UNGOVERNABLE AMERICA?: THE CAUSES AND CONSEQUENCES OF POLARIZED DEMOCRACY

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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, 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 purer 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 America's governance institutions 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

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[*]Sudler Family Professor of Constitutional Law, NYU Law School. As I get older, the desire grows stronger, not weaker, to thank my frequent collaborators, Pam Karlan and Sam Issacharoff, for all they have contributed to my thinking about these issues, even when, or especially when, we disagree.

[1]A 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;

[2]Brownstein, Second Civil War, at 14.

[3]As 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.

more partisanly divided over the last generation, too.[4] Over the last generation, voters have sorted themselves out so that their party affiliation and their ideology are far more aligned now than 30 years ago: most self-identified conservatives are now Republicans, while liberals are Democrats.[5] Split ticket voting has declined sharply: more voters consistently vote for the same party, whether for House, Senate, or the Presidency.[6] Voters who have become sorted in this way are more strongly attached to their party affiliation; these party loyalties are manifested in

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[4]Using 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. 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). *See also* Marc J. Hetherington, *Resurgent Mass Partisanship: The Role of Elite Polarization*, 95 Am. Pol. Sci. Rev. 619, 621 (2001) (National Election Study data show that "partisans of every stripe were significantly more loyal to their party's standard-bearer in 2000 than in either 1992 or 1996"). 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

[5]Matthew Levendusky, The Partisan Sort: How Liberals Became Democrats and Conservatives Became Republicans 38-77 (2009).

[6]Marc J. Hetherington, *Resurgent Mass Partisanship: The Role of Elite Polarization*, 95 Am. Pol. Sci. Rev. 619, 621 (2001); Larry Bartels, *Partisanship and Voting Behavior, 1952-1996*, 44 Am. J. Pol. Sci. 35 (2000).

various ways that shape policy and elections.[7]

Take, for 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.[8]

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 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.[9] 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.[10] Healthcare legislation was enacted in the face of even more extreme partisan division: not a single Republican in either House or Senate voted for the most far reaching piece

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[7]Levendusky, at 8.

[8]The 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.

[9]For 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.

[10]http://www.readthestimulus.org/

of domestic legislation in 45 years.

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 is larger than it has even been for a President at this stage; one year in, only 18% of Republicans, but 82% of Democrats, approve of Obama's performance – a gap of 64 points.[11] From the Eisenhower through the Carter years, this gap in one-year approval ratings never exceeded 34 points; since then, it has averaged 48 points.[12] Another perspective on these measures: before Reagan, no President had averaged more than a 40 point gap in approval rating during his term; starting then, only the elder George Bush has averaged *less* than a 50 point gap.[13] As difficult for Obama supporters as it may be to believe, those opposed to him are as vehemently opposed as Democrats were to George W. Bush.[14] For a generation now, Americans of different parties have lived in different worlds, and do so today, when they look at the President.[15] This general polarization appears to be driven from the top down, rather than the bottom up: as political elites (those who hold office) have become more sharply polarized, voters have become identified themselves more strongly and consistently in partisan terms.[16]

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

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[11]Jeffrey M. Jones, Obama's Approval Most Polarized for First-Year President (Jan. 2 5 ,   2 0 1 0) ,   a t   h t t p : / / www.gallup.com/poll/125345/obama-approval-polarized-first-year-president.aspx

[12]The point gap one-year in was 45 for Reagan; 32 for G.H.W. Bush; 52 for Clinton; 45 for GW Bush. Id.

[13]Id.

[14]President 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).

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

[16]That polarization is elite driven in this way is the theme of Levendusky's important book, a theme he seeks to prove over several chapters.

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.[17] 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?

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

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[17]A 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.

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.[18] Before the Obama presidency, it

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[18]Bush 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

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, recall 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.[19] 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 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

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[18](...continued)
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

[19]A *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."

America together."[20] Is it not jolting to hear how similar this sounds to the more recent Obama campaign?

Of course, some believe 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.[21] 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."[22] After 2006, Speaker Nancy Pelosi adopted the conception of the opposition party that Speaker Newt Gingrich had perfected during the 1990s.

We will debate endlessly whether we should see the Bush 43 presidency as the cause of an increasingly partisan and polarized world,

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[20]The quotes and details here are taken from Brownstein, at 222-228.

[21]See, e.g., Jonathan Chait, The Big Constitutional: 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.").

[22]Brownstein, at 338.

among parties and voters, or as itself having been caused by these forces.[23] 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.[24] "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. The question is why they no longer do.

American politics today does not lack figures who might fill the role of the these kind of centrist political leaders. It is 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.[25] 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

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[23]Representative 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.

[24]For one surprising of this nostalgia, from a sophisticated source that should know better, see Poole and Rosenthal, Ideology and Congress 319 (2d. rev. ed. 2007) ("Our political suffers from the disappearance of moderate leaders of the past. Men like Dan Rostenkowski, Sam Rayburn, Chuck Percy, Mark Hatfield, and Howard Baker were able to reach across party lines and craft compromises.").

[25]Peter Boyer, Getting to No, New Yorker (Sept. 28, 2009).

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 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.[26]

Each side blames the other, of course, for being the primary cause of polarization.   As in most blood feuds, each side has its own story of origins, which portrays its hunkering down into uniform opposition as a necessary response to the hyperpartisanship of the other party. Republicans often trace these origins to a disputed House election in 1984, in which the Democratically-dominated House chose to seat the Democratic candidate. [27] For many Republicans, convinced that their candidate had rightfully won, this was a transformative moment; because Democrats already held overwhelming control of the House, this decision convinced House Republicans that Democrats would stop at nothing to aggrandize power. Out of this moment was born House Republican acceptance of Newt Gingrich's philosophy: that Republicans would never be treated fairly or get anywhere by trying to work with Democrats, and instead should unite in opposition and pursue the single objective of House control. For many Democrats, the origins of modern partisanship begin with Ronald Reagan's presidency, which they saw as a revolutionary attack on longstanding political consensus, which thus required concerted opposition.   Was hyperpolarized party politics caused by the Clinton presidency, which George W. Bush cast as "the most partisan in American history?" Or the Bush II presidency, which some argue made a conscious decision 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 "progressive" government in modern history, 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 true that the Democratic party moved sharply to the left in the 1960s and the Republican Party sharply to the right in the 1980s.[28]   And Republicans in the House vote with somewhat greater unity than do

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[26]As 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.

[27]See Juliet Eilperin, Fight Club Politics.

[28]For documentation on the Republican movement, see Sinclair, at 36-67.

Democrats.[29] But the larger truth is 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, 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.

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[29]Brownstein,at 15.

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 the 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 backed 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.[30] 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

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[30]Id. 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).

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.

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.[31] 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.[32] 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,

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[31]See, e.g., David Lublin, The Republican South 22-23 (2004).

[32]

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

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.[33] 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.[34]).

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

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[33]Black and Black, at 400, 402.

[34]Black and Black, at 404.

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."[35]

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

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

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 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 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. Primary elections are much lower turnout events than general elections; for the House, the former averages about one-third the latter.[36] As low turnout events, primaries tend to be dominated by the most committed, activist party members, who tend to be the more ideologically extreme party members.[37] Morever, this effect can be exacerbated by the particular legal structure a state or party uses for its primaries.

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)[38] permit at least some non-party members, such as such as independents, also to participate. The most ideologically committed and hard-core party activists dominate closed primaries even more than they dominate primaries in general. As a result, closed primary winners are more likely to reflect the ideological extremes around which the median party activist centers.[39] Closed primaries are thus one

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[36]David Brady et. al., *Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate*?, 32 Legis. Stud. Q. 79, 91 (2007) (aggregating data from 1956-98).

[37]For presidential elections, this finding has been documented in Barbara Norrander, *Ideological Representativeness of Presidential Primary Voters*, 33 Am J.. Pol. Sci. 570 (1989); Polsby and Wildavsky, 1978; for Senate elections, in Brady and Schwartz, 1995; Francis et. al., 1994; Schmidt, Kenny and Morton 1996; for House elections, in *Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate*?, 32 Legis. Stud. Q. 79 (2007).

[38]See 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). During the years California used a blanket primary, an extreme form of the open primary, moderates were more likely to be elected to the state legislature and voting in that body was more bipartisan. *Open Primaries*, Public Policy Institute of California 8(2010).

[39]One important empirical study that documents this finding is Elizabeth Gerber and Rebecca Morton, *Primary Election Systems and Representation*, 14 J. Law, Econ., and

institutional structure that contributes to more polarized partisan officeholders.

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.[40] 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.[41] Though the overwhelming preference in that general election, Schwarzenegger might never have made it out of the normal Republican primary process.

Similarly, during the Democratic presidential primaries in 2008, Barack Obama performed better in open-primary states than closed ones,

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[39](...continued)
Org., 304 (1998).

[40]Empirical 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.

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

in which Hilary Clinton did better.[42] To the extent Obama was seen as the more centrist candidate, which accounts for this pattern, he had greater success in primary electorates that expanded the electorate beyond only voters who had previously registered as Democrats. 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.[43] 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.[44] 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.[45] Thus, Congress probably does have the power to regulate primary elections for national

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[42]Of the 16 closed primaries, Obama won 7, Clinton 9; of the 25 open primaries, Obama won 13, Clinton 11.

[43]The 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."

[44]For a summary of these laws, see Pildes, Howard L. J.

[45]Indeed, the Supreme Court has read this power expansively.

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 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.[46] The Court held that California's unusual, crazy-quilt verison 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.[47] 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.[48] 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.[49] I would guess that

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[46]See 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).

[47]Pildes, Supreme Court Foreword, 118 Harv. L. Rev. 29, 101-30 (2004).

[48]Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184 (2008).

[49]Brownstein, 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

the Court will not hold open primaries, a longstanding feature of the 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.[50]

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 Unites 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 with 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 Downsian analysis, as well as conventional lore in American politics, had been that candidates tack to the extremes during primaries, then move back to the center for general elections. Moreover, during the 1950s and 60s, "the parties were remarkable for their high degree of ideological overlap and bipartisanship, at both the mass and elite levels, suggesting that candidates were converging to the median voter"[51]

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[49](...continued)
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.

[50]A 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 appears to be rising; cities that now use it include San Francisco, Minneapolis, Oakland, Memphis, Springfield, IL, among others.

[51]Matthew Levendusky, The Partisan Sort: How Liberals Became Democrats and Conservatives Became Republicans 131-32 (2009). For the data that supports this point,
(continued...)

– just as the Downsian models predicted. But the need to follow that script diminished over the last generation, at least for the U.S. House. Instead, we have experienced a large rise in the design of "safe" election districts, in which general election constituencies overwhelmingly tend to favor one party over another, which makes winning the primary 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. Over the last decade, in particular, more congressional districts have become "safe" in just this way. Overwhelmingly stocked with voters of one party or the other; these districts ensure that the dominant party's candidate can count on winning the general election with landslide, non-competitive margins.

Some experts on redistricting and Congress believe that safe election districts increase polarization by favoring the election of candidates from the extremes of either party.[52] But other experts find no relationship between redistricting and the polarization of Congress.[53] On one point, there is broad consensus: the safe minority districts that the Voting Rights Act requires do tend to produce the most liberal Democratic representatives, and in that sense, the creation of these districts enhances polarization.[54] But beyond this effect, there is no agreement among experts

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[51](...continued)
Levendusky cites David Brady et. al., *Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate?*, 32 Legis. Stud. Q. 79 (2007) and Nolan McCarty et. al., Polarized America: The Dance of Ideology and Unequal Riches (2006).

[52] See, e.g., Bruce Cain, From Equality to Fairness: The Path of Political Reform, in Party Lines at 21 ("[T]here is evidence at the individual district level that more competitive seats lead to more moderate members and that 'cross-pressured' members are more likely to have more centrist voting scores."); Jamie Carson et. al.,*Redistricting and Party Polarization in the U.S. House of Representatives*, 35 Am. Pol. Res. 878 (2007) ("The findings reported in this article suggest that a portion of the polarization we are observing in Congress is being artificially generated by the mapmakers responsible for drawing district boundaries at the state level.").

[53]*See, e.g.*, Brunell and Grofman, *Evaluating the Impact of Redistricts On District Homogeneity, Political Competition, and Political Extremism in the U.S. House of Representatives, 1962 to 2006,* at 125 in Designing Democratic Government; *See* Nolan McCarty, Keith Poole, and Howard Rosenthal, *Does Gerrymandering Cause Polarization?*, 53 *American Journal of Political Science* 666-680 (2009).

[54]See Brunell and Grofman, at 133 ("By the 1990s, the seats being won by large margins were disproportionately those held by African Americans who are by and large quite liberal, and thus we get a positive correlation between ideological extremism and homogeneity among the Democrats."); *see also* McCarty et al., at 3 ("Some legal
(continued...)

to support the intuitively plausible view that safe districts tend to produce more extreme officeholders.

The decline in competitive elections for Congress is a familiar story. The data has been collected elsewhere.[55] 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.[56]   The 2002 and 2004 elections were the least competitive in post-war history.[57] 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.[58] The 2006 and 2008 elections were a departure from this story, because they reflected the nationalization of House elections, as voters dissatisfied with the war in Iraq, an imploding financial system, and President Bush took those concerns out on House Republicans, which

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[54](...continued)
requirements such as majority-minority districts may exacerbate polarization.")..

[55]For 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).

[56]Id. at 257. McCarty et.al agree that redistricting accounts for much of this decline in competition; they conclude that the redistrictings of 1980, 1990, and 2000 account in the aggregate for 83% of the decline in competitive seats since 1980.   *See* Nolan McCarty, Keith Poole, and Howard Rosenthal, *Does Gerrymandering Cause Polarization*?, 53 *American Journal of Political Science* 666-680 (2009). 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.

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

[58]Eric 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.

enabled Democrats to pick up 31 and 21 seats in 2006 and 2008.[59] But it took a much larger shift in voters' preferences between the two parties nationwide than it had historically to shift control of this number of seats, precisely because the rise of safe seats creates more a buffer for existing congressmen.[60]

No doubt several factors contribute to the decline of competitive House elections,[61] but one is the successful flourishing of districting

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[59]See 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).

[60]See Issacharoff and Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 Ohio St. L.J. 1121(2007). As they put their findings:

> [B]etween 1946 and 1998 the party out-of-power would have required an average gain of 1.5% of the vote to pick up five additional seats and 2.3% to pick up an additional ten seats. These are thin margins corresponding to the presence of competitive districts. By contrast, in 2004, the Democrats would have needed to pick up 4.9% to gain five seats and 5.7% to pick up ten seats. Even in watershed years in which one party surged in popular support at the expense of the other (1946, 1964 and 1994, for example), the buffer in the most at-risk districts was decidedly thinner.

[61]The 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. Uslaner. 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

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 not widely recognized.

The more general story is familiar by now: 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 task [62]). This enables incumbents to gerrymander, both for their own benefit and their party's. In recent years, computer technology, along with voters voting in more consistent patterns, has enabled the practice of this dark art 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 optimal partisan gerrymander is not that different from bipartisan incumbency protection gerrymanders in that both have lots of safe seats[63]). The result is more districts designed to be overwhelmingly Democratic or Republican. One need look no further for evidence than this unembarrassed admission regarding California redistricting by Representative Loretta Sanchez, in which she describes the

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[61](...continued)
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).

[62]For a description and survey of these alternative institutions in other democracies, and analysis of the consequences, see Pildes, Constitutionalization, supra note ___, at 78-81.

[63]Brunell and Grofman, *Evaluating the Impact of Redistricts On District Homogeneity, Political Competition, and Political Extremism in the U.S. House of Representatives, 1962 to 2006,* at 125 in Designing Democratic Government.

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."[64]

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 commissions and those that partisan state legislatures design.[65] 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.[66] 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 less well appreciated element in this story: the role the Voting Rights Act (VRA) plays, in parts of the country with significant

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[64]Hanh 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.

[65]Data 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).

[66]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.

minority populations, in reducing political competition. 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.[67] 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.[68] 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, does any better among white Texans.

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. 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 can become 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.[69]

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[67]The key decision is Thornburg v. Gingles, 478 U.S. 30 (1986).

[68]Id. at ___.

[69]Thomas Mann also notes this point. See Thomas E. Mann, Redistricting Reform: What is Desirable? Possