least ninety-eight percent.”¹⁸⁶

One such harm is referred to as partisan bias.¹⁸⁷ “Theories of partisan bias condemn districting arrangements that make it easier for one party than the other to convert votes cast in its favor on Election Day into legislative seats.”¹⁸⁸ In this instance, the harm takes place

when one party can capture a greater share of seats in the legislature than the other party for a given level of electoral support. For example, if Democrats garner 53 percent of the vote and thereby capture 60 percent of the seats in the legislature, then in an unbiased system the Republicans will also capture 60 percent of the legislative seats if they garner 53 percent of the vote. If the Republicans were to capture a greater seat share in this situation—say 70 percent—the system would contain partisan bias in favor of the Republicans.¹⁸⁹

Another potential harm is the reduction of electoral competition.¹⁹⁰ Proponents of this theory argue “that partisan gerrymandering is harmful where it leads to a constriction of the competitive processes by which voters can express choice.”¹⁹¹ A third potential harm is that partisan gerrymandering creates increased polarization in the legislature by

¹⁸² *Id.* at 1277.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1280–83.

¹⁸⁵ *Id.* at 1273.

¹⁸⁶ *Id.* at 1281.

¹⁸⁷ Cox, *supra* note 173, at 419.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 422.

¹⁹¹ *Id.* at 423 (citation omitted).

removing the incentive to appeal to centrists in elections, and making it so that candidates need to appeal to only the most dedicated members of a party's base.¹⁹² What each of these problems has in common is that they reduce the faith of voters in the representative character of government, thereby disincentivizing them from voting in the first place because they feel like their votes do not influence the outcome of elections in a meaningful way.

C. Legislative Action Is Needed

Judicial remedies for the harms of partisan gerrymandering have been largely ineffective, and so legislative action is needed. Court challenges to districting drawing have often been regarded as non-justiciable political questions, and “[o]nly in the last forty years has the judiciary entered the political thicket of apportionment.”¹⁹³ Nevertheless, the Supreme Court “has largely avoided the apportionment-related issue of partisan gerrymandering.”¹⁹⁴ The first time that the Court made a significant contribution to this area was in *Baker v. Carr*.¹⁹⁵ In that case, the Court developed a six factor structure for analyzing political question issues, found apportionment to be a justiciable non-political question, and adopted the “one person, one vote” standard “requiring legislatures to create districts with equal populations.”¹⁹⁶ This “began the so-called apportionment revolution, in which redistricting became primarily driven by legal decisions.”¹⁹⁷ These doctrines continued to develop in relation to redistricting with the Voting Rights Act of 1965 and several racial gerrymandering cases.¹⁹⁸ Even with this standard in effect, courts still had difficulty addressing the qualitative issues of fair and effective representation.¹⁹⁹ In cases dealing with this issue, such as *Gomillion v. Lightfoot*,²⁰⁰ the Supreme Court used the Fifteenth Amendment, rather than the Fourteenth as in *Baker*, to hold that the gerrymander at issue in that case was “an illegal method of minimizing the impact of a group of voters’ influence because the new boundaries did not conform to the traditional districting principles.”²⁰¹

Importantly with these cases, “[e]ven though the Court established standards of review for racial gerrymandering, the Court remained silent as

¹⁹² *Id.* at 427–28.

¹⁹³ Weaver, *supra* note 175, at 1273.

¹⁹⁴ *Id.* at 1274.

¹⁹⁵ *Id.* at 1288.

¹⁹⁶ *Id.* at 1288–89.

¹⁹⁷ *Id.* at 1290.

¹⁹⁸ *Id.* at 1294–95.

¹⁹⁹ *Id.* at 1292–93.

²⁰⁰ 364 U.S. 339 (1960).

²⁰¹ Weaver, *supra* note 175, at 1293.

to the issue of political gerrymandering.”²⁰² The Court’s first opportunity to directly address partisan gerrymandering was in the 1972 case *Gaffney v. Cummings*.²⁰³ There, the Court upheld the plan, stating that political considerations always played a part in a redistricting plan, but hinted that plans which unduly discriminated against certain political groups might be unconstitutional.²⁰⁴ In 1986, the case of *Davis v. Bandemer*²⁰⁵ “established a formal judicial role in partisan gerrymandering disputes” and “suggested the coming of a second reapportionment revolution,” but “failed to provide a clear standard to the lower courts when dealing with these issues.”²⁰⁶

A plurality of four Justices argued for a standard that required plaintiffs to prove intentional discrimination against a political group as well as a discriminatory effect on that group. Justice White, writing for the plurality, did not consider the showing of the intent prong a difficult one because districting involves political considerations. However, the effects prong required a showing that the group had been repeatedly denied the opportunity to affect the political process. This requirement went beyond showing that the results of an election were not proportional to the relative strength of the parties. In order to show an unconstitutional gerrymander, a group of like-minded voters would need to show an inability to convert their majority numbers into an electoral victory over a number of election cycles. The plurality required a showing of discriminatory effect even if the group had established discriminatory intent.²⁰⁷

Seven Justices found the redistricting plan at issue constitutional, but used different reasoning.²⁰⁸ Justice White’s plurality opinion was followed by courts going forward, but even after members of the Court “went so far as to find that partisan gerrymandering might impose a greater threat to Equal Protection than electoral districts of unequal population”²⁰⁹ just a few years prior, “only in *Republican Party of North Carolina v. Martin* did a court find a constitutional violation using the *Bandemer* standards.”²¹⁰

Nearly twenty years after *Bandemer*, “the Supreme Court, in *Vieth v.*

²⁰² *Id.* at 1300–01.

²⁰³ *Id.* at 1301.

²⁰⁴ *Id.*

²⁰⁵ 478 U.S. 109 (1986).

²⁰⁶ Weaver, *supra* note 175, at 1303.

²⁰⁷ *Id.* at 1306 (citations omitted).

²⁰⁸ *Id.* at 1302–03.

²⁰⁹ *Id.* at 1302.

²¹⁰ *Id.* at 1308–09.

Jubelirer,²¹¹ faced the issue of partisan gerrymandering and again attempted to provide proper judicial standards.²¹² In a change of course, “[w]riting for the Court, Justice Scalia determined the claim represented a political question [lacking judicially manageable standards,] and that the Supreme Court lacked the ability to decide the matter.”²¹³ One concurring opinion “agreed with the plurality as to the judgment, but disagreed that all partisan gerrymandering claims fall within the political question doctrine,” and “[i]n three dissenting opinions, four Justices argued partisan gerrymandering was a justiciable issue and proposed possible standards to evaluate the claims.”²¹⁴

On top of the difficulty in getting political gerrymandering issues in front of a court, some scholars believe that the Constitution does not even provide a judicial remedy for this kind of problem:

Although there is a consensus that gerrymandering may violate the Constitution, there is a marked disagreement as to why. To begin with, there is disagreement about which provisions of the Constitution gerrymanders violate. Depending upon whom one reads, gerrymandering supposedly violates the First Amendment, the Guarantee Clause, the Elections Clause, the Equal Protection Clause. A few go further, claiming that although gerrymandering violates no specific clause, it violates the Constitution’s overall structure. Perhaps just as important, there is disagreement about the constitutional evils caused by gerrymandering. Some claim that gerrymanders are unconstitutional because they dilute votes; others lament that they generate uncompetitive elections; and still others say that the evil is that gerrymanders produce extremist legislators, who are unwilling to compromise. . . . In the case of gerrymandering, we believe that the dissensus about why and when gerrymanders are unconstitutional reflects rather serious shortcomings with the underlying assertion that the Constitution somehow regulates gerrymandering.²¹⁵

These scholars base their arguments on the fact that the “Constitution never sets out criteria for the proper composition of the legislature, the suitable amount of electoral competitiveness, or the correct ideological

²¹¹ 541 U.S. 267 (2004).

²¹² Weaver, *supra* note 175, at 1310.

²¹³ *Id.* at 1314.

