

WHY THE CENTER DOES NOT HOLD IN AMERICAN DEMOCRACY: PERSONS, HISTORY, INSTITUTIONS

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American democracy over the last generation has had one defining attribute: extreme partisan polarization. We have not seen the intensity of political conflict and the radical separation between the two major political parties that characterizes our age since the late 19th century.¹ Moreover, this dramatic polarization, though perhaps now so familiar as to be taken for granted, is actually relatively recent. Only over the past generation has it emerged. Before then, most of 20th century American politics, while driven by its own conflicts (particularly the first term of the New Deal), had nothing like the political-party polarization that arose and has endured throughout our era. As one of the best popular books on the subject puts it, on major issues now nearly all Republicans and Democrats “line up against each other with regimented precision, like nineteenth-century armies that marched shoulder to shoulder onto the battlefield.”² Even in the Senate, the most conservative Democrat is now more liberal than the most liberal Republican. The parties have become pure distillations of themselves. They are internally more unified and coherent, and externally more distant from each other, than anytime over the last 100 years. A center in American politics has all but disappeared.³

Politics as partisan warfare: that is our world. Nor is this extreme polarization limited to the halls of Congress. Assessing citizen views about politics is trickier than gauging voting records in Congress, but at least by some measures, Americans as a whole have become dramatically more partisan and polarized over the last generation, too.⁴ Take, for

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¹A host of studies reach similar conclusions about this fact, even as they use a variety of different measures to assess party polarization. Aldrich, 1995; Coleman, 1997; Collie and Mason, 2000; Fiorina, 1999; Fleisher and Bond, 2000 and 2004; Jacobson, 2000; Roberts and Smith, 2003; Rodhe, 1991; Sinclair, 2000; Stonecash, 2003.

²Brownstein, *Second Civil War*, at 14.

³As one study puts it, in 1968, 60% of members of Congress voted in the middle third of the ideological spectrum; by 2004, that had become 25%. Theriault, at 484.

⁴Using another measure, one study concludes that only 13% of voters in the 2004 Presidential election were “swing voters”, compared to an average of 23% in Presidential elections from 1972-2004. *The Swing Voter in American Politics* (William G. Mayer ed.

(continued...)

example, whether citizens approve of the President's performance. From the Eisenhower years through the Reagan ones, the 1950s-1980s, citizens who identified themselves with one party or the other gave Presidents of their own party higher approval ratings, of course, than citizens who supported the other party. But the gap was modest, ranging from 22-39 points between how much supporters of the party in power approved the President and how much his opponents did. In the 1980s, though, that gap shot up to 60 points (80% of the party in power's voters approve of the President's performance but only 20% of other party's voters do), where it has more or less remained ever since.⁵

Now we have entered the Obama era, a partisan transition in the Presidency. One year in provides an apt opportunity to reassess how temporary or enduring is dramatically polarized democracy in America. To the extent anyone (particularly liberals) thought it was the Bush presidency

⁴(...continued)

2008). Here's another perspective on the point: in recent elections, party-line voting has become much more the norm than in earlier years. Thus, party loyalty in Presidential elections in 2000, 2004, and 2008 was 90.0%, 91.0%, and 90.5%. In the last four House elections, it ranged between 90.1% and 92.0%. See Gary C. Jacobson, *the 2008 Presidential and Congressional Elections: Anti-Bush Referendum and Prospects for the Democratic Majority*, 124 *Pol. Sci. Q.* 1, 8-9 (2009). Similarly, this analysis of the 2008 elections reflects an increasingly polarized electorate:

Number of states decided by less than 5 points in 2008: 7, down from 12 in 2000 and 11 in 2004. Percentage of electoral votes in those states down from 26% in 2000 and 25% in 2004 to 17% in 2008. Number of blowout states (10 percent plus) in 2008: 34 plus DC. That's up from around 25 in 2000 and 2004. Percentage of electoral votes in blowout states up to 71 in 2008 from 57 or 58 in 2000 and 2004. Average state winning margin in 2008 at around 17 points, up from 14 or 15 in 2000 and 2004. Conclusion: more, not less polarization in these results. The country is more, not less divided than ever. While there are more blue states, the divide between the red states and blue states is larger than ever. There may be only one United States of America, as Barack says, but the divide between the red states and blue states is deeper than at any time in the past sixty years. And the correlation between 2004 Bush margin and 2008 McCain margin: .95. So same divisions are four years ago, only deeper.

This commentary from Michael Crowley summarizes findings of political science professor Alan Abramowitz. See <http://www.tnr.com/blog/the-stump/polarized-america>

⁵The most extreme partisan gap ever reported in these polls occurred during the Bush 43 presidency; in 2004, this gap was 75.3 points, with 90.5% of Republicans approving of his performance and only 15.2% of Democrats doing so. Brownstein, at 16.

that was exceptionally divisive – or even intentionally polarizing – and hence the cause of this extreme polarization, we have transitioned to a new moment. Yet if the thought was that the election of President Obama would be a magic elixir, healing and dissolving these divisions, the signs suggest these divisions are not softening. If anything, they continue to harden.⁶ Consider within Congress: the two major legislative issues of the Obama Presidency thus far have been economic stimulus and health care. In February, the massive stimulus bill was enacted without a single Republican vote in the House and only three Republican votes in the Senate; on the other side of the coin, not a single Democrat in the Senate voted against it and only seven in the House did so.⁷ If health care legislation is enacted, it will likely be in the face of even more extreme partisan division. Again, probably no Republicans in the House will vote for it; this time, only one or two Senate Republicans might do so. Or consider the public more generally: those affiliated with opposing parties continue to have vastly divergent views over President Obama's performance. The partisan gap in approval ratings for President Obama are much the same as they have been for other Presidents throughout the age of polarization. Only 20% of Republicans, but 80% of Democrats, approve of Obama's performance, a gap of 60 points.⁸ This is the same gap that has persisted since the Reagan years (though not as extreme as the 75 point partisan gap of the Bush 43 years). As difficult for Obama supporters as it may be to believe, those opposed to him are quickly becoming as vehemently opposed as Democrats were to George W. Bush.⁹ For a generation now, Americans of different parties have lived in different worlds, and do so today, when they look at the President.¹⁰

⁶For an astute recent popular analysis, which concludes that “[o]n every front, the chasm is widening between the parties over Washington’s proper role,” see Ronald Brownstein, “A Reaganite or Jacksonian Wave?”, *Nat. J.* (Oct. 31, 2009). Brownstein posits that the parties are so divided that Democrats can be seen as Jacksonian heirs, who want to enlarge government to defeat perceived special interests, while Republicans today can be seen as Reagan heirs, who want to reduce the scope of government across the board.

⁷<http://www.readthestimulus.org/>

⁸<http://people-press.org/report/?pageid=1592>

⁹President Obama's approval ratings one year in are comparable to those of President George W. Bush before Sept. 11th (when the latter shot up dramatically).

¹⁰A contrary view is presented in Morris P. Fiorina et. al., *Culture War? The Myth of a Polarized America* (2d ed. 2006), which argues that political leaders are more polarized than the mass of citizens. That view, however, has been effectively criticized, in my view, by Abramowitz and Jacobson, in *Red and Blue Nation?* 72-114 (Pietro S. Nivola and David (continued...))

The aim of this lecture is to explore whether the extreme polarization that has characterized our politics over the last generation is likely to continue to endure for years to come, and whether we can do anything about it, should we choose to. Assessing this momentous question concerning our political future depends on understanding what has caused the rise of extremely polarized American democracy. If the causes are deep, structural transformations in American politics and life, there is little reason to expect the nature and dynamics of our politics to change. Nor could we do anything about it, even if we wanted to. If the causes do not lie so deep, but instead rest on specific features of the way politics has come to be organized and institutionalized, then hyperpolarization is not inherent to democracy in America today. If we could identify the specific features of the way politics has come to be organized that account for extreme polarization, we could, in principle, change those features and restore a center to American politics. And if the cause of polarization is more a matter of particularly polarizing and divisive political leaders, rather than anything either in deep structural transformations of American politics or anything about specific institutional features of the way democracy is currently organized, then we could escape extremely polarized partisan divisions by finding and choosing leaders who seek to forge broad-based consensus around a revitalized center.

Three principal types of causes have been offered for the eruption of American politics into radically divided warring partisan armies.¹¹ These potential causes are persons, history, and institutions, as I will call them. I want to explore these potential explanations in order to suggest whether American democracy is likely to continue to remain hyperpolarized for years to come and what, if anything, can be done to re-create the kind of center that existed in American politics before the last generation. At the end, I conclude with some brief thoughts on the consequences of radical polarization for American government. If the causes of polarization cannot be changed, is there some way to manage the likely consequences?

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W. Brady eds. 2006), both of which conclude that elected official polarization is consistent with polarization in the electorate.

¹¹A fourth cause is the fragmentation and transformation of the media and sources of information over the last generation, including the rise of cable television and the Internet. I have neither the space here, nor the expertise, to address that issue here, though it is obviously important as part of the cause-effect dynamic that accounts for increased polarization.

I. PERSONS

Widely shared views, reflected in public commentary, often implicitly attribute the rise of polarized politics to individual personality. The optimistic expression of this view is that, if only the right political leaders would appear (we would elect them) – Presidents, majority and minority leaders who are committed to finding common ground, open to sound compromises, consensus builders, indeed, uniters not dividers, one might say – the political system might move beyond the poisonous, unproductive divisions that have characterized American politics over the last generation. The cause of polarization, that is, has been divisive political elites and leaders.

So consider the following story. A relative outsider to Washington runs for the Presidency. During his campaign, he directs most of his energy and resources to persuading voters who are undecided, independent, or otherwise in the center. Part of his appeal is that, as an outsider, he is free of the partisan dynamic and anger that has characterized Washington in recent years, and that he has the temperament and inclination to reach across party divisions, build consensus, and change the tone of national politics. After getting elected, he seems to begin making good on those promises. He offers a major cabinet position to a member of the other party; he reaches across the aisle and actively negotiates with leaders of the other party over his first piece of major legislation. When that legislation is enacted, he warmly praises the leader of the other party, even though that figure's ideology and politics could not be further from the President's own. Yet despite all this, within a few months of taking office, the President finds the other party militantly and virtually uniformly opposed to nearly all his policies. The President's advisors see the other party as determined to be opposed for the sake of opposition itself, to deny the President any success or even to deny the legitimacy of his holding office. The two political parties pull further and further apart. No matter what he does, the President can't seem to move citizens who disagree with him; a year in, his approval rating is at the low 50% level, an exceptionally weak standing historically so early into a first term. Despite the seeming pledges of the President during the campaign, or his initial behavior in office, or the apparent desire of voters for such a consensual, bridge-building figure, politics are just as divisive and polarized as before the election – maybe even moreso.

To liberals, that perhaps sounds like it could be the story of President Barack Obama. But to conservatives, it will perhaps sound like the story of President George W. Bush. And indeed, the most factual

elements (that is, least subject to interpretive dispute) are taken from the Bush presidency, not the Obama one.¹² Before the Obama presidency, it might have been difficult to persuade those hostile to President Bush that it was anything other than Bush's agenda, style, and advisors (Karl Rove, most of all) that explained poisonous party polarization. Surely the election of a different kind of figure, with a different agenda, would change that. Yet as President Obama's presidency quickly begins to look like an inverted image of the Bush one, in terms of the extreme polarization of American democracy, perhaps readers will be more open to the suggestion that something deeper about American democracy accounts for this polarization, rather than the personalities of particular Presidents or political leaders.

To continue to develop this perspective, let me remind you of some other facts about George W. Bush's campaign and the comparable period in presidency to where we now are in Obama's. By all accounts, Bush actually had a strong track record of compromise, accommodation, open-mindedness, accessibility, and bipartisanship in his six years as governor of Texas. He was considered to have "changed the tone" of politics and governance in Texas after the explosive four years that preceded him. As a candidate, he sought to build on that record; he presented himself as a "different kind of Republican," just as Bill Clinton eight-years earlier had presented himself as a "different kind of Democrat." He embraced uncharacteristic issues for a Republican, such as his commitment to educational reform; he would transcend party divisions; he chose the mantle of "compassionate conservatism." Media analyses often confirmed this view.¹³ At fund-raising events, he criticized the Clinton-Gore administration as "the most relentlessly partisan in our nation's history," though he spread the blame to both parties: "Americans have seen a cycle of bitterness: an arms race of anger, and both parties have some of the

¹²Bush offered the Secretary of Energy position to John Breaux, Democratic Senator of Louisiana, who turned it down. Bush's first major piece of legislation, the No Child Left Behind Act, received bipartisan support and was actively negotiated with two major liberal Democratic figures in Congress, Rep. George Miller and Sen. Edward Kennedy, whom Bush praised highly visibly. Brownstein, at 228-29. On Sept. 10, 2001, Bush's approval rating was 51%. *Id.* at 249. On Sept. 10, 2009, Obama's approval rating was 52% in the Gallup poll. <http://www.gallup.com/poll/113980/gallup-daily-obama-job-approval.aspx>

¹³A *USA Today* story from April, 2000 was typical: Bush would "govern from the center, rejecting the shrill conservative absolutism that turned off swing voters after Republicans won control of Congress in 1994." The Pew Research Center, in a 2000 study, found that media reports had generally described Bush as "a different kind of Republican—a 'compassionate conservative,' a reformer, bipartisan."

blame.” And as he promised to heal the wounds of bitter partisan divisions, he pledged to be open to the best new ideas, no matter their source: “I will listen to the best ideas from my fellow conservatives and moderates and new Democrats. I will bring America together.”¹⁴ Is it not jolting to hear how similar this sounds to the more recent Obama campaign?

Of course, some believe that none of this was sincere (as no doubt others believe about similar expressions during the Obama campaign) and that the Bush team actually planned all along to run a polarizing, divisive, highly partisan administration.¹⁵ But it is worth keeping in mind, at least, that those who shaped the Bush presidency believed they were responding to forces that mastered them, rather than the other way around. One of these forces was a polarized electorate. After nearly a year in which they viewed Bush as having reached out in a bipartisan way, with some major pieces of legislation behind him, Bush’s poll numbers hadn’t changed at all. His advisers concluded that the electorate was so partisan and polarized, with so few swing or independent voters genuinely not committed to either party, that the only way Bush could build support and win re-election was by appealing to his base. Put simply, there were too few persuadable voters out there. Bush’s first year also convinced his advisers that there was little benefit in reaching out to the other side; Washington in general, as they experienced it, turned out to involve a permanent campaign, and they perceived Democrats in Congress as determined to unite in opposition to Bush for purely partisan reasons. They claimed that some Democrats were willing to participate in bipartisanship, but that Democratic Party leaders were effective in prohibiting that (a more general theme to which I will return in Part III C.). In terms that could describe the Republican party under Obama, some commentators characterized congressional Democrats during the Bush years as having “steadily renounced the idea of operating as a junior partner in governing and recast themselves as an opposition party decided to resisting the majority.”¹⁶ After 2006, Speaker Nancy Pelosi adopted the conception of the opposition party that Speaker Newt Gingrich had perfected during the 1990s.

¹⁴The quotes and details here are taken from Brownstein, at 222-228.

¹⁵See, e.g., Jonathan Chait, *The Big Con: The True Story of How Washington Got Hoodwinked and Hijacked by Crackpot Economics* 149 (2007) (“From the beginning, ‘compassionate conservatism was an artifice designed to mask Bush’s conservatism from an electorate that did not want a sharp rightward turn.’”).

¹⁶Brownstein, at 338.

We will debate endlessly whether we should see the Bush 43 presidency as the cause of an increasingly partisan and polarized world, among parties and voters, or as itself having been caused by these forces.¹⁷ But we need to take seriously the possibility that it is these larger forces, not the particular individual personalities, that drive polarization. In particular, as President Obama reaches a similar stage of his presidency and receives virtually no support from the opposing party, the script begins to look eerily similar. Obama, no more than Bush, seems able so far to transcend the divisions against which he campaigned. That ought to suggest that forces larger than individual personalities are at work.

Another form the temptation takes to cast individual personalities as responsible for the current state of our politics is a nostalgia for “statesmen” of the past. “Statesmen” here typically means moderate political leaders who forged compromises, transcended partisan differences, stood up to party leaders, spoke and acted independently, and sought consensus near the center. The question is not whether these figures existed in earlier eras; they did.

Nor is it the case that American politics today lacks figures who might fill the role of these kind of centrist political leaders. It’s that larger forces marginalize these figures or drive them out altogether. That such figures do not exist today is not, that is, primarily, a failure of personality. One of the principal mechanisms has become the party primary. Perfect bookends to this fact are provided by Arlen Specter, on the Republican side, and Joe Lieberman, on the Democratic side.

In 1980, Senator Specter himself describes being part of a regular lunch group of moderate Republican Senators that had 15 members.¹⁸ By 2009, this group had dwindled to two, the Senators from Maine, and no longer included Specter himself. As a moderate from Pennsylvania, Specter was one of the few Senators who cast a significant percentage of votes that crossed party lines; his voted against President Regan’s nomination of Robert Bork to the Supreme Court, for example, was instrumental in Bork’s defeat. By the time of President Obama’s stimulus bill, he was one of only three Republican Senators to vote for the bill. In today’s more hyperpartisan age, that was enough to be considered a final

¹⁷Representative Richard Gephardt, the Democratic leader of the House for the first two years of Bush’s presidency, suggests the latter when he describes Bush as “truly a product of what is happening [in Washington].” Brownstein, at 243.

¹⁸Peter Boyer, *Getting to No*, New Yorker (Sept. 28, 2009).

act of party heresy. Specter's position as a moderate drew a blistering primary challenge from Pat Toomey, who carried the banner of a "purer" Republican Party. With polls strongly suggesting Toomey would easily defeat five-term Senator Specter in the primary, the specter of a primary defeat pushed Specter to switch his party identity.

Lieberman's experience is strikingly similar. He, too, was forced out of his party by the primary process, in his case, an actual defeat in 2006, by a challenger who represented a "purer" version of the Democratic Party. Only six years earlier, Lieberman had been the party's Vice Presidential nominee, chosen in part for his apparent moderation and representation of a less polarizing political style. Lieberman's voting record strongly supported the Democratic Party on many issues, including health care, reproductive rights, public education, the Bush tax cuts, and labor issues. But his support for the Iraq war and Bush administration policies on terrorism, drew a challenge from a candidate who saw Lieberman not as a moderate, but a betrayer of the Democratic party, and primary voters agreed. The independence that had been seen as such a virtue had become a huge liability. He was thus relegated to the no-man's land of an Independent (not even the representative of an actual Independent party). Because Lieberman and Specter have been in office so long, and have such recognized names and reputations, both have been able to survive, in the late stages of their careers, their expulsion in the process of party purification. But consider the prospects of comparable figures who might consider seeking office today. If the Liebermans of the political world are not fit for the Democratic Party, it is hardly likely that comparable figures not already as well known will be able to get elected as Independents. Similarly, if emerging Specters are not fit for the Republican Party, it is hard to imagine similar figures will be successful as Democrats. The dynamics of party polarization are relentlessly squeezing out political figures who in another day and age would be considered centrists or moderates.

More generally, both parties continue to marginalize their more moderate factions. During the 1980s and 90s, the Democratic Leadership Council (DLC), an organization of avowedly centrist "New Democrats" that Bill Clinton chaired, played a major role in the Democratic Party. In the years after Clinton, the DLC was mocked and effectively pushed to the side by a variety of organizations and actors, sometimes called the "New New Democrats," who demanded that the Democratic Party become more aggressively partisan. In a similar way, Republicans continue to push

moderates out of the party in favor of more partisanly “pure” Republicans – even at the cost of endorsing third-party candidates.¹⁹

Each side blames the other, of course, for being the primary cause of polarization, to which “our” side – the victimized one – is only responding out of necessity. Like most blood feuds, the debate about origins is itself part of the feud. Was it the House Democrats of the 1970s and 80s, who supposedly ignored fair processes, shut the minority out completely, humiliated the Republicans, and ran the institution like a fiefdom? Or the Reagan presidency, which brought a more hard-core conservative ideology to Washington? Was it the Clinton presidency, which George W. Bush cast as “the most partisan in American history?” Or the Bush II presidency, which purportedly decided to polarize the country and appeal only to his base, content to run the country on a 50% +1 basis? Or is Barack Obama is trying to run the most massive government presidency America has seen years, to which a polarized opposition is a justified response? Newt Gingrich and Tom DeLay? Or Nancy Pelosi and Harry Reid? My aim is not to wade into this morass and assign responsibility. It is to suggest, for now, that the polarizing politics that has been a generation in the making and continues to grow is a sign that structures and forces larger than the personalities of particular political figures might well be at work.

