

TIME TO END PRESIDENTIAL CAUCUSES

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INTRODUCTION

In the middle of the hotly contested Iowa Democratic presidential caucuses, precinct results were so close that “more than a dozen delegates were awarded based on coin flips.”¹ While rare, relying upon similar games of chance is a long-standing feature of the nomination process in Iowa.² These coin tosses were initially reported as decisive, many of the reports were quickly amended to highlight the much more nuanced process of selecting delegates in the Iowa caucuses.³ In the topsy-turvy 2016 presidential election cycle, the real story was not the one-off oddities of each caucus or primary; rather, it was that the process played out as intended.

The way we select presidential nominees needs to change. It is true that “[n]ominating candidates for president is one of the most important features of American governance.”⁴ Yet, the rules governing this crucial process are set by national party rules and various state laws, creating a complex web of deadlines and processes that engenders voter confusion, disenfranchises some, and is ripe for reform.

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1. Russell Berman, *Was the Iowa Caucus Decided by Coin Flips?*, ATLANTIC (Feb. 2, 2016), <http://www.theatlantic.com/politics/archive/2016/02/hillary-clinton-bernie-sanders-coin-flips-iowa-caucus/459429/> [<https://perma.cc/XUH7-S4HS>].

2. *See id.* (“Games of chance have been included in the Democratic caucus rules ‘forever,’ said Norm Sterzenbach, a former executive director of the state party who oversaw the nominating contests in 2008 and 2012. ‘It happens, but it’s not frequent,’ he said in an interview on Tuesday afternoon. They usually occur when calculations for electing delegates to the county convention result in an extra delegate that can’t be assigned to one candidate by rounding. The county delegates are distinct from the ‘state delegation equivalents,’ which is what the party uses to determine how many delegates each candidate secures for the national convention in Philadelphia.”).

3. *See, e.g.*, Domenico Montanaro, *Coin-Toss Fact-Check: No, Coin Flips Did Not Win Iowa for Hillary Clinton*, NPR (Feb. 2, 2016, 6:41 PM), <http://www.npr.org/2016/02/02/465268206/coin-toss-fact-check-no-coin-flips-did-not-win-iowa-for-hillary-clinton> [<https://perma.cc/TY7S-SNZ3>].

4. Steven S. Smith & Melanie J. Springer, *Preface* to REFORMING THE PRESIDENTIAL NOMINATION PROCESS, at vii (Steven S. Smith & Melanie J. Springer eds., 2009).

In reality, the presidential caucus has outgrown its usefulness. While previously exalted for promoting party unity and typified by the compelling Iowa caucuses, selecting delegates for national conventions through this method no longer adds value to the democratic process. This Article will make the case for permanently moving away from presidential caucus elections for three reasons: (1) caucuses disenfranchise and underenfranchise voters, (2) caucuses further partisan polarization and gridlock, and (3) they are an election administration nightmare. A transition away from caucuses and to presidential primaries, along with a few additional structural changes will make the process more inclusive, provide voters a greater choice in nominees, and achieve the noble goal of more fully promoting electoral integrity.

As this Article discusses, the national parties have repeatedly tinkered with the nomination process over the past forty years. Since the fallout from the 1968 Democratic National Convention—where rioters vented their anger over an exclusionary nomination process and which led to a series of reforms to the presidential nominating process—the national parties have strived to find the balance between including individual voters in the process without removing the role of the party establishment. After each presidential election cycle, the parties attempt to address the fundamental issues presented by that cycle. Following 1968, reforms were enacted to take away power from party leaders and backroom dealers.⁵ However, in the 1980s, the pendulum swung back to the promotion of party leaders, at least in the Democratic Party, through the superdelegate rule.⁶

Following the 2016 election cycle, there will be a great opportunity to implement reform. A major change should be to move away from presidential caucuses. They persist with, in the words of John Oliver, “complex, opaque rules.”⁷ These complex rules, which include participating in person for over an hour, negatively impacts participation in the electoral process. For example, in 2012, “participation rates in the Republican Party’s caucuses averaged 3 percent.”⁸ 3 percent. Compellingly, *PolitiFact* has observed that “[c]aucuses and delegate math can be incredibly confusing, and the arcane party structures don’t reflect how most people assume presidential selection works.”⁹ Yet, we want voters to understand the process and to feel engaged. For these reasons, and the others discussed in this Article, it is time to end states’ use of the presidential caucuses to select party nominees.

5. See Steven S. Smith & Melanie J. Springer, *Choosing Presidential Candidates*, in REFORMING THE PRESIDENTIAL NOMINATION PROCESS, *supra* note 4, at 1, 6–7.

6. *Id.* at 6.

7. *Last Week Tonight with John Oliver: Primaries and Caucuses* (HBO television broadcast May 22, 2016) [hereinafter *Last Week Tonight*].

8. BARBARA NORRANDER, *THE IMPERFECT PRIMARY: ODDITIES, BIASES, AND STRENGTHS OF U.S. PRESIDENTIAL NOMINATION POLITICS* 76 (2d ed. 2015).

9. Lauren Carroll & Riley Snyder, *Fact-Checking Claims About the Nevada Convention Chaos*, POLITIFACT (May 19, 2016, 10:45 AM), <http://www.politifact.com/truth-o-meter/article/2016/may/19/claims-bernie-sanders-supporters-fraud-and-miscond/> [<https://perma.cc/VAB9-Q9T7>].