²¹⁴ *Id.*

²¹⁵ Larry Alexander & Saikrishna Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 WM. & MARY L. REV. 1, 6–7 (2008) (citations omitted).

balance of legislators within a legislature.”²¹⁶ Further, they state that “[t]he infinite number of possible ideal districting baselines [to measure others against] makes it all but impossible to suppose that the Constitution implicitly singles out one such baseline and mandates it.”²¹⁷ They dismiss arguments “that gerrymanders unconstitutionally deny the electorate competitive election” by saying the arguments “exalt[] a preference for competitive elections that is constitutionally immaterial;”²¹⁸ the preference is simply not there in the text. Most convincingly, they argue that “[t]he Supreme Court went as far as was plausible into the political thicket when it discovered the ‘one-person, one-vote’ requirement. Any further, and the Court indulges the view that the Constitution prohibits whatever outrages judicial and scholarly sensibilities.”²¹⁹

Whether or not these scholars can convince courts that the Constitution does not provide remedies against perceived gerrymandering, Congress is free to take action at any time.²²⁰ “The Constitution gives states the ability to undermine the people, but names Congress as the protector of the people’s right to vote for House members.”²²¹ However, as detailed above, “recent trends show Congress failing in that duty.”²²² Continual failures by Congress to ensure fair and representative elections “recently led Justice Stevens to conclude that ‘ample evidence demonstrates that many of today’s congressional representatives owe their allegiance not to “the People of the several states” but to the mercy of state legislatures,’ which secure such results through partisan gerrymandering.”²²³ In this way, partisan gerrymandering harms federalism. It “diminishes the quality of representation in the House and makes House election results dependent upon control of state government. That latter effect both contravenes the original conception of federalism and diminishes the ability of voters to choose differing state and federal policies.”²²⁴ When federalism is endangered, there are serious concerns for the government at both the state and federal level.

To the extent that basic principles of federalism require the

²¹⁶ *Id.* at 8.

²¹⁷ *Id.* at 59–60.

²¹⁸ *Id.* at 60.

²¹⁹ *Id.* at 61–62 (citation omitted).

²²⁰ Brian O’Neill, Note, *The Case for Federal Anti-Gerrymandering Legislation*, 38 U. MICH. J.L. REFORM 683, 684–85 (2005).

²²¹ *Id.* at 683.

²²² *Id.* “In the 2002 congressional election, the major parties left eighty seats uncontested, the average margin of victory was the highest in fifty years, and 373 of the 377 incumbents who stood for reelection won. More than eighty percent of incumbents won in landslides—garnering sixty percent of the vote or more. All fifty-three members of the California House delegation were returned to Washington in 2004.” *Id.* at 683–84 (citations omitted).

²²³ *Id.*

²²⁴ *Id.* at 685.

separation of state government from the federal, failure to maintain separation threatens the legitimacy of the House as a representative body. The legitimacy of any one state's congressional delegation is a national matter because every state's citizens will naturally want the federal government to be legitimate: an unrepresentative delegation could taint the entire legislative process, and tainted laws affect all citizens.²²⁵

Finally, “[u]nlike reform by Congress, reform by the judiciary has no inherent legitimacy.”²²⁶ If the main complaint about gerrymandering comes from its diminishing of the perceived legitimacy of elections, and therefore laws made by the legislature, it makes sense that the legislature should be the one to restore its own legitimacy in the eyes of voters.

D. *Implications for Future Partisan Gerrymandering Cases*

The report to Congress by the Comptroller General called for in the Act could provide a structure for courts to build upon in future partisan gerrymandering cases. At this time, this argument is speculative, as the Act is vague as to what the contents of the Comptroller General's report would be. However, if the Comptroller General reported that enacting national standards for congressional redistricting was desirable due to the failings of past redistrictings across the country, challengers to present or future partisan gerrymanders could use the report to support their arguments. Such findings would need to catalogue redistrictings in the past that harmed an identifiable political party's chance to effectively influence the political process over an extended period of time.

Hopefully the Comptroller General's report would provide some more compelling empirical data proving the harms that are theorized to be caused by partisan gerrymanders. Current studies suggest that gerrymandering is not an important cause of polarization; the Senate has become just as polarized as the House of Representatives, and Senate districts are not significantly gerrymandered along partisan lines.²²⁷ Additionally, “the evidence is weak that House polarization causes Senate polarization or that gerrymandering has polarized the House.”²²⁸ However, mathematical projections, as opposed to empirical observations, do support the idea that gerrymandering distorts voters' choices in who ultimately gets

²²⁵ *Id.* at 699.

²²⁶ *Id.* at 703.

²²⁷ Nolan McCarty, *Lessig, Klein, and the Economist on Polarization, Spending, and Gerrymandering*, MONKEY CAGE (Mar 13, 2012), <http://themonkeycage.org/2012/03/13/lessig-klein-and-the-economist-on-polarization-spending-and-gerrymandering> [<http://perma.cc/2K85-9ASC>].

²²⁸ *Id.*

elected. Researchers at Duke University

varied the state's congressional districts to calculate what the outcome of the 2012 U.S. House of Representatives elections might have been had the state's districts been drawn to emphasize nonpartisan boundaries. The team re-ran the election 100 times—using the same votes as in 2012 and tweaking the voting map with only the legal requirements of a redistricting plan in mind. Not once did they get the split of Democratic and Republican seats seen in the actual election.²²⁹

The average simulated election elected seven or eight Democrats and five or six Republicans, a marked difference from the actual outcome of nine Republicans and four Democrats.²³⁰ “During the 2012 elections in North Carolina, Republicans took nine of the state's 13 U.S. House seats although 51 percent of the two-party vote went to Democratic candidates.”²³¹ The Comptroller General's report would likely focus on empirical data, as the focus of the office is to carry out “audit, evaluative, and investigative assignments and [to provide] legal analyses to the Congress.”²³² Whatever the findings, they would be a welcome addition to the mixed studies on the true effects of partisan gerrymandering.

The report could also support the feasibility of future partisan gerrymandering litigation. Though *Vieth* contained a plurality opinion dismissing the partisan gerrymandering challenge in that case as a nonjusticiable political question, it is important to keep in mind that the holding was not from a majority of the Court.²³³ Thus, “*Vieth* did not resolve the question left open in *Bandemer*, namely, what are the judicially manageable standards to adjudicate partisan gerrymandering claims.”²³⁴

Supported by the principle of *stare decisis*,²³⁵ future challengers to partisan gerrymanders could urge courts to return to *Bandemer*'s two-pronged analysis, relying on the Comptroller General's report to prove a

²²⁹ Robin Smith, *Same Votes, Different Districts Would Change Results*, DUKETODAY (Oct. 29, 2014), <http://today.duke.edu/2014/10/mathofredistricting> [<http://perma.cc/KVH3-G2HP>].

²³⁰ *Id.*

²³¹ *Id.*

²³² *Office of the Comptroller General*, U.S. GOV'T ACCOUNTABILITY OFFICE, <http://www.gao.gov/about/workforce/ocg.html> [<http://perma.cc/FUF8-CEWG>] (last visited May 12, 2015).

²³³ Weaver, *supra* note 175, at 1332–33.

²³⁴ *Id.* at 1334.

²³⁵ In *Vieth*, the Court stated that claims of *stare decisis* were weakest in cases that involved interpretations of the Constitution because mistakes of the Court could not be remedied by Congress. 541 U.S. 267, 305 (2004). However, even after saying this in support of overruling *Bandemer*, that case was not overruled by a majority of the Court. *Id.* at 312–13.

discriminatory effect.²³⁶ In *Vieth* the Court stated that the *Bandemer* standard had proved unmanageable in application, largely due to the inability of plaintiffs to prove a discriminatory effect over several elections.²³⁷ As stated above, a plurality of Justices in *Bandemer* argued for a standard that required plaintiffs to prove intentional discrimination against a political group as well as a discriminatory effect on that group, characterized in *Vieth* as “the *Bandemer* plurality’s vague test of ‘denied its chance to effectively influence the political process.’”²³⁸ With a report from the Comptroller General detailing instances in recent history where partisan gerrymanders have denied a chance at effectively influencing the political process, challengers could satisfy this prong of the *Bandemer* test and redeem it as a manageable standard. If a plaintiff could prove that he had been a member of an identifiable party and voted for that party over a long period of time in a gerrymandered district where it was impossible for his party to elect a candidate due to partisan bias, he might have a claim strong enough to get past the Court’s concerns in *Vieth*.

V. THE OPEN OUR DEMOCRACY ACT AS A PACKAGE OF REFORMS

On average less than fifty percent of eligible voters participate in national elections.²³⁹ “Even in a close national race where each vote holds significantly more practical sway, such as the 2000 Presidential election, turnout [does] not dramatically increase.”²⁴⁰ By conducting interviews and surveys, the *New York Times* found that “Americans do not vote because they see no reason to vote;” they felt that their votes had lost value both in influencing the results of elections and in symbolic value as a democratic virtue.²⁴¹ Because of this, a worthy goal of any individual election reform is to reverse this demoralization and increase voter turnout by inspiring the hope that changes can be and are being made to the electoral process.