The temptation to see our present polarized politics through the lens of individual personality, a temptation fed by the media as well as presidential candidates who promise (and might well believe) all will be different under their watch, perhaps reflects a general American tendency to emphasize the power of individuals in shaping events, rather than deeper historical processes or institutional structures. I have tried to raise skepticism about whether individual personality can explain the state of American democracy today. In turning now to other explanations, I hope the implausibility of these personality-based explanations becomes even more apparent.

II. HISTORY

At the opposite end of the spectrum of possibilities are large scale structural transformations in the foundations of American democracy. These transformations can be traced, in a sense, to a single Act of Congress,

¹⁹As recently occurred in the special election to fill a vacant seat in a reliably Republican district, New York’s 23rd. See Adam Nagourney and Jeremy W. Peters, G.O.P. Moderate, Pressed by Right, Abandons Race, N.Y. Times Oct. 31, 2009.

the Voting Rights Act of 1965 (VRA), a statute I have written about for many years. More specifically, it is due to what I call the first generation of the VRA's implementation.

The VRA is undoubtedly the most important and most effective civil-rights statute ever enacted. It also unleashed forces that, building on themselves over several decades, have caused a tectonic shift in the underlying foundations of American politics. The culmination of this shift is perhaps the major cause of the kind of hyperpolarized, party politics we now have. If this view is right – as I think it mostly is – it means we should see the practice of democracy before the current era as, in some sense, “unnatural.” Thus, the 20th century figures we associate with moderation, compromise, and appeals to the center should perhaps be viewed as manifestations of an earlier, less mature stage of American democratic development. Conversely, the hyperpolarization of the last generation should be understood as the steady-state of American democracy, the manifestation of a more mature American democracy, and hence likely to be enduring.

If this sounds topsy-turvy, it is because many people fail to appreciate that from roughly 1890-1965, the South was a one-party political regime, much like one-party authoritarian states around the world. Nor was the complete monopoly the Democratic Party had on the South throughout those years the product of routine forces of political competition, as if the Democratic Party in the South was merely the Microsoft of its era. Instead, that monopoly came about through a sequence of purposeful actions taken at the end of Reconstruction, which included violence, intimidation, informal manipulation and fraud during elections, eventually culminating in long-term, lasting legal changes in statutory law and state constitutions that redefined and massively contracted the Southern electorate. These legal changes effectively eliminated or drastically reduced African-American electoral participation, and, though this consequence is less well appreciated, also reduced the white electorate by perhaps as much as a third in some states. Although we tend to see this process through the lens of race, and view this history as about the assertion of white supremacy, it is also a story about political competition and its suppression. The Democratic Party in the South, by using laws and state constitutions to redefine the Southern electorate in its own image, succeeded in destroying the foundation for any politically effective challenge to the Party's domination. The one-party South was not the “natural expression” of “Southern” political preferences; it was an artificial monopoly created through the use of state power to eliminate competitors. I am not sure what the right

analogy would be in the economic sphere. It's not just as if Microsoft were to get laws passed that made it impossible for Apple to compete effectively; it's as if Microsoft got laws passed that eliminated potential Apple consumers from being able to participate in the marketplace.

The projection of this Southern pathology onto the national political landscape were political parties incoherently divided internally. Partisan loyalties did not neatly track ideological ones (as they do today). The Democratic Party was a coalition of Southern Democrats, extremely conservative on race or any issue that even conceivably touched on race, along with moderate to liberal Democrats from other parts of the country. This in turn enabled the Republican Party to sustain its own divided coalition of liberals and moderates, mostly from the Northeast and the West Coast, and much more traditional, old-line conservatives from the Midwest and other rural areas. Political scientists describe the country as having a "four-party system," particularly from 1937 on. As one study shows, during this era, even though Democrats formally controlled the House, the largest bloc was almost always conservative Republicans; then liberal Democrats; then conservative Democrats; and finally, moderate Republicans (the same was true for the Senate). None of these groups were large enough to pass legislation; doing so required strong support from at least two of the groups. As a result, any significant legislation required compromise and bargaining across party lines. This is the era being looked back to nostalgically by those who exalt a prior generation's political leaders who were able to forge "comprises" and transcend party divisions. Such figures existed not as a matter of individual personality in isolation, but because the structural environment of parties and politics then meant that compromises existed to be had – and that compromise was recognized by all to be essential to legislate at all.

As an example, even when the Democratic Party controlled all three of the House, Senate, and Presidency during the Kennedy and Johnson and Johnson administrations, the party was fragmented and not coherent on many major issues, especially, of course, those that touched on race. Much of the major legislation of this period required bipartisan support from majorities of moderate and liberal Republicans and Northern Democrats to defeat a "conservative coalition" dominated of Southern Democrats and Republicans: the Civil Rights Act (1960), the Higher Education Act (1963), the Civil Rights Act (1964), the Voting Rights Act (1965), the Immigration Act (1965), and the Open Housing Act (1968). Even Alaskan and Hawaiian statehood (1958 and 1959) required bipartisan coalitions to overcome concerted Southern Democratic opposition, because southerners

viewed these new states as likely to elect representatives supportive of civil rights legislation.²⁰ As this era was being forced to a close, the political scientist James MacGregor Burns, in his 1963 book, *The Deadlock of Democracy*, was able to write that “[t]he consequence of the four-party system is that American political leaders, in order to govern, must manage multi-party coalitions just as the heads of coalitional parliamentary regimes in Europe have traditionally done.”

The 1965 VRA, and related changes in the era in constitutional doctrine and law, began the process of unraveling this system. The VRA began what might be considered the “purification” or “maturation” of the American political system. Put another way, the VRA initiated the rise of a genuine political system in the South, which meant the destruction of the one-party monopoly and the emergence, eventually, of a more normal system of competitive two-party politics. Just as the peculiar structure of the one-party South had projected itself onto the shape of national political parties, so too the dramatic transformation of Southern politics in turn reshaped the essential structure of the national political parties. As the VRA and related measure broke down the barriers to electoral participation in the South – literacy tests, poll taxes, manipulative registration practices, durational residency requirements – a massive infusion of new voters, mostly black but whites as well, entered and reconfigured Southern politics.

These voters were on average, much more liberal than the median white voting Southerner had been before 1965. No longer could conservative, one-party political monopoly be maintained. Over the next generation, these new voters ripped asunder the old Democratic Party of the South, eventually fragmenting it into two parties: a highly conservative Republican Party, into which many of these formerly Democratic Southern voters fled, and a new, moderate-to-liberal Democratic Party that was more in line ideologically with the rest of the Democratic Party nationwide. There was, of course, a self-re-enforcing feedback dynamic to this whole process as well; as the Democratic Party became more liberal in the South, more conservatives fled it; as more conservatives fled, the Democratic Party became even more liberal.

²⁰Id. at 127-28. The first civil rights legislation of the modern era, the 1957 Civil Rights Act also enacted during the Eisenhower years, similarly required a bipartisan coalition, given the fragmentation of the Democratic Party. Id. at 127. A superb account of how that coalition was orchestrated is given in Robert Caro, *Master of the Senate* (2003).

Starting in the 1990s, a new feature of the recently amended VRA, the requirement that safe minority districts be created, added new fuel to this process.²¹ By concentrating Southern black voters into the majority in certain districts and removing them from most others, the effect was to eliminate districts in which white-black coalitions had controlled outcomes (districts in the 30-45 percent African American range, which had been electing moderate white Democrats). In Congress and state legislatures, white Democratic representatives were decimated; instead, representatives tended to become either very liberal Democrats, typically minority representatives elected from safe minority-controlled districts, or Republicans.²² Of course, these effects then fed back as well into the dynamic of party competition, increasing the separation of conservatives and liberals into two parties with increasingly coherent, and distinct, ideologies. Safe districting was not the main cause of the emergence and polarization of two-party competition in the South, which was inevitable once the 1965 VRA was enacted, but it might have accelerated that process by a decade.

For those skeptical that a 1965 statute could control the shape of democratic politics today, the key is to understand the gradual, though inexorable, nature of the profound transformation at work. It took years after 1965 before a robust two-party system, with a newly born Republican Party in the South, emerged. Not until roughly the mid-1990s did the South, for the first time in a century, become a genuine two-party system with robust, regular competition regularly taking place between them. From 1874-1994, for 60 consecutive elections, the Republicans were a minority of the southern delegation in the Senate and House; in 1994, that flipped in both chambers.²³ Thus, the Republican Party became a genuinely national party for the first time since Reconstruction (as some historians note, not since Whigs fought Democrats in the 1830s and 1840s has American politics rested on a thoroughly nationalized two-party system.²⁴).

²¹See, e.g., David Lublin, *The Republican South* 22-23 (2004).

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Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359 (1995) (reviewing QUIET REVOLUTION IN THE SOUTH).

²³Black and Black, at 400, 402.

²⁴Black and Black, at 404.

This process only just began in 1965; the citizens the VRA newly empowered first had to start registering and turning out to vote; candidates had to begin appealing to those votes; the power of those votes had to manifest itself; pressure had to begin to be felt by the Democratic Party of the South to respond; as that party moved left, the Republican Party had to be reborn; candidates had to start to be willing to run under that banner; voters had to be willing to change their party affiliation; existing officeholders had to become willing to change their party identity. The process of changing party affiliation, for both voters and officeholders, is an enormous, once-in-a-generation experience, if that. At some point in this dynamic, a tipping point gets crossed. Conservatives who had long thought of themselves as Democrats decide they are Republicans, and there is a cascade among others who perceive themselves the same. If one had to date that tipping point, it was probably in the years leading up to 1994, when what experts characterize as a “surge” of Republican officeholding occurred in the South -- a surge that enabled Republicans nationally to take control of the House. It took about a generation, from 1965 to 1995, for the massive political restructuring wrought by the VRA to work its way through American democracy.