I. THE PRESIDENTIAL NOMINATION PROCESS

This part will provide a brief overview of the presidential nomination process by detailing the history of attempted reform. This part also will include an in-depth review of the caucus process.

A. *History of Reform*

The presidential selection process has undergone significant change over the past century. Before 1972, the process for selecting delegates to the national party conventions lacked coherence. Typically, “caucuses or party leaders (such as the governor or party bosses) chose delegates.”¹⁰ In the early twentieth century, the parties employed a very different approach, with an “election at state or district conventions and ‘delegate primaries’ in which delegates’ names, but usually not presidential candidates’ names, were on the ballot.”¹¹ Also, at the same time, the public came to view the caucus system “as an instrument of party leader control; this perception stimulated a shift in many states from caucuses to primaries.”¹²

The frustration over the presidential selection process boiled over following the 1968 Democratic National Convention. When the Democratic Party nominated Vice President Hubert Humphrey for the presidency, it struck a nerve.¹³ The convention “occurred in the midst of intensifying anti-Vietnam War sentiment in the party, in the aftermath of the April assassination of the Reverend Martin Luther King Jr. and the June assassination of Senator Bobby Kennedy, and during clashes between protesters and Mayor Richard Daley’s Chicago police.”¹⁴ In one fell swoop, “[t]he disastrous 1968 Democratic National Convention shattered confidence in [the] efficient but undemocratic system.”¹⁵

Hubert Humphrey won the nomination without setting foot on the campaign trail or participating in any primary, but rather he worked with party leaders to gain delegates through the more traditional state party committees and conventions.¹⁶ Predominately liberal members of the party, who had supported Eugene McCarthy and Bobby Kennedy, called for reform in the process.¹⁷

To address these concerns, “the convention authorized the creation of the Commission on Party Structure and Delegate Selection, known as the McGovern-Fraser Commission.”¹⁸ The McGovern-Fraser Commission’s

10. Alan Martinson, Note, *La Follette’s Folly: A Critique of Party Associational Rights in Presidential Nomination Politics*, 42 U. MICH. J.L. REFORM 185, 188 (2008).

11. Smith & Springer, *supra* note 5, at 2.

12. Heather R. Abraham, Note, *Legitimate Absenteeism: The Unconstitutionality of the Caucus Attendance Requirement*, 95 MINN. L. REV. 1003, 1006 (2010).

13. See Smith & Springer, *supra* note 5, at 4–5.

14. *Id.*

15. Sean Wilentz & Julian E. Zelizer, *A Rotten Way to Pick a President*, WASH. POST (Feb. 17, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/14/AR2008021401595.html> [<https://perma.cc/8EB6-R2WU>].

16. Smith & Springer, *supra* note 5, at 4–5.

17. *Id.*

18. *Id.*

reforms primarily had the effect of several states adopting candidate primaries, “doubling the number of primary voters between 1968 and 1972 and eliminating the old processes that were often manipulated by state party leaders.”¹⁹ However, not all Democratic Party leaders were pleased to see presidential primaries implemented over caucuses.²⁰

During the 1970s, the Republican Party followed several of the reforms instituted after the McGovern-Fraser Commission, which sparked significant changes over the last forty years.²¹ Following the changes of the 1970s, the new system was tested by the candidacies of Ronald Reagan and Jimmy Carter. Unsurprisingly, having broken the absolute power of the party bosses, “[t]he GOP’s reforms gave a stronger voice to the Republican right, letting the upstart Reagan nearly upset President Gerald R. Ford in 1976 by winning the North Carolina and Texas primaries.”²² Similarly, Jimmy Carter used a stunning victory in the “Iowa caucuses to transform himself from an unknown peanut farmer and obscure governor (‘Jimmy who?’) into the front-runner.”²³ Incidentally, the next wave of reforms would address the fear of a weaker outside candidate unable to marshal significant support among the party faithful.²⁴ In 1981, the Democratic Party convened the fourth nominating commission in twelve years and began developing new rules to reassert party leadership.²⁵ The party created what is now known as the “superdelegate rule,” which included “governors, members of Congress and former presidents.”²⁶

Since then, following each presidential election cycle, the parties attempt to address the perceived flaws in the process. Following 2008, the Democratic Party considered the role of superdelegates and the issue of front-loading.²⁷ In 2012, the Republican Party changed certain delegate pledging rules to require delegates to be pledged on the first ballot—a move viewed by the party as one to accelerate the nomination selection process and limit the length of the campaign.²⁸

19. *Id.*

20. *Id.* at 6 (“The rapid shift to primaries, particularly in most of the big states, surprised Democratic reformers and even disappointed some. [Representative Donald] Fraser, for example, advocated participatory caucuses that involved hours of discussion of the candidates and issues and gave the more highly motivated partisans more influence over outcomes. Incidentally, Fraser’s home state of Minnesota was one of the states that continued to use a caucus-convention system.”).

21. Wilentz & Zelizer, *supra* note 15 (“The Republican Party, feeling some of the same frustration, soon followed suit.”).

22. *Id.*

23. *Id.*

24. Smith & Springer, *supra* note 5, at 6.

25. David S. Broder, *Democrats and Unintended Consequences*, WASH. POST (Jan. 17, 1982), <https://www.washingtonpost.com/archive/politics/1982/01/17/democrats-and-unintended-consequences/d4741a07-05a2-47b1-bd33-b04458338005/> [https://perma.cc/MT76-5YT6].

26. Wilentz & Zelizer, *supra* note 15.

27. See Smith & Springer, *supra* note 5, at 8.

28. Patrick O’Connor, *Could a 2012 Rule Change Upend the GOP’s 2016 Nomination Process?*, WALL ST. J. (July 10, 2015, 7:10 AM), <http://blogs.wsj.com/washwire/2015/07/10/could-a-2012-rule-change-upend-the-gops-2016-nomination-process/> (“Some have

B. The Caucus

During the 2016 election cycle, thirteen states and four territories administered presidential caucuses, each of them using various complex, opaque rules to administer the process.²⁹ But how does the caucus process actually work? Take, for example, the 2016 Iowa caucuses. What is it like for a caucus goer on caucus night? In Iowa, once the caucus is called to order, supporters for the various candidates voice their support. Then, the caucus goers physically separate into groups of like-minded supporters in the corners of the room.³⁰

Domenico Montanaro of NPR described this process as “like a junior high dance, if the kids weren’t so petrified of each other.”³¹ An elected chair then assesses the number of supporters.³² During this initial round, each candidate needs the support of at least 15 percent of the participants.³³ The supporters of candidates deemed nonviable must then choose another candidate.³⁴ This “re-caucus” obligates shuffling and can encourage the cajoling and persuading of these supporters to join other groups.³⁵ “Once the re-caucusing is settled, . . . the numbers are tallied.”³⁶

In Iowa, “[t]here were 1,683 precinct caucuses” that “elected 11,065 delegates to the county conventions, which [took] place March 12,” but “[t]hat universe of 11,065 delegates [will be] whittled down to 1,406 who will attend congressional district (April 30) and state conventions (June 18),” and “[t]he breakdown of those 11,065 is not reported on caucus night.”³⁷ All told, following the precinct caucuses, delegates attend county, congressional, and state conventions to pick the national convention delegates. The entire process of selecting the delegates to the national convention takes months, with forty-four delegates eventually being sent to the national convention.³⁸

When the media reported Hillary Clinton’s 49.9 to 49.6 percent lead over Bernie Sanders, that meant only “state delegate equivalents.”³⁹ That means those are estimated percentages of how many delegates per candidate, out of the 11,065 available, will attend the congressional district and state

suggested this rule might help winnow the field, as a de facto shortcut to winning the nomination.”) [https://perma.cc/4WJ5-F7LJ].

29. FEC, 2016 PRESIDENTIAL PRIMARY DATES AND CANDIDATE FILING DEADLINES FOR BALLOT ACCESS 5–6 (2016), <http://www.fec.gov/pubrec/fe2016/2016pdates.pdf> [https://perma.cc/B48R-L73U]; *Last Week Tonight*, *supra* note 7 (discussing the State of Washington’s use of an uncounted caucus).

30. Domenico Montanaro, *How Exactly Do the Iowa Caucuses Work?*, NPR (Jan. 30, 2016, 8:08 AM), <http://www.npr.org/2016/01/30/464960979/how-do-the-iowa-caucuses-work> [https://perma.cc/EFH4-PT7J].

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Montanaro, *supra* note 3 (emphasis omitted).

38. Montanaro, *supra* note 30.

39. Montanaro, *supra* note 3.

conventions.⁴⁰ Yet, in the months and weeks to follow, that number could change drastically through the congressional and state conventions, contributing to the uncertainty that surrounds the caucus process.

II. THE CASE FOR ENDING PRESIDENTIAL CAUCUSES

While the call to do away with presidential caucuses has grown louder over the years, there is still significant resistance to change.⁴¹ Specifically, “[d]espite their flaws, caucuses are treasured by many voters who have grown up with the tradition.”⁴² The most commonly identified benefits of caucuses, however, the so-called “salutary aspects,” including “collective deliberation of candidate options and issues”⁴³ and promoting party unity, are no longer sufficient to justify their use in the nomination process. Caucuses are “a deeply flawed method for selecting a nominee.”⁴⁴ As one observer noted, “[i]n theory, caucuses fostered community and civic deliberation . . . [i]n practice they prevented participation by those who had little time to spare.”⁴⁵

This part will make the case for turning away from presidential caucuses by noting three significant deficiencies in the caucus process. First, caucuses disenfranchise and underenfranchise many voters. Second, by drawing upon a more extreme electorate, caucuses further partisan gridlock. Third, the unique nature of the caucus process makes it impossible to administer any vote-counting or recount process to ensure the integrity of the caucus results.

A. *Caucuses Disenfranchise Voters*

The parties need to move away from presidential caucuses because they underenfranchise minority voters in caucus states and disenfranchise voters in states with later nomination processes by taking away their right to a “meaningful” vote. As the *Washington Post* has lamented, “[C]aucuses can be highly undemocratic.”⁴⁶ To that end, the reforms initially ushered into the presidential nomination process in the 1970s have produced a more fair and democratic process.⁴⁷ Gone are the backroom deals and party bosses.⁴⁸

40. *See id.*

41. Josh Israel, *America Is Supposed to Be a Democracy. So Why Do We Still Have Caucuses?*, THINKPROGRESS (Mar. 15, 2016), <https://thinkprogress.org/america-is-supposed-to-be-a-democracy-so-why-do-we-still-have-caucuses-ffbdf32caf9#.od36joxz3> [<https://perma.cc/QWK3-6E73>].

42. Abraham, *supra* note 12, at 1005.

43. Costas Panagopoulos, *Are Caucuses Bad for Democracy?*, 125 POL. SCI. Q. 425, 427 (2010).

44. *Id.*

45. JAMES W. CEASAR ET AL., *EPIC JOURNEY: THE 2008 ELECTIONS AND AMERICAN POLITICS* 97 (2009).

46. Wilentz & Zelizer, *supra* note 15.

47. Richard Pildes, *Two Myths About the Unruly American Primary System*, WASH. POST (May 25, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/25/two-myths-about-the-unruly-american-primary-system/> (“The recommended reforms [from the McGovern-Fraser Commission] aimed to make the caucus system more open, more transparent and more accessible to all Democrats.”) [<https://perma.cc/ED3H-8DMG>]. *But*

Yet, “[t]he increased power that voters now exert over presidential nominees has not, however, been allocated equally among all voters.”⁴⁹ The first caucus and primary elections, Iowa and New Hampshire, have a disproportionately strong influence on selecting the ultimate presidential nominees.⁵⁰ As such, many have long bemoaned the racially unrepresentative composition of voters in the Iowa caucuses.⁵¹ It is clear that “[t]he first states to cast votes are culturally distinct from the nation as a whole.”⁵²

The consequence of this early placement in the election season is agenda setting.⁵³ Scholars have noted that “candidates pay minimal attention at the outset of their campaigns to issues that particularly affect black citizens.”⁵⁴ The same is true for the issues impacting all minority groups. In fact, “[t]he racial homogeneity of the early-voting states, along with their lack of a major metropolitan area, establishes a domestic agenda that often overlooks issues that strongly affect” minority communities.⁵⁵

The caucus process also is at odds with many of our deeply held notions of free and fair elections. By “eliminat[ing] the secret ballot,” voters are forced “to declare their loyalties publicly, and are thus vulnerable to intimidation and manipulation.”⁵⁶ The caucuses “also shut out many citizens who have to work during caucus times.”⁵⁷ If you do not attend in person, you cannot participate. This particularly overburdens lower-class and middle-class voters, who often have fixed shifts or are unable to be away from home or work for extended periods of time.⁵⁸

Recent political science research has shown that the caucus system disproportionately disenfranchises minorities, low-income earners, and young people, who are much less likely to show up than older, white, wealthier voters. For example, in an issue brief, Tova Wang of the Century Foundation argued that “voters, especially new voters, will have difficulty

see id. (“But the commission was not trying to create a purely populist, primary-controlled system that essentially eliminated the voice of the institutional party figures.”).

48. *Id.*

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

50. Lisa K. Parshall & Franco Mattei, *Challenging the Presidential Nomination Process: The Constitutionality of Front-Loading*, 26 HAMLINE J. PUB. L. & POL’Y 1, 1 (2004) (“Perhaps the most egregious deficiency of a front-loaded calendar is that by the time many voters cast their preferences, nominations have already been mathematically determined.”).

51. *See, e.g.*, Gerald C. Wright, *Rules and Ideological Character of Primary Electorates*, in REFORMING THE PRESIDENTIAL NOMINATION PROCESS, *supra* note 4, at 23, 27; Anthony Johnstone, *The Federalist Safeguards of Politics*, 39 HARV. J.L. & PUB. POL’Y 415, 444 n.140 (2016);.

52. Johnstone, *supra* note 51, at 444 n.140.

53. Note, *supra* note 49, at 2322–23.

54. *Id.*

55. *Id.* at 2322.

56. Wilentz & Zelizer, *supra* note 15.

57. *Id.*

58. *See* Ian Millhiser, *Ban the Iowa Caucus*, THINKPROGRESS (Jan. 25, 2016), <https://thinkprogress.org/ban-the-iowa-caucus-1be63c1c6bdb#.4m9vuj3oo> [<https://perma.cc/KN5H-TLGL>].

navigating caucuses' arcane rules and procedures and that participation will be discouraged by the strenuous and time-consuming demands (one time, location) caucuses place on voters."⁵⁹

The physical attendance requirement of the caucus process alone "tends to disenfranchise identifiable factions of voters, such as deployed service members, religious observers, persons with disabilities or in poor health, students who attend school away from home, and shift workers unable to leave work."⁶⁰ In turn, this produces a caucus pool of voters who represent a narrow range of backgrounds, interests, and experiences.⁶¹

This means that campaigns are incentivized to prioritize only the most avid partisans and consistent voters—the few that turn out to vote.⁶² Turnout is historically lower in caucus states, particularly compared to primary election states. "The 2.5 percent turnout rate in the 1976 Iowa caucuses paled alongside the 33.4 percent who voted in that year's New Hampshire primary," and "[a]cross all states in 1976, turnout averaged 1.9 percent for the caucuses and 28.2 percent for the primaries."⁶³ As of 2016, not much has changed. Campaigns looking to pick up votes in the admittedly small state of Iowa have a smaller window of committed, partisan supporters to woo.

In addition, other scholars have argued that the phenomenon of "front-loading," which is when states move their caucuses and primaries earlier in the calendar, exacerbates the underrepresentativeness of the caucus system.⁶⁴ In the early 1970s, Iowa moved up its caucus schedule.⁶⁵ Gerald C. Wright has noted that, as a result, Iowa has assumed "importance far out of proportion to [its] contributions to the delegate counts."⁶⁶ In fact, since

59. Panagopoulos, *supra* note 43, at 427.

60. Abraham, *supra* note 12, at 1004 (detailing the experience of Felipe Goodman, who, after serving a decade as a rabbi in Nevada, became a citizen intending to vote but was unable to because the state's scheduled caucus was held on a Saturday and required attendance); *see also* Richard L. Hasen, *Whatever Happened to "One Person, One Vote"?*, SLATE (Feb. 5, 2008, 5:33 PM), <http://www.slate.com/id/2183751/> ("Orthodox Jews complained that they couldn't vote in the Saturday morning Nevada caucuses.") [<https://perma.cc/Z4VA-CQ8E>].

61. The impact of these rules also implicates basic rights of participation and evokes the U.S. Supreme Court's voter-participation cases. *Cf.* Guy-Uriel E. Charles, *Corruption Temptation*, 102 CALIF. L. REV. 25, 36 (2014). In those cases, the Court has been concerned where state law excludes a class of citizens from participation in the democratic process. Examples include, *Harper v. Va. State Board of Elections*, 383 U.S. 663 (1966), where the Court struck down Virginia's poll tax on the ground that wealth was not relevant to a citizen's ability to participate in the political process, and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), which held unconstitutional Tuskegee's racial gerrymandering ordinance that removed almost all of the black citizens from the city.

62. *See infra* Part II.B.

63. Thomas E. Patterson, *Voter Participation: Records Galore This Time, but What About Next Time?*, in REFORMING THE PRESIDENTIAL NOMINATION PROCESS, *supra* note 4, at 44, 46.

64. *See* Parshall & Mattei, *supra* note 50, at 1.

65. Anthony J. Gaughan, *Five Things You Should Know About the Iowa Caucuses*, NEWSWEEK (Jan. 24, 2016, 4:08 PM), <http://www.newsweek.com/five-things-know-iowa-caucuses-418948> [<https://perma.cc/ZH9B-PMAB>].

66. Wright, *supra* note 51, at 27.

the 1980s, it has been “obvious that early events received far more candidate and media attention and caused many candidates to drop out once their popularity and fundraising ability proved inadequate to continue.”⁶⁷

The earlier states’ power, particularly Iowa’s, lies in the winnowing of the field of candidates and the perception of momentum.⁶⁸ This is important for the campaigns because, “[i]f the participants in the early states are indeed somehow unrepresentative of the larger set of decision-makers whose preferences should weigh in on the final nomination choice, then their participation constitutes a bias favoring some kinds of candidates over others.”⁶⁹ The unrepresentative early state caucus goes might “screen out candidates who might gain momentum and competitiveness with a different set of early states.”⁷⁰

Finally, “[t]he caucus system also presents an example where people can be routinely denied the opportunity to cast a meaningful vote.”⁷¹ During the caucus process, as discussed earlier, “a voter whose candidate does not receive a fixed percentage of the vote in the first round of voting—usually fifteen percent—will not be able to ‘vote’ for that candidate in later rounds”⁷² and instead will be forced to revote for a different candidate. This means, in the caucus system, voters lack a “meaningful” right to vote.⁷³ While they may have the ability to join the caucus and participate in the discussion regarding the potential nominees, “at a certain point they may no longer be able to cast a vote for their candidate of choice.”⁷⁴ This is not a denial of a formal right to vote; but, in seeking the ideal presidential nomination process, encouraging *meaningful* voting is a desirable characteristic.

Moreover, voters in later caucuses and primaries also are denied a meaningful right to vote because their preferred candidate, or at least a larger, diverse pool of candidates, dissipates after the earlier states have completed their nomination process.⁷⁵ In the past two decades, other states have attempted to jump the line and hold their caucus or primary earlier. This makes sense. During the 2000 presidential election cycle, “both

67. Smith & Springer, *supra* note 5, at 7.

68. Wright, *supra* note 51, at 27.

69. *Id.*

70. *Id.*

71. Chad Flanders, *What Do We Want in a Presidential Primary: An Election Law Perspective*, 44 U. MICH. J.L. REFORM 901, 921 (2011).

72. *Id.*

73. *Id.* (“A right to a meaningful vote, by comparison, implicates the diversity of the field of candidates running, and whether there is a candidate running who matches up with your preferences, or more generally, who you think is running on an attractive platform. Even if your favored candidate may never win the election, having a meaningful vote means that you get at least *the chance* to vote for him or her. This is another way of saying that a right to a meaningful vote may not be a right to an effective vote. A meaningful vote is one cast in favor of a candidate you *like* whether or not your vote is effective in getting that candidate elected.”).