Among other things, this low turnout harms perceptions of Congress as legitimate and representative. Those feelings can further encourage more eligible voters to abstain from voting. The Committee for the Study of the American Electorate, a nonpartisan research organization, “found that there are numerous ancillary societal problems that directly relate to nonvoting.”²⁴²

These problems included “the fact that people who don’t vote tend not

²³⁶ See Weaver, *supra* note 175, at 1306 (discussing the two-pronged analysis set out in *Bandemer*). This discussion is also contained at note 207, *supra*.

²³⁷ *Vieth*, 541 U.S. at 282–83.

²³⁸ *Id.* at 286.

²³⁹ Carmichael, *supra* note 134, at 256.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 285 nn.159–62.

²⁴² *Id.* at 284.

to participate in other forms of political, civic, or social activity.”²⁴³ The Committee went on to further note that

there is an inherent danger to the orderly process of democracy that results from a lack of participation by most voters. . . . Voting promotes the civility of the national dialogue and the habitual use of orderly and lawful processes to effect change. . . . An apathetic electorate that no longer participates in the process is a dangerous thing to a stable democracy. The possibility of unlawful conduct in order to create change becomes more likely.²⁴⁴

According to one commentator, “[a] logical conclusion is that the lack of participation in the democratic process itself, not the breakdown of the American family, is the root of many societal ills. . . . Voting abstention and the general apathy of the electorate point to a loss of faith in the democratic system.”²⁴⁵

These are the problems the Act directly seeks to address by encouraging voter turnout and therefore restoring faith in Congress and the American system of government. Creating single open primaries has the potential to incentivize political candidates to appeal to more centrist voters outside of the extremes of their parties, and to make voters feel like their voices have a better chance of being heard. This will address the problem of apathy by forcing politicians to campaign on issues and positions that are important to a wider group of people than at present. Not only will they have to appeal to voters across the ideological spectrum within their own parties, but they will also have to be palatable to potentially sympathetic voters in opposing parties because of the structure of the single open primary. This goal will be carried even further by reform of partisan gerrymandering after the study called for in the Act is completed. Redrawing of heavily gerrymandered districts will ensure that there is indeed a mix of party affiliations and ideologies within a given congressional district for a candidate to have to appeal to, thereby, in theory, further solidifying an ideological shift to the center. And finally, making Election Day a national holiday will give these newly involved voters a dedicated time to go and do their civic duty. Even more so than weekend voting, it will make voting easier for voters to fit into their schedule, and more formal recognition of the act of voting will go towards restoring the image of voting as a civic duty and virtue in a democratic society as it once was.

Each of these three proposals would be effective in increasing voter

²⁴³ *Id.* (citation omitted).

²⁴⁴ *Id.* at 284–85 (citations omitted) (internal quotation marks omitted).

²⁴⁵ *Id.*

participation and perceptions of legitimacy in the political process, but all three together are stronger than any one or two alone. Without an Election Day holiday, gains made in increasing feelings of inclusion would be limited by the remaining problem of voters not having time to physically go to the polls. Without gerrymandering reform, candidates would still be speaking to voters that are ideologically very similar within their presently gerrymandered districts, and the moderating effects of the single open primary would be diminished. Without the change to a single open primary, one Republican and one Democrat would continue to necessarily run against each other in the final election, and the moderating effects of redrawn districts would be limited by the continued incentive to appeal to the extremes of political parties who are most likely to go out and vote in a given district.

VI. CONCLUSION

Congress has the power to enact these reforms, and a strong interest in protecting its own legitimacy and the perceived integrity of the electoral process. On a national level, these reforms should each be desirable to all eligible voters, and so the Act should have the support of a wide portion of the electorate. The only obstacle to the passage of these reforms are the Congressmen themselves. It is too early in the legislative process to know what the arguments of the opponents of the Act will be, but, somewhat cynically, it is safe to speculate that the only motivation will be conservation of the power of individual incumbent Congressmen and their respective parties. The end goal of the reforms set out in the Act is to increase voter participation through increased inclusion and by providing an easy opportunity and heightened incentive to go and cast a vote so that individual voters start to feel like their voices are heard through elections. As this Comment has argued, the reforms are capable of having their intended effects if they are passed by Congress and fully enacted.