Rather than entering a post-partisan stage, we are probably still in the midst of the process of party purification. We have not reached equilibrium yet and party polarization might well increase further in coming years. Some of the Southern Democrats still in the House were elected nearly 20 years ago, in districts that are strongly Republican in national elections; they remain in office due to personal popularity and incumbency. When they retire, those seats will likely be filled by Republicans. The Democratic Party will be “purified” of some of its more moderate or conservative members. The “purification” process continues on the Republican side, as well, as primaries or their threat continue to push remaining moderates, like Arlen Specter, out of the party, and general elections become nationalized, so that entire regions are represented in the House by only one party – as became true of New England when Chris Shays, a moderate Republican from Connecticut, was defeated in 2008 by his Democratic opponent.

Moreover, the more Americans participate in politics, the more polarized and partisan they become. And after decades of worrying in popular and academic commentary about the political passivity of Americans, over the last five years, Americans are participating much more, both in terms of voter turnout and other means of participation. Indeed, polarization among the public might have increased *more* in the last

generation than among members of Congress. As one major analyst puts it: “Far from being disconnected from the public, Democratic and Republican candidates and officeholders are polarized precisely because they are highly responsive to their parties’ electoral bases.”²⁵

We are dealing with transformational historical forces here, forces as large as the end of American apartheid. The political realignment launched by the VRA was 30-40 years in the making. It has helped produce a world of political parties internally more coherent and unified and externally more differentiated and polarized from each other than in the pre-VRA world. Instead of thinking of this world as aberrational, or as the creation of a few polarizing figures, I suggest we should see it as likely to be then normal, ongoing state of American party politics. The period before the VRA, shaped by massive disenfranchisement in the South that sustained an artificial Democratic Party monopoly, was the aberrational one. That is why I say that the poisonous state of hyperpolarized partisan politics over the last generation might be, paradoxically, a reflection of the full maturation of the American political system. And as such, it is likely to endure.

III. INSTITUTIONS

This historical perspective on our present polarized politics is sobering, as it is meant to be. Certainly it is designed to suggest that the view that political leaders, or particular figures, are responsible for this polarization is naive – a characteristic, perhaps tempting confusion of viewing individual personalities as the cause of today’s polarized politics, rather than recognizing that these personalities are instead the effects of much deeper, more long-term structural transformations in American politics and parties. Indeed, so sobering is this historical perspective that it might appear that polarized politics is so pre-determined by these larger forces that there is nothing we can do about it. And that might well be right.

But I now want to turn to an arena in between personality and history, the realm of institutional design. As a legal scholar who works on the design of democratic institutions and processes, I am particularly aware of how seemingly small-scale, micro-level changes in the legal rules and institutional frameworks within which democracy is practiced can have large effects in shaping the nature of democratic politics. The large

²⁵Abramowitz, at 80, which goes on to note that the bases of both parties are decidedly polarized.

historical forces that the maturation of American democracy unbottled cannot be put back inside, nor would we want them to be. But perhaps they can be channeled in certain directions, rather than others, through the specific ways we design the laws and institutions of democracy. I identify here the three specific institutional features that have either contributed to the rise of polarized politics or that could be adjusted to help reconstruct a center in American politics. I also note the processes by which these specific changes could be made and assess the likelihood of them happening.

One last point by way of putting what follows in context. On the one hand, those who focus on large-scale historical processes often miss the way the contingencies of smaller-seeming factors, such as laws and institutional structures, can nonetheless matter in contributing to exactly how that historical change gets expressed. At the same time, those who make a career studying these institutional-design features, such as law professors, can attribute too much significance to institutional design, while not appreciating enough the larger historical forces and patterns at work. My aim is to steer between those alternatives by identifying the specific institutional changes I believe could do the most to help rebuild a center in American politics, while not suggesting they are panaceas that, even if adopted, would magically restore an era of consensual politics and parties.

A. *Primary Elections*

The single most discrete institutional or legal change that would have comprehensive effects across all elections would be a shift to using “open” primary elections. State-mandated primary elections can be either closed, open, or something in between. Closed primaries (used in twelve states) permit only previously registered party members to vote; open primaries (used in about half the states in some form)²⁶ permit at least some non-party members, such as such as independents, also to participate. It is well known and documented that the most ideologically committed and hard-core party activists dominate closed primaries. As a result, closed primary winners are more likely to reflect the ideological extremes around which the median party activist centers. Closed primaries are thus one institutional structure that contributes to more polarized partisan officeholders.

²⁶See Kristin Kanthak & Rebecca Morton, *The Effects of Electoral Rules on Congressional Primaries*, in *Congressional Primaries and the Politics of Representation* 16, 121 tbl.8.1 (Peter F. Galderisi et al. eds., 2001).

Voters and candidates are well aware of these effects of closed primaries. California voters, for example, expressed disaffection for years with the state's closed primaries and the more extreme candidates voters therefore confronted on general election day. This disaffection was accentuated by the large and growing number of self-identified independents in the state. But because sitting legislators had been elected under this very system and were strong partisans, the California legislature resisted popular pressure to open the primaries. Once the initiative process gave voters a choice to switch from closed to open primaries, though, voters overwhelmingly endorsed the latter. The central justification for doing so was that open primaries would generate more moderate nominees and give voters more centrist choices on general election day.²⁷ More centrist candidates also recognize that their prospects depend on the legal structure of primaries. Governor Schwarzenegger and his advisors understood that a socially moderate, pro-choice Republican faced daunting hurdles to surviving an ordinary Republican primary. That is surely part of why he seized the opportunity a recall election offered: to bypass the activist-controlled, closed Republican primary and appeal directly to the general electorate in a single election.²⁸ Though the overwhelming preference in that general election, Schwarzenegger might never have made it out of the normal Republican primary process.

Voters are familiar with these empirical facts from watching presidential elections. During the presidential primaries in 2008, for example, Barack Obama consistently did better in open-primary states than closed ones, in which Hilary Clinton did better. To the extent Obama was seen as the more centrist candidate, which accounts for this pattern, he had much greater success in primary electorates that consisted of independents than those that permitted only registered Democrats to vote. The same was true when John McCain ran against George W. Bush in 2000. McCain did better in open primary states than closed ones, in which only registered

²⁷Empirical studies of the two elections conducted under the blanket primary before the Court struck it down suggested that it had in fact produced more moderate candidates. See Elisabeth R. Gerber, *Strategic Voting and Candidate Policy Positions*, in *Voting at the Political Fault Line: California's Experiment with the Blanket Primary* at 192, 210; see also Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 *J.L. Econ. & Org.* 304, 318–21 (1998) (concluding that House representatives from closed primary states adopt policy positions furthest from their median voters' position and that those from semi-closed primary states take more moderate positions).

²⁸Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 *Wm. & Mary L. Rev.* 415 (2004).

Republicans could vote. To extend these specific examples more generally, a world of open primaries would tend to select for, and reward, the Obamas and McCains, while a world of closed primaries does so for figures like Hilary Clinton and George W. Bush. Greater use of open primaries would tend to select for candidates whose appeal was more centrist and would tend to pull candidates and therefore officeholders more to the center.

But there are two more specifically legal aspects of this issue that must be considered. First, for national elections, Congress could, in principle, enact a statute requiring states to use open primaries for electing members of the House and Senate and for presidential primary elections. I would expect there to be some controversy over whether Congress actually has such power under the Constitution. Traditionally, states have regulated whether parties must hold primaries at all, as well as the specific features of those primaries, such as whether they are open or closed. Congress has never tried to mandate that states use one kind of primary or another for elections to national office.

Nonetheless, Art. I., Sec. 4 of the Constitution appears to give Congress this power, should it choose to exercise it. That provision authorizes state legislatures, in the first instance, to regulate the “manner of holding elections for Senators and Representatives.” But Art. I., Sec. 4 also expressly gives Congress the right to take over these functions from the states.²⁹ Under this power, Congress has passed national laws that require states to use single-member districts for electing members of the House, that regulate the voter-registration process for national elections, and that mandate and regulate the process of casting and counting provisional ballots in national elections.³⁰ Similarly, the Supreme Court has never held an Act of Congress unconstitutional under this provision for going beyond the bounds of what Art. I., Sec. 4 permits Congress to do.³¹ Thus, Congress probably does have the power to regulate primary elections for national offices. As a practical matter, however, the idea of Congress taking over from the states the power to decide the structure of primary elections, even for national office, would confront the powerful forces of tradition and

²⁹The text reads: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.”

³⁰For a summary of these laws, see Pildes, Howard L. J.

³¹Indeed, the Supreme Court has read this power expansively.

inertia. For those reasons, the most practical route to replacing closed primaries with open ones might well be individual state level efforts – particularly aided by those states that have direct-democracy devices, for as the California experience illustrates, voters tend to be more supportive than existing officeholders or existing party leaders in most places of open primaries.

The second legal issue the effort to replace closed with open primaries would confront is whether Supreme Court doctrine poses any barriers to the constitutionality of open primaries. Until a few years ago, there would have been no question about that; as noted above, many states have used open primaries for years. But in a 2000 decision, the Supreme Court held that the political parties have First Amendment associational rights that make certain forms of state-mandated primaries unconstitutional.³² The Court held that California's unusual, crazy-quilt version of the open primary unconstitutionally violated the associational rights of party members. I have criticized the analysis and the outcome in the Court's decision elsewhere.³³ Even accepting the decision, though, only three states used the version of the open primary at issue in that case; if the Court's decision is limited to that peculiar form, constitutional law will not stand in the way of more widely used forms of open primaries. Indeed, the Court seems to have grown cautious already about extending the principles of its earlier decision.³⁴ Thus, as a constitutional lawyer, I would offer two insights from the current state of the law. First, one cannot say there is no risk that the Supreme Court will hold come to hold open primaries unconstitutional. But some commentators, including those who support open primaries, misunderstand or overstate this risk.³⁵ I would guess that the Court will not hold open primaries, a longstanding feature of the

³²See *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000). California had adopted a “blanket” primary, in which voters could choose, office by office, in which party's primary they wished to vote. For a full description and analysis of *Jones*, see Richard H. Pildes, *Democracy and Disorder* 68 U. Chi. L. Rev. 695 (2001).

³³Pildes, *Supreme Court Foreword*, 118 Harv. L. Rev. 29, 101-30 (2004).

³⁴*Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184 (2008).

³⁵Brownstein, for example, apparently informed by “lawyers in both parties,” concludes that the Supreme Court has held, or will hold, open primaries unconstitutional. Hence, he suggests that only if state parties decide to choose open primaries will such primaries be adopted. Brownstein, at 378-89. The Supreme Court has certainly not yet held open primaries unconstitutional and, to the extent Brownstein is repeating predictions, I think they are much too pessimistic about the likely constitutionality of open primaries.

American electoral landscape, unconstitutional. More to the point, it would be a serious mistake for those who support open primaries to shy away, out of fears that the Court will hold such primaries unconstitutional, from pursuing legislative efforts, state or national, to adopt open primaries.³⁶

The move to open primaries is the single cleanest, most discrete institutional change I can think of that might help to rebuild the center in American politics. It stands as a nice example of how simple changes in one law could potentially have a meaningful effect not just on elections, but on how governance and policymaking in the United States proceeds. But the emergence of radically polarized politics over the last generation has not been *caused* by the structure of primary elections – that is, by the absence of open primaries. That time period does not coincide with the replacement of open primaries by closed primaries. We have polarized politics for other reasons. Given that kind of politics, a move toward open primaries would be one way in which we could change the institutional framework within which elections take place in ways that might help keep more centrist figures in office and lead more of them to choose to run -- and to win.

B. *Gerrymandering*

The cycle of primary, then general elections might, in theory, mitigate the effects closed primaries have in favoring candidates from the extremes. The standard lore in American politics had been that candidates tack to the extremes during primaries, then move back to the center for general elections. But the need to follow that script diminished over the last generation, at least for the U.S. House. When general election constituencies tend to favor overwhelmingly one party over another, the general election is not a competitive forum. In election districts “safe” for one party or the other, winning the primary becomes tantamount to winning the general election. No need or incentive then exists for ideological extreme winners of closed primaries to tack back to the center in the general election. And over the last decade, in particular, more and more congressional districts have become “safe” in just this way. They are overwhelmingly stocked with voters of one party or the other; that party’s

³⁶A less familiar alternative to the open primary would be to merge primary and general elections into a single event through adopting new voting rules, such as Instant Run-off Voting (IRV). See Issacharoff et al., at 1132-1141; Richard Briffault, Lani Guinier and the Dilemmas of American Democracy, 95 Colum. L. Rev. 418 (1995). Support for IRV seems on the rise, with two major cities, San Francisco and Minneapolis, having adopted it recently.

candidate can count on winning the general election with landslide margins and hence does not face a competitive general election.

The decline in competitive elections for Congress is a familiar story. The data has been collected elsewhere.³⁷ One striking point is enough to convey the picture: normally, the election after the Census and redistricting is the most competitive, as everyone scrambles to win in newly configured districts. But in the wake of the most recent Census and redistricting, the 2002 elections were instead *less* competitive, by almost any measure, than the *routine, average* election over the previous three decades, let alone than after the previous three rounds of redistricting.³⁸ The 2002 and 2004 elections were the least competitive in post-war history.³⁹ To show how recent these changes are from 1970-2004, the average number of House seats that changed parties was 14.5; but from 1996-2004, it was just 4 seats.⁴⁰ The 2006 and 2008 elections were a departure from this story, with Democrats managing to pick up 31 and 21 seats respectively, but whether they reflect the traditional experience of a midterm election during an unpopular war and then an imploding economy, or a more generalizable change, remains to be seen.⁴¹

³⁷For a summary of that data, see Pildes, *The Constitution and Political Competition*, 30 *Nova L. Rev.* 253, 256-60 (2006). For a recent general overview of these issues, see *Party Lines: Competition, Partisanship, and Congressional Redistricting* (Tom Mann and Bruce Cain eds. 2006).

³⁸*Id.* at 257. This lack of competitive elections for Congress contrasts notably with the greater competitiveness seen in Senatorial and Gubernatorial elections. While only one of eleven House elections was decided by less than ten percentage points in 2002, fully half of state governorships and Senate seats contested on the same day -- in elections impervious to political gerrymandering -- were instead competitive enough to be decided by less than this ten-point margin.

³⁹Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 *J. POL.* 75 (2006).

⁴⁰Eric Uslaner, Professor of Govt. And Politics, Univ. of Md., data available at ___. Uslaner also notes, as have others, that electoral margins of victory have been increasingly dramatically. Thus, from 1992-94, only about 40 House seats were won by margins of 5% or more, which would make them non-competitive by certain standard definitions; by 2004, only ten House seats were won by as little as a 5% margin. By the late 1990s, 75% of House incumbents were winning by margins of 60% or more.

⁴¹See Gary C. Jacobson, *the 2008 Presidential and Congressional Elections: Anti-Bush Referendum and Prospects for the Democratic Majority*, 124 *Pol. Sci. Q.* 1 (2009); Gary C. Jacobson, *Referendum: The 2006 Midterm Congressional Elections*, 122 *Pol. Sci. Q.* 1 (2007).

No doubt several factors contribute to the decline of competitive House elections,⁴² but one is the successful flourishing of districting practices intentionally designed to make election districts “safe.” But there is one aspect to the way districting today contributes to the decline of competitive elections that I do not believe anyone has recognized, at least in print. I will first lay out the general way recent practices of gerrymandering have contributed to non-competitive elections, then explain the crucial aspect to the story that has gone missing.

⁴²The other potential contributing causes appear to be greater party polarization among the electorate; the greater geographical concentration of voters by party affiliation independent of the way election districts are designed; and the increasing cost of elections, which disadvantages challengers. Of course these factors likely interact, also, in complex ways. On the financial side, the cost of beating an incumbent, the amount challengers spent on average to defeat House incumbents, rose 15 times from 1974-2004. Uslander. On the geographic side, voters have become more geographically concentrated by partisan affiliation in recent decades. See Bill Bishop, *The Big Sort*; see also *The Schism in U.S. Politics Begins at Home*, *Austin-American Statesman*, April 4, 2004. Some have argued, for example, that the apparent greater polarization in voting patterns is an effect of safe districting, rather than a cause; faced with only the extreme partisan choices generated by non-competitive safe districts, voters, on this view, will appear to be more partisan in their voting behavior. See MORRIS P. FIORINA ET AL., *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (2005). In recent work, some authors have suggested that redistricting practices have not played a significant role in the decline of competitive elections. Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 *J. POL.* 75, 86 (2006). But other experts have pointed out serious methodological flaws that undermine this recent work; in particular, this study uses the three-way 1992 Presidential election, in which Ross Perot received 18.9% of the vote, as a baseline for assessing the 1992 congressional elections, while using the conventional two-party Presidential race in 1988 as a baseline for the 1990 elections. This greatly distorts the results; when the data are re-analyzed with less distorted baselines, they continue to show that redistricting has contributed to the decline of competitive congressional elections. See Michael McDonald, *Re-Drawing the Line on District Competition*, 39 *PS: Pol. Sci. & Pol.* 99 (2006); see also Michael McDonald, *Drawing the Line on District Competition*, 39 *PS: Pol. Sci. & Pol.* 91 (2006). Although Gary Jacobson, a leading analyst of congressional elections, earlier concluded that redistricting practices were “a major reason” for the decline in competitive elections, more recent, unpublished work by Jacobson concludes that increasing partisan consistency and polarization in voters’ voting patterns in all elections, districted or not, contributes more than redistricting to the decline in competitive congressional elections. See Jacobson, *Competition in U.S. Congressional Elections 8* (draft paper presented at conference, “The Marketplace of Democracy” (March 6, 2006). In earlier work shortly after the 2002 elections, Jacobson attributed a strongly causal role to redistricting: “Redistricting patterns are a major reason for the dearth of competitive races in 2002 and help to explain why 2002 produced the smallest number of successful House challenges (four) of any general election in U.S. history.” Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 *POL. SCI. Q.* 1, 10-11 (2003).

The more general story is familiar by now and I will simply summarize the broad pattern: in most states, politically self-interested state legislatures draw election district boundaries each decade after the new census (all other democracies use independent entities for this task⁴³). This enables incumbents to gerrymandering, bot for their own benefit and that of their party. In recent years, computer technology has enabled the practice of this dark with increasing precision and success. In addition, in many states, incumbents of both parties have come to engage in mutual self-protection treaties – sweetheart gerrymanders – in which they agree to draw safe districts all around and not compete. The result is more and more districts designed to be overwhelmingly Democratic or Republican (if Coke and Pepsi made agreements not to compete in each others' territories, it would violate the antitrust laws). One need look no further for evidence than this unembarrassed admission regarding California redistricting by Representative Loretta Sanchez, in which she describes the role of redistricting czar Michael Berman, the leading consultant to the controlling Democratic Party in drawing the new district lines:

So Rep. Loretta Sanchez of Santa Ana said she and the rest of the Democratic congressional delegation went to Berman and made their own deal. Thirty of the 32 Democratic incumbents have paid Berman \$ 20,000 each, she said, for an "incumbent-protection plan." "Twenty thousand is nothing to keep your seat," Sanchez said. "I spend \$ 2 million (campaigning) every election. If my colleagues are smart, they'll pay their \$ 20,000, and Michael will draw the district they can win in. Those who have refused to pay? God help them."⁴⁴

The impact of incumbent driven, anti-competitive gerrymandering on competition is further suggested by differences between the competitiveness of congressional districts that are drawn by courts or

⁴³For a description and survey of these alternative institutions in other democracies, and analysis of the consequences, see Pildes, *Constitutionalization*, supra note ____, at 78-81.

⁴⁴Hanh Kim Quach & Dena Bunis, *All Bow to Redistrict Architect: Politics Secretive, Single-Minded Michael Berman Holds All the Crucial Cards*, ORANGE COUNTY REG., Aug. 26, 2001, available at <http://fairvote.org/redistricting/reports/remanual/usnews6.htm#arch>.

commissions and those that partisan state legislatures design.⁴⁵ In 2002, the seventeen states using commissions or courts to draw congressional lines, 31% of the commission-drawn districts were competitive enough to preclude a landslide, 23.3% of the court-drawn districts were similarly competitive, but only 16.3% of the legislatively-drawn districts were competitive enough to be won by less than a landslide.⁴⁶ A decade earlier, the 1992 redistricting produced the same general pattern: Commission-drawn districts were the most competitive, court-drawn districts were less so, and legislatively drawn districts were the least competitive. The major difference between 1992 and 2002 was a decline of almost 50% by 2002 in the number of congressional districts not won by a landslide when legislatures controlled districting.