74. *Id.*

75. See, e.g., Benjy Sarlin, *Republican Field Narrows as Iowa Caucus Knocks Out Candidates*, MSNBC (Feb. 3, 2016, 8:02 PM), <http://www.msnbc.com/msnbc/republican-field-narrows-iowa-knocks-out-candidates> [<https://perma.cc/6TQH-DLWK>].

parties had contested nominations decided earlier than ever, with about 40% of their primaries to follow at a later date and thus entirely irrelevant,” and “[i]n 2004, the Democratic Party identified its nominee before voters in 16 primary states . . . had their say.”⁷⁶

The caucus process excludes too many from the nomination process because, by their very design, they are exclusive. Caucuses exclude minority communities and are inaccessible for the disabled, the working voter, and the caregiver.⁷⁷ In particular, the Iowa caucus tends to rely on a small, homogenous subset of caucus goers who are not reflective of the diversity of the American electorate. It is time to consider alternatives to the caucuses.⁷⁸

B. *Caucuses Exacerbate Polarization*

A wealth of research also shows how presidential caucuses exacerbate party polarization.⁷⁹ Polarization is a fixture in the political process, but it has reached historic levels.⁸⁰ While strategies are needed to reduce polarization, the few that have been offered seek to cure polarization in Congress.⁸¹ Reforming the presidential nominating contest is not a panacea for polarization, but it could be a first step toward meaningful participation and reducing gridlock.

First, studies have shown that caucuses tend to have significantly less participation than primaries.⁸² This means that only a small subset of the country is meaningfully participating in selecting the delegates to the national conventions, where the party’s nominees accept the nomination. As discussed above, this, combined with the front-loading phenomenon, results in only an incredibly small subset of voters in a handful of states playing a role in winnowing the field of potential candidates. This has a direct impact on the types of candidates who make it through the caucus process. Scholars have argued that “low turnout produces biases between the general population and the voting public, a concern that is conceivably exacerbated by caucuses, which attract fewer participants to the events.”⁸³

There are also measurable differences between the presidential primaries and caucuses. In a 2010 study, Professor Costas Panagopoulos found that “across the six demographic characteristics[,] . . . the distributions of traits among both caucus participants and primary voters are substantively similar to those in the population as a whole, although there are indications that

76. Parshall & Mattei, *supra* note 50, at 4.

77. See Panagopoulos, *supra* note 43, at 427–28.

78. See Millhiser, *supra* note 58.

79. See *e.g.*, Panagopoulos, *supra* note 43, at 429, 439.

80. See THOMAS E. MANN & NORMAN J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 3–4 (2012).

81. See, *e.g.*, Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253 (2006) (arguing that gerrymandering deserves significant blame for polarization).

82. Panagopoulos, *supra* note 43, at 429.

83. *Id.* at 430.

caucus participants are more dissimilar from the population, compared to primary voters.”⁸⁴ According to Professor Panagopoulos:

Generally speaking, there is clear evidence that caucus voters held more extreme views on these issues, compared to both primary voters and to the population at large . . . [and] these estimates suggest that the public’s policy preferences overall were more congruent with those of primary voters than with those of caucus voters.⁸⁵

This is significant because it means that caucus goes influence the delegates selected for the county and state-level caucuses—and ultimately the delegates attending the national conventions—are more polarized than the rest of the public.

Particularly in terms of policy preferences, the difference between caucus goes and the general public “can produce bias with respect to candidate choice, manifesting themselves through differential levels of support for each of the parties’ contenders.”⁸⁶ This can be seen in the caucus results of the Iowa Republican presidential caucus, where recently more socially conservative candidates have been successful.⁸⁷

Gerald Wright has astutely observed that “[a]s the parties have become more polarized . . . the voices of the two parties come from increasingly distant ideological positions, with the likely result that the candidates nominated will be polarized as well.”⁸⁸ That is troubling because 39 percent of Americans consider themselves independent and are turned off by increased partisanship.⁸⁹ This means that “the great middle of the electorate is left unrepresented.”⁹⁰ Regardless of the purported benefits of party unity, a process that furthers polarization and gridlock—while simultaneously discouraging the nearly 40 percent of Americans who consider themselves to be independent from participating—is worthy of reconsideration.

C. Caucuses Present Administrative Challenges

Finally, by design, the caucus system, with its multiple-round series of tallies, cajoling and persuading voters, and retallying of votes, makes meaningfully resolving caucus electoral disputes impossible. Fundamentally, it may not be feasible to accurately determine the results of the caucus. Consider this year’s Iowa Democratic presidential caucus. Following a contentious night of caucusing, the *Des Moines Register*

84. *Id.* at 431.

85. *Id.* at 436.

86. *Id.* at 440.

87. *Results from the 2016 Iowa Caucus*, WALL ST. J. (Feb. 2, 2016, 1:05 PM), <http://graphics.wsj.com/elections/2016/iowa-caucus-results/> (“On the Republican side, social conservatives have asserted their influence in recent years.”) [<https://perma.cc/M98W-Z6JS>].

88. Wright, *supra* note 51, at 37.

89. Joshua Holland, *What Everyone Gets Wrong About Independent Voters*, NATION (May 18, 2016), <https://www.thenation.com/article/what-everyone-gets-wrong-about-independent-voters/> [<https://perma.cc/9BQM-GT9D>].

90. Wright, *supra* note 51, at 37; *see also* NOLAN M. MCCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2008).

editorial board called for an audit of the results, calling the caucus a “debacle.”⁹¹

“The Iowa Democratic Caucuses are not a primary,” but rather, according to Iowa Democratic Party Press Secretary Sam Lau, “[T]hey are the first step in a representative delegate selection process.”⁹² This works by awarding county delegates “based on Democrats who came to the caucuses on Monday who aligned and then realigned—sometimes for a different candidate than they initially supported.”⁹³ According to Lau, because “[t]here are no paper ballots to recount” and because “Monday’s caucuses were a unique event that involved more than 171,000 Iowans and their neighbors at a specific time and place,” the result “cannot be re-created or recounted.”⁹⁴

This is an important distinction between caucuses and primary elections. The caucuses are a ticking time bomb of ballot-casting and ballot-counting controversy. Professor Edward Foley has talked extensively about the importance of avoiding vote-counting disputes.⁹⁵ It is true that no electoral system is impervious to dispute, no matter how well designed or administered. The parties, however, could reduce the risk of controversy by moving away from caucuses, which, given their unique, one-off nature, leave room for dispute and, in the words of Sam Lau, “cannot be re-created or recounted.”⁹⁶

Now, this is not to say that an audit of the reported caucus results is impossible or even impracticable. The lack of safeguards in the process, however, means that the public lacks an ability to ensure errors did not occur during the caucusing itself. The *Des Moines Register*’s editorial keys in on this distinction.⁹⁷ During the 2016 Iowa Democratic presidential caucus, “[t]oo many accounts have arisen of inconsistent counts, untrained and overwhelmed volunteers, confused voters, cramped precinct locations, a lack of voter registration forms and other problems.”⁹⁸ According to members of the editorial board who were observing caucuses, there were plenty of “opportunities for error amid Monday night’s chaos.”⁹⁹ It would be exceedingly difficult to accurately resolve a challenge alleging errors in those processes.

In our presidential nomination process, we should keep in mind what Charles Evans Hughes once proclaimed: “Our entire system of government

91. Gabriel Debenedetti, *Sanders Prepares for Possible Challenge to Iowa Caucus Results*, POLITICO (Feb. 4, 2016, 9:07 PM), <http://www.politico.com/story/2016/02/bernie-sanders-iowa-caucuses-challenge-218784#ixzz44g8lQpuF> [<https://perma.cc/AY3U-S5TR>].

92. *Id.*

93. *Id.*

94. *Id.*

95. See generally EDWARD B. FOLEY, *BALLOT BATTLES* 348 (2016).

96. Debenedetti, *supra* note 91.

97. *Id.*

98. *Something Smells in the Democratic Party*, DES MOINES REG. (Feb. 5, 2016), <http://www.desmoinesregister.com/story/opinion/editorials/caucus/2016/02/03/editorial-something-smells-democratic-party/79777580/> [<https://perma.cc/8ALB-QUE5>].

99. *Id.*

depends upon honest elections and a fair count.”¹⁰⁰ Ensuring a fair count is a standard to strive for in our elections.¹⁰¹ This year came the closest to a full-scale dispute over the Iowa caucuses. While Senator Bernie Sanders did not pursue a recount, as he contemplated,¹⁰² given the significant, disproportionate value placed on the Iowa caucus, other candidates may not have conceded as quickly. Further, a different candidate in a different caucus state or in a different year may see the political advantage of challenging the results of the caucuses. And in all elections, particularly presidential elections, “[b]allot counting is something for which appearances truly matter.”¹⁰³ For these reasons, we should move away from presidential caucuses.

III. ALTERNATIVES

If we are to move away from presidential caucuses, what should take their place? Reformers have long sought that answer, and several options have emerged. If the national parties choose to move away from a caucus to a primary election method in the thirteen states and four territories still holding caucuses, what type of system should they choose? This part will discuss the two predominant ideas for improving the presidential primary system and a structural change that would improve both.

A. National Primary

One popular reform idea is to have all states hold their primaries on the same day, also known as the “National Primary.”¹⁰⁴ Holding the primaries on one day would eliminate the caucus system and negate the incentive to front-load the schedule of elections. It would have a democratizing effect because “every voter could in principle be the ‘deciding’ vote of the primary election.”¹⁰⁵

One of the main criticisms of the national primary plan is that it would make it harder for lesser-known candidates to be successful.¹⁰⁶

B. Regional Primary

The other major reform proposal is a system of regional primaries. There are several iterations on how this process might work, but generally, “[s]tates will be grouped along regional lines, reflecting both geography and interests,” with the “regional primaries . . . spread apart by a couple of

100. CHARLES E. HUGHES, PUBLIC PAPERS OF CHARLES E. HUGHES: GOVERNOR 1907, at 24 (1908).

101. FOLEY, *supra* note 95, at 340.

102. Debenedetti, *supra* note 91.

103. FOLEY, *supra* note 95, at 340.

104. Flanders, *supra* note 71, at 936 (“For decades, a favorite proposal of reformers has been a national primary system.”).

105. *Id.*

106. *Id.* at 937.

weeks, and held throughout the primary season.”¹⁰⁷ Some reformers believe the smaller states should go first, much like the current regime of Iowa and New Hampshire holding the “first-in-the-nation” status.¹⁰⁸ Others believe the first region should be assigned randomly or on a rotating basis.¹⁰⁹

The regional primary retains several of the structural flaws of the current system. The earlier states remain in prime position to influence the agenda and tone of the campaign, as well as winnow the field.

C. Ranked Choice Voting

A structural change that would address the three deficiencies in the caucuses—disenfranchising, further polarization, and the impossibility of resolving a vote-counting dispute—would be addressed by a process known as ranked choice voting (RCV), also known as instant runoff voting.¹¹⁰ This process is currently used by voters in Minneapolis, Cambridge, Oakland, and internationally in countries such as Australia and Ireland.¹¹¹

RCV allows voters to indicate their ideal choice and then rank the remaining candidates.¹¹² After the first round of counting, the candidate with the fewest votes is eliminated and his or her voters shift their support to their already identified second choice.¹¹³ This instant runoff continues “until the winner secures a majority of the vote.”¹¹⁴ In the context of a presidential primary, RCV would ensure that everyone could cast a meaningful vote for their preferred candidate.¹¹⁵ But, unlike the caucus system where voters are cajoled into supporting a candidate in the room with their friends and neighbors, each voter can rank candidates as they wish without intimidation or harassment.¹¹⁶ RCV also encourages more positive campaigns by encouraging candidates to find the broadest support possible—because they are looking for voters’ second and third votes. Minneapolis Mayor Betsy Hodges credits RCV for her surprise victory in

107. *Id.* at 939; see also Larry J. Sabato, *Picking Presidential Nominees: Time for a New Regime*, in REFORMING THE PRESIDENTIAL NOMINATION PROCESS, *supra* note 4, at 136, 146.

108. Flanders, *supra* note 71, at 939.

109. *Id.*

110. *Ranked Choice Voting/Instant Runoff*, FAIRVOTE, <http://www.fairvote.org/rcv#rcvbenefits> (last visited Nov. 19 2016) [<https://perma.cc/NTV6-W6WY>].

111. Rob Richie & Andrew Spencer, *The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, from City Councils to Congress*, 47 U. RICH. L. REV. 959, 982 (2013).

112. See Rob Richie, *The Case for a One-Person, One-Vote National Primary to Nominate Our Presidential Candidates in 2020*, IN THESE TIMES (June 2, 2016), <http://inthesetimes.com/article/19163/the-case-for-a-one-person-one-vote-national-primary-to-elect-our-presidenti> [<https://perma.cc/G73M-35LC>].

113. *Id.*

114. *Id.*

115. See Richie & Spencer, *supra* note 111, at 1007.

116. Ben Jacobs, *How the Iowa Caucuses Work: A Confusing Election Process Explained*, GUARDIAN (Jan. 19, 2016, 7:30 AM), <https://www.theguardian.com/us-news/2016/jan/19/iowa-caucuses-explained-2016-election-democrats-republicans> [<https://perma.cc/XRQ8-SQV8>].

2013.¹¹⁷ Moreover, RCV has been shown to reduce polarization and, given that runoffs are instantaneous, the administrative issues impacting caucuses are eliminated.¹¹⁸

This is a novel suggestion, but the United States has historically used alternative approaches to winner-take-all elections.¹¹⁹ And, other leading scholars have advocated for its inclusion in the presidential primary process.¹²⁰ In striving for the ideal presidential nomination process, using tools—like RCV—that foster civility, inclusivity, and expand voter choice is a step in the right direction.

CONCLUSION

Every four years, the country waits in anticipation for the results of the Iowa caucuses. Yet, as Larry Sabato has remarked, “Even a cursory glance at the presidential primary process reveals fundamental flaws that undermine democratic process, disenfranchise some voters and cede too much power to others, increase the cost of elections, and extend the duration of campaigns.”¹²¹ It is finally time to reform our presidential nomination process. An important first step is to move away from presidential caucuses. This is because, as political science research has shown, “replacing caucuses with primaries may result in some marginal improvements in terms of demographic and attitudinal representation.”¹²²

These marginal improvements, however, will have a large impact on the types of candidates that are successfully able to navigate the nomination process; they will not be decided by a fraction of the population in two homogeneous states. Indeed, marginal improvements will ensure that more Americans can take a meaningful part in our presidential process. This much we know to be true, “[f]or true democrats who put a premium on the voice of the average citizen,” moving away from caucuses “is itself enough reason to move towards a blanket adoption of primaries.”¹²³ It is worth doing.

117. *Mayor Betsy Hodges on the Impact of Ranked Choice Voting in the 2013 Minneapolis Mayoral Race*, FAIRVOTE MINN. (Sept. 23, 2014), <http://fairvotemn.org/node/2414> [<https://perma.cc/8DLJ-MFXD>].

118. See Beth Hawkins, *Still Confused?: An FAQ on Ranked-Choice Voting*, MINNPOST (Nov. 4, 2013), <https://www.minnpost.com/politics-policy/2013/11/still-confused-faq-ranked-choice-voting> [<https://perma.cc/U8VW-7FQS>].

119. See Robert Richie & Steven Hill, *The Case for Proportional Representation*, in REFLECTING ALL OF US: THE CASE FOR PROPORTIONAL REPRESENTATION 3, 23 (Joshua Cohen & Joel Rogers eds., 1999); see also Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. REV. 1867, 1868 (1999).

120. Edward B. Foley, *Third-Party and Independent Presidential Candidates: The Need for a Runoff Mechanism*, 85 FORDHAM L. REV. 993 (2016).

121. Sabato, *supra* note 107, at 136.

122. Panagopoulos, *supra* note 43, at 441.

123. Wright, *supra* note 51, at 37.