Now for the unappreciated element in this story: the role the Voting Rights Act (VRA) plays, in parts of the country with significant minority populations, in making this gerrymandering process much more difficult to unwind, should we want to, than most realize. Since the mid-1980s, in a process that really took hold for the first time in the 1990s, the VRA has required the creation of “safe” minority election districts when voting is racially polarized.⁴⁷ The law’s definition of racially polarized voting is a simple one, with the consequence that these districts are generally required wherever there are significant minority populations. Racial polarization is defined to mean elections in which minority voters overwhelmingly prefer a particular candidate (typically, a minority candidate) while white voters overwhelmingly prefer a white candidate – regardless of the various reasons, legitimate or illegitimate, that might explain these differences.⁴⁸ For example, if 90% of African American voters in Texas preferred Obama to McCain in the 2008 election, while 70% of white Texans preferred McCain, that election would be considered racially polarized – even if no Democratic candidate for President, black or white, tends to do better among white Texans.

⁴⁵Data and analysis in this paragraph are from Jamie L. Carson & Michael H. Crespin, *The Effect of State Redistricting Methods on Electoral Competition in United States House of Representatives Races*, 4 ST. POL. & POL’Y Q. 455 (2004).

⁴⁶*Id.* at 456, 460 tbl.1. “A race is [defined here as] competitive if the winning candidate received less than 60 percent of the two-party vote in the general election.” *Id.* at 460 tbl.1.

⁴⁷The key decision is *Thornburg v. Gingles*, 478 U.S. 30 (1986).

⁴⁸*Id.* at ____.

There are first-order and second-order effects on the increase in safe districts and the decline in competitive ones from the VRA's resulting requirement that safe minority districts be drawn. The initial effect is that these safe minority election districts, which might typically be around 55% African American, are themselves overwhelmingly Democratic on general-election day. Indeed, they are among the least competitive, in partisan terms, in the country; Democratic candidates typically win in these majority-minority election districts with around 75-80% of the vote. If districts that are overwhelmingly safe for one party tend to produce more extreme officeholders, as they do, these are among some of the safest districts in the country. But it's the second-order effects of safe minority districts that must be understood as well. One of the first things all redistricting bodies do, whether state legislatures or independent commissions, along with making sure they comply with one-person, one-vote requirements, is to create VRA-mandated districts. The process of doing so typically concentrates a portion of the state's Democratic voters into these safe minority districts. And the result is that there are many fewer Democratic voters to spread around in other districts. Hence, it becomes considerably more difficult to create competitive districts in the rest of the state as well, not just in the districts designed to be "safe" for minority voters.

To put this point another way, if a redistricting body set out to maximize the number of competitive districts in a state with a significant minority population, consistent with other legal obligations like one-person, one-vote, it could surely create more competitive districts than we currently have. To the extent competitive districts generate more centrist candidates and officeholders, that would be an institutional change that would diminish the radical polarization in bodies like the U.S. House. But redistricting bodies, even if motivated to do so, cannot set out to create as many competitive districts as possible. Once they create safe minority districts, the partisan distribution of the remaining voters means that there simply are fewer Democratic voters left to spread around to create additional competitive districts, particularly in light of other legal and practical constraints, such as that districts must be contiguous and tolerably compact – which means redistricters cannot simply pick and choose voters to put in the same district, no matter where in the state they might live. In states that have a Republican majority statewide, the effect is to enhance the size of that majority considerably in the rest of the state, which means that it becomes much more difficult to draw competitive districts in the rest of the state (in a state with a Democratic majority statewide, the effect would be the opposite). Since large proportions of African-Americans live in the

South, and most Southern states are Republican on a statewide basis, this means that the VRA plays a role of minimizing the number of competitive districts that can be drawn in the South, not just in the VRA districts themselves, but in other districts as an unintended consequence.

Consider a concrete illustration not from a Southern state, but from Arizona, where we have unusually transparent access to the recent redistricting process. In 2000, voters there passed a citizen initiative that removed the power to design congressional and state legislative districts from the state legislature and gave it to an entity called the Independent Redistricting Commission.⁴⁹ The enacted initiative expressly required the Commission to make creation of competitive districts one of its six priorities. Because districting was done by commission, rather than the legislature, there is an unusual clear public record of the process. Before the Commission drew initial districts, Republicans had a 5% voter registration advantage statewide. But the first thing the Commission did, as legally obligated, was to create the required number of VRA districts. After that was done, the Republican advantage in the rest of the state shot up to 16%. The significance of these differences must be appreciated: when candidates are within 5%, the race is defined as competitive by all standards; when they are 16% apart, the race is typically considered a landslide and safe for the dominant party's candidate. The Arizona process thus exemplifies the contributing roles the cascading effect of the VRA in the modern practice of safe districting – from which more partisan and polarized candidates on both sides tend to emerge, win, and stay in office. A similar dynamic was at work in Georgia, and it is surely true in many other states with significant minority populations.⁵⁰ Thus, VRA districts themselves are not competitive in partisan terms; and their creation makes it more difficult as well to create other districts that are competitive.

This is not to suggest, of course, that we should abandon the VRA obligation to create safe minority election districts. Every matter of electoral-institutional design is a matter of tradeoffs, as perhaps is most of

⁴⁹The Arizona process led to a series of conflicts and competing lawsuits over the state districts among those thought the Commission should have created more districts that were competitive, the United States Department of Justice, which concluded the initial plan the Commission proposed violated the VRA, and others. For the last stage in the litigation and a summary, see *Arizona Coalition v. Redistricting Comm'n*, 208 P.3d 676 (Ariz. 2009).

⁵⁰On Georgia, I am indebted for this insight to Professor Nate Persily, who served as a court-appointed independent expert to redistrict Georgia's General Assembly during the 1990s.

public policy. The need for safe minority districts in contexts of racially polarized voting, and the benefits of creating them, might well outweigh these various ancillary effects of creating such districts. But to understand our present situation, and to consider in an intellectually honest and realistic way, what institutional and legal changes might enable the rebuilding of a center in American democratic institutions, we need a full account of the causes that underlie current institutional structures, including the proliferation in recent decades of safe election districts throughout the country. To rail against the decline of competitive elections in bodies like the U.S. House is easy, in the abstract. To recognize that making a serious dent in that phenomenon might well require confronting the practice that has emerged under the VRA of the last 20 years shows how much more difficult it might be in fact, and what tradeoffs might be involved, to pursue creation of more competitive districted elections as one institutional antidote to the hyperpolarized politics of our era.

Even leaving the VRA aside, the mechanisms for dealing with safe-district gerrymandering in the purely partisan context are limited. Courts are not going to play a major role through constitutional law. This is not just because the Supreme Court has been so reluctant to get involved in this area.⁵¹ Even if the Court were willing to get more involved, there is not much, I believe, that the courts can do. Trying to enforce through court decree a requirement that districts be competitive, or that they not be designed to be overwhelmingly safe for one party or the other, is a task for which courts lack the requisite tools and comfort level. At most, courts would only address these issues at the margins – and even that seems unlikely. The only meaningful institutional mechanism for reducing safe districting and the polarized officeholders that result is to take districting out of the hands of self-interested political actors and transfer it to bodies like independent commissions.

In theory, Congress could probably mandate this for national elections, using the Art. I., Sec. 4 powers discussed above. Indeed, one member of the House, Rep. John Tanner, a moderate Democrat from Tennessee, has proposed legislation that would require every state to establish independent five-member commissions to do congressional redistricting. But even apart from the political constraints that make it unlikely Congress would act, I am concerned about how effective a congressional mandate would be. If shoved down the throats of state

⁵¹Vieth v. Jubelirer.

legislators from Washington, determined state political actors may well find avenues for asserting political control over these commissions. Policing that from Washington would not be easy. In the long run, I suspect such commissions will be more effective if created at the state level. Of course, state legislatures generally have no interest, and every disincentive, to give up this power that directly affects their career prospects. The best that can be hoped here is that those states that have direct democracy, as in the Arizona experience, will move in this direction through voter initiatives and in the remaining states, public pressure will reach the point that state legislatures perceive no viable option other than to create such commissions.

Gerrymandering only directly affects House seats, of course, since Senate “districts” are fixed by unchanging state boundaries. Yet the political parties in the Senate have polarized almost as much as in the House, and over the same time period, as in the House.⁵² Thus, how could gerrymandering, or other institutional changes that directly affect only the House that I will discuss later, account for the more general fact of extreme polarization, which the Senate manifests as well? The potential answer lies in a remarkable fact: virtually the entire growth of polarization in the Senate over the last generation is accounted for by Senators who have two characteristics: they are Republican former House members elected to the House after 1978 (the year Newt Gingrich, the architect of the unified Republican party strategy, was first elected). Put another way, there has been no increase in polarization from the early 1970s to today among Democratic Senators who served in the House, Republicans who served in the House before 1978, or Democratic and Republican Senators who did

⁵²Most studies show the House to be somewhat more polarized over the last generation, but not significantly so. Sean M. Theriault and David W. Rohde, *Former Republican Representatives and Party Polarization in the U.S. Senate*, at 2 (Draft for Conference on Bicameralism, Oct. 23-24 (2009)); Richard Fleisher and Jon R. Bond, *The Shrinking Middle in Congress*, 34 *Brit. J. Of Pol.* 429, __ (2004). One 2006 study that compares increasing House versus Senate polarization from 1973-2004 concluded that over this period House Republicans became 62% more polarized, compared to a 51% change for Senate Republicans, while House Democrats became 33% more polarized and House Senators only 16% more polarized. Sean M. Theriault, *Party Polarization in the U.S. Congress*, 12 *Party Politics* 483, 487 (2006). Additional important works in the emerging literature on Senate polarization are Frances Lee, *Agreeing to Disagree: Agenda Content and Senate Partisanship, 1981-2004*, 32 *Legis. Stud. Q.* 199 (2008) and Sean M. Theriault, *PARTY POLARIZATION IN CONGRESS* (2008).

not serve in the House at all.⁵³ While this does not conclusively demonstrate that House polarization caused Senate polarization, it is certainly suggestive.⁵⁴ It is also consistent with anecdotal observations, such as this one from former Senator Alan Simpson earlier this decade; “The rancor, the dissension, the disgusting harsh level came from those House members who came to the Senate. They brought it with ‘em. That’s where it began.”⁵⁵

Thus, polarization in the House might well be the cause of similar, if somewhat lesser, polarization in the Senate. Over the last generation, House districts have become increasingly uncompetitive, safe partisan homes; most (but not all) experts believe these safe seats are sending more polarized members to the House.⁵⁶ Assuming that is so, current gerrymandering technology and practices might contribute to the rise of these increasingly safe seats, but only as one of several factors whose relative role is difficult to sort out. In addition, to the extent gerrymandering does contribute to safe seats and non-competitive elections, deciding whether efforts to rebuild a center ought to take on gerrymandering requires confronting the extent to which VRA districts contribute to making election districts uncompetitive today. As if all that is does not make this institutional issue intractable enough, the political economy of changing the institutions with the power to design districts, as we approach the next round of redistricting, is just as daunting.

C. *Internal Legislative Rules*

⁵³Putting this in quantitative terms makes the point even more dramatically: The post-1978 House Republicans elected to the Senate are 90.8% more polarized than pre-1978 House Republicans elected to the Senate and 52.3% more polarized than Republican Senators without House experience. Theriault, 2009, at 14.

⁵⁴As is true in general throughout this article, separating out the large scale transformations in American politics discussed in __ from the discrete institutional changes addressed here is difficult. Theriault notes that taking into account the partisan orientation of the particular state in question, the region as a whole the Senator comes from (South or non-South), and the size of the state (House members are more likely to seek Senate seats in small states), the fact of service in the post-1978 House is no longer statistically significant as an explanatory variable. *Id.* at 24, 26.

⁵⁵CQ Weekly 3069 (Dec. 13, 2003). Even in the early 2000s, when Simpson made these comments, some political scientists were reaching this conclusion about House polarization causing Senate polarization. See Evans and Olesek 107 (2001); Sinclair 75 (2001); Rae and Campbell 8 (2001).

⁵⁶The leading analysis for the contrary view is McCarthy, Poole, Rosenthal, Does Gerrymandering Cause Polarization (July 7, 2008 draft).

For those hoping that specific, malleable features of institutional design contribute to current polarized politics, there is one more element on which some hope might fasten. This feature lacks the sordid drama of gerrymandering, or the high profile of primary elections; it does not concern, as both those areas so, the direct voter-politician relationship. Instead, the changes have to do with the more mundane institutional rules concerning how power is exercised within our national legislative bodies and how those bodies are organized.

Over the last generation, shifts in formal rules and informal practices have enabled party leaders to force far more lock-step voting behavior on party members, particularly in the House. Recent changes in the internal rules and practices of the House and Senate also may have reinforced the partisan incentives of members of Congress. The strength of legislative parties historically has depended to some extent on the internal governance structures of the House and Senate, which are always subject to renegotiation. For example, the Congress that Woodrow Wilson criticized in 1885 as a "committee government"⁵⁷ run by "petty baron[]"⁵⁸ committee chairs (as opposed to a coherent policymaking body reflective of strong party control) transformed itself just a few years later. Under "Czars" Thomas B. Reed in 1889 and Joseph G. Cannon in 1903, House rules were dramatically recast to centralize power in the Speaker, who at that time also headed his political party.⁵⁹ The result of powerful leadership and these internal rule changes was disciplined party unity that lasted until World War I.⁶⁰

A similar transformation has occurred in recent decades. As usual, each party blames the other for the resulting polarization. The process of centralizing control in party leaders, which enables party discipline to be

⁵⁷Woodrow Wilson, *Congressional Government* 62 (Johns Hopkins Univ. Press 1981) (1885)

⁵⁸*Id.* at 76.

⁵⁹See John H. Aldrich, *Why Parties? The Origins and Transformations of Political Parties in America* 227-28 (1995); David W. Rohde, *Parties and Leaders in the Postreform House* 4-5 (1991); Joseph Cooper & David W. Brady, *Institutional Context and Leadership Style: The House from Cannon to Rayburn*, 75 *Am. Pol. Sci. Rev.* 411, 413 (1981).

⁶⁰See Cooper & Brady, at 413-15. For more on the decline of strong party unity through this period, see Aldrich at 228. The changes Democrats imposed occurred from 1970-77, though Rohde argues the effects of these changes on party discipline were gradual and did not fully manifest themselves until 1983. *Id.* at 16.

enforced more effectively and hence contributes to polarization, began again under Democratic control in the 1970s-80s.⁶¹ As more liberal Democrats entered Congress and moved the median Democratic representative to the left, they chafed at the power much more senior, more conservative (often Southern) Democrats held, particularly through committee chairmanships. The Democrats began to end the longstanding role of seniority in allocating committee chairmanships. When committee chairmanships were allocated by fixed entitlement rules, seniority in particular, they became the basis for independent position taking against the party leadership – indeed, the strongest alternative base for power. Next, when the Republicans took control of the House in 1994, they further broke the back of the committee chairmanship system. Shortly after Newt Gingrich became Speaker, the House passed rules that limited committee chairmanships to six-year terms and that explicitly announced that seniority would no longer determine who became chairs.⁶² Thus, committee chairs had to gain and maintain the approval of their party's leadership. Indeed, in the 104th Congress, Newt Gingrich every committee *and subcommittee* chair.⁶³ To Beltway insiders, there are famous tales exemplifying the party discipline leaders can now exact, such as the Republican Party denying Representative Chris Shays chairmanship of the Government Reform Committee because he had used procedural rules to force a vote on campaign finance reform.⁶⁴

Some apparently thought these centralizing tactics would be the monopoly of one party,⁶⁵ but both in opposition during the Bush years and then as the majority since 2006, the Democrats have continued the process of using and changing rules to centralize control in party leaders and to enforce unified discipline along party lines. Thus, when Nancy Pelosi became Speaker, she kept the six-year term limit on chairmanships and put in place rule changes that increased leadership's power to name ranking members on all committees and all members on the most exclusive

⁶¹The best narrative of the internal changes in House rules and practices that have centralized power in party leaders over the last generation is David W. Rohde, *Parties and Leaders in the Postreform House* (1991).

⁶²Hacker & Pierson, *Off Center*, at 146.

⁶³Black and Black, *The Rise of Southern Republicans* 398.

⁶⁴*Off Center*, at 147.

⁶⁵This is the general theme of *Off Center*.

committees.⁶⁶ Moreover, while still in opposition, she argued – much as Republicans appear to be doing during the first year of the Obama administration – that the Democrats should not assist in trying to improve Republican legislation, but should be oppositional throughout, in an effort to draw sharp contrasts with the aim of taking over the chamber in later elections.⁶⁷ She discouraged Democrats from co-sponsoring bills with Republicans, to avoid enabling Republicans to look bipartisan and discouraged ranking Democrats from negotiating with Republicans on their committees.⁶⁸ For example, during the debates over privatizing Social Security, she, along with Senator Reid, decided the Democrats would not only oppose Bush’s efforts, but would not offer any alternative, nor negotiate with Bush, until he gave up privatization.⁶⁹ Whether in opposition or in the majority, Pelosi is in many ways a mirror image of Newt Gingrich when it comes to using rules and institutional structures to realize a vision of unified and polarized partisan combat. Not surprisingly, the current minority leader in the House, in turn, seems to be doing the same.

Once again, some might be tempted to see this as a story of individual personalities that happen to be hyperpartisan, or of “the other side” engaging in hyperpartisan tactics, to which “my side” is being forced to respond. But from a broad perspective over the course of a generation, individual actors look instead to be acting out a deeper script.

As with gerrymandering, these institutional changes apply more directly to the House than the Senate. Senate rules and practices have not dramatically changed over the last generation to centralize greater in the hands of party leaders.⁷⁰ But to the extent that Senate polarization is accounted for by post-1978 Republican House members who bring a culture of polarized politics with them that they have absorbed in the House, it remains possible, as with gerrymandering, that a House culture of extreme partisanship, fueled partly by rules and practices specific to the House, nonetheless contributes significantly to the comparable polarization that now exists in the Senate.

⁶⁶Brownstein, at 342.

⁶⁷Id.

⁶⁸Id.

⁶⁹Id. at 344.

⁷⁰Rohde, at 177-79.

To the extent we have identified another contingent, recent institutional feature that has contributed to today's polarized parties, we could imagine, in theory, that Congress, particularly the House, could choose to decentralize legislative power away from party leaders. Indeed, in earlier eras, one response to dramatic concentration of partisan national political power was precisely to fragment power within the Congress. Thus, in the aftermath of Reconstruction, Congress was restructured to weaken the ability of party leaders to assert unified control, for the self-conscious purpose of recapturing the Framers' vision that political power should be diffused, not concentrated.⁷¹ Measures included rise of the seniority system, which insulated promotion, particularly to committee chairs, from control of a few party leaders, and redistribution of power among a larger number of more independent congressional committees.⁷²

Yet of the institutional features I've identified, this one seems the least likely to be malleable. As difficult as it might be to create open primaries or independent districting bodies more widely, those are contexts in which an outside actor could force the change on an otherwise recalcitrant political body. In those states with direct democracy, for example, the voters themselves could institute these other changes, as they have in some states. But under the Constitution, the House has the power to define its own internal procedures; only the House, therefore, could change the current rules.⁷³ Unless the leadership is willing to dilute its own authority – or there is a widespread revolt against it – such changes are not going to occur.

In addition, this is one area where the costs of changing the rules in question, to fragment leadership power in the House, might be greater than

⁷¹The language congressional reformers used is revealing: "This oneness of design, this 'harmony of action,' this 'unity of purpose' . . . [was] not consistent with the genius and spirit of our institutions;" it was "not the object for which the framers of this Government labored." The Framers had "sought not to concentrate power in the hands of a few men to the end that 'harmony of action' and 'unity of purpose' might be secured, but their great aim was the diffusion of power." These passages are quoted in Nelson, *supra* note ____, at 116, which makes the argument that these reforms were part of the general late 19th century effort to fragment and diffuse political power in the combined wake of Jacksonian democracy and the demise of federalism, which had given America's institutions a much more majoritarian thrust.

⁷²See Nelson, *supra* note ____, at 114-19.

⁷³Constn. Art. I, sec. 5.

the benefits. These other power centers in the House, from which party members would be able to stand more independent of party leaders, would have to be allocated in some other way; the most likely would be a return to a seniority-based system. Would that produce more centrist policymaking in the House? The most senior members come from the safest of congressional districts. First, it is not clear they would stand closer to the center of the party than party leaders. The 1970s revolt against seniority came about precisely because Southern committee chairmen, who held such strong power, were much more conservative than the median majority party member by then. Second, the more centralized control of today's party leaders has the benefit of making the House a more coherent entity, which both makes it easier for the President to work with the House and makes the majority party more easily accountable to the electorate as a whole. If climate-change legislation could be bottled up by a powerful senior committee chair, for example, even though the majority party stood for such legislation and the party's most visible candidates, including the President, had run on the need for such legislation, that one committee chair can either be accountable to the party leadership, through the kind of centralized rules that exist in the House today, or would be accountable only through the constituents of his or her own individual district, through the election process. In any event, whatever the merits of decentralizing House control away from party leaders, this is the least likely to change of the crucial institutional features that contribute to radical polarization.

IV. THE CONSEQUENCES OF RADICAL POLARIZATION

If nothing can be done about the causes of extreme polarization, or we are unlikely to make those institutional changes that might help rebuild a center in American politics, then a few words about how to think about the consequences of this enduring polarization are in order. Those consequences will depend on whether government is unified, with one party controlling the House, Senate, and Presidency, as today, or divided, with different parties each controlling at least one of these institutions.

The experience of either these forms of government is unlikely to be similar to that in prior years. Each type, divided or unified government, is likely to take on the extreme form of its type. Divided government had been the norm for most of the last half of the 20th century.⁷⁴ When Eisenhower assumed office for his second term confronted by a Democratic

⁷⁴See Fiorina, at 7.

House and Senate, it was the first time since Grover Cleveland's election 72 years earlier that a President went into office with either chamber controlled by the opposite party.⁷⁵ After an important moment of strongly unified Democratic governments under Presidents Kennedy and, especially, Johnson, divided government solidified as the norm for the second half of the twentieth century. From 1955 through 2000, government was divided for 32 of the 46 years; and from 1969 to 2000, government was divided for 26 of 32 years, or 81% of the time (all but Carter's Presidency and the first two years of Clinton's).⁷⁶

Divided government has been characterized as producing a politics of "confrontation, indecision, and deadlock."⁷⁷ To the extent anything gets done, dilute, discrete compromises replace ideologically coherent, large initiatives.⁷⁸ Looking back, though, some academics have famously questioned this image and suggested that divided governments have actually produced as much "significant" legislation as unified ones.⁷⁹ But whatever the merits of that historical debate,⁸⁰ the past is unlikely to be prologue. Those earlier eras of divided government occurred before the historical transformation and purification of the political parties; those were precisely the eras in which the parties were the incoherent groupings reflected in the "four-party system," in which shifting coalitions of majorities could be put together across issues by taking advantage of the internal divisions within the parties. We have been through the VRA-induced sea change, and the parties today, in their unity and polarization, are nothing like the parties of earlier divided-government eras. If we enter into periods of divided government again, I expect government to be far more paralyzed and stalemated than in the past. Divided government can function, as long as a center can be constructed across party lines. But it is that center that will be absent. Some might therefore think divided government a virtue, on the theory that "that government which does nothing" is best. But that all depends on one's view of the status quo that happens to be prevailing when we enter into divided government.

⁷⁵See Sundquist, *Constitutional Reform*, at 93.

⁷⁶These figures start from those in *id.* at 93, and are updated to reflect the Clinton Presidency. Note that Presidents were elected to office without their party in control of at least one chamber of Congress in seven of the 11 elections between 1956 and 2000.

⁷⁷CCS Report, at 3; Sundquist, at 96-97.

⁷⁸See Tushnet, at 22-25.

⁷⁹Mayhew, *Divided We Govern*, at ____.

⁸⁰I have questioned it elsewhere. See Levinson and Pildes.

Moreover, I see no institutional or legal changes that could overcome the paralysis that will characterize divided government, amidst polarized parties, in the coming years.

In other work, I have offered some suggestions for managing the peculiar risks of unified government during times of hyperpolarized parties. One risk is that the system of checks and balances will break down, as indeed I believe it did during the years of unified government we had from 2000-06. When parties are united and bitterly divided against the opposing party, 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, and holding the President accountable. A second risk is 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.

With respect to the first risk, if we want to empower congressional checks on executive power that are more likely to be effective during unified government, we can consider measures that would give the minority party, which has the appropriate incentives, greater tools to oversee the executive branch. Some other democracies do so. As I and others have described,⁸¹ we might consider giving the minority control of a certain oversight committee, such as an auditing committee; enabling the minority to call hearings under certain circumstances; or otherwise increasing the opposition party's ability to get information from the executive branch. These measures are not minority-veto rights, but ways of enabling more effective oversight.

If the second risk is that legislation will be less well thought-through, less deliberative because not subject to partisan checks and balances over the details, responding to that risk is even more difficult. One possibility, within our existing institutional structures, might be to encourage a more aggressive approach to judicial review, either in the courts' role as statutory interpreters or their role as constitutional adjudicators. To compensate for the decline of internal legislative checks and balances likely to occur during times of unified government with highly polarized parties, that is, we might consider the courts playing more of this kind of function. Courts, for example, might be stricter about insisting that

⁸¹Levinson and Pildes; Ackerman; Fontana.

a solid evidentiary or empirical foundation exist for legislation, or legislation in particularly sensitive areas.

One might be tempted to go further and suggest that, with polarized parties, the minority party should be given a veto right over legislation, as a way of ensuring some influence over outcomes. In my view, however, this gets the matter exactly backwards. It assume the minority party will use its influence to improve legislation it disagrees with, instead of simply using this power to block legislation altogether. When the parties are highly polarized and sharply differentiated, the latter is more likely. The California experience with its budgeting process, with its voter-initiated requirement of 2/3rd support to adopt a budget, is instructive. That rule is probably as responsible as any single item for the dysfunctional state of California politics and for the massive economic crisis confronting the state. A minority veto of this sort enables a polarized, unified minority party determined to oppose the main thrust of the majority's agenda to bring government to a halt. The minority cannot itself govern, of course. But neither can the majority in the presence of this kind of veto and polarized parties. In essence, a minority veto turns unified government into divided government. In today's era of polarized politics, we get exactly the paralysis I suggested above would be associated with divided government today. There might be justifications for minority vetoes when political parties are internally fragmented, but when they are polarized, such vetoes are likely to shut government down (again, for those tempted to consider that desirable, that would depend on the prevailing status quo). Thus, if polarized politics and parties are likely to endure, we might see Senate majorities seeking to modify the filibuster rule for legislation⁸² in various ways, such as reducing from 60 to 55 the number of votes need to close off a filibuster (as the Senate did in 1975 when it reduced the number from 66 to 60).⁸³ Doing so, however, would itself require a two-third Senate

⁸²I leave aside use of the filibuster for judicial nominations. Different considerations might be thought involved. Federal judgeships are lifetime appointments; it is not clear why one political party, particularly in times of highly polarized parties, should be able to project its power a generation or so into the future without extraordinary checks. In addition, judicial nominations are not subject to the ordinary majoritarian process of House and Senate approval. Thus, although there seems to be greater political controversy over filibusters for judicial nominations than legislation, there might be greater justification in theory for the former rather than the latter. Without endorsing this view, I want to raise it to flag these potential differences.

⁸³See generally Gregory J. Wawro and Eric Schickler, *Filibuster* 266-68 (2006) (describing process leading to the 1975 change). As these authors note, "[t]he primary (continued...)

majority.⁸⁴ Or the Senate could selectively disable the filibuster for additional types of legislation, as it has done already for budgetary changes, which only require a majority vote (thus avoiding the California scenario at the national level).⁸⁵

The ideas sketched out here are meant to be speculative. All are obviously fraught with their own, countervailing concerns. In raising them, my aim is not to endorse them, but to shift attention to the consequences of radical party polarization, during unified and divided government, and to stimulate thought about confronting the consequences of polarized politics for the organization of American government.

CONCLUSION

One main point of this lecture has been that our radically polarized politics, and the absence of a center in American democracy today, should not be attributed to the individual personalities who happen to occupy leadership positions, including the Presidency, at particular moments over the last generation. One year into the Obama era, this should be becoming apparent even to those who blamed the last eight years of intense partisanship on President George W. Bush (or Karl Rove). Presidents Bush and Obama might have very different personalities and presidential styles, but the essential structure of politics that has characterized the last generation – of parties and citizens who see political choices through radically different lenses, with no common ground between them – has not changed at all. Indeed, it might even be intensifying. The forces fueling this generation of partisanship are much deeper, and more enduring, than a matter of particular personalities. If anything, political leaders are caught within these structures, even those who might genuinely desire to forge more common ground and seek a more consensual politics. We should not delude ourselves into thinking that the next election, or the one after that, will change any of this.

⁸³(...continued)

legislative impact of obstruction today is to expand the ‘gridlock interval’ to include an additional ten senators (up to the 60th percentile senator) on the opposite side of the status quo from the president. This expansion of the gridlock interval often has a major impact on policy . . .”). *Id.* at 279.

⁸⁴See Steven S. Smith and Sarah A. Binder, *Politics or Principle? Filibustering in the U.S. Senate* (1997).

⁸⁵Wawro and Schickler, at 279-80.

The causes of this polarization instead are some combination of the large-scale historical processes and the specific institutional and legal features I have described. I do not have the ability to separate out how much history and institutional design have contributed separately, though the dominant forces are surely the historical transformations unleashed by the maturation of American democracy embodied in the VRA. But in any event, the only one of these institutional features I can envision even marginal changes in during the coming years is the structure of primary elections, for which it is realistic to imagine greater use of open primaries. Pragmatically, if we are unlikely to make the institutional changes that might contribute to rebuilding a center, separating out the precise causal contributions to polarization of history versus institutions is of little moment. The reality is that the era of highly polarized, partisan politics will endure for some time to come.

If we cannot effectively address the causes of polarization, we need to reflect more on addressing the consequences. Those consequences – unified government without meaningful checks and balances, divided government that is paralyzed – are very different from those the Constitution’s designers anticipated. But then, they did not anticipate political parties at all, let alone the radically polarized parties – and citizens – that continue to define the nature of democracy in America today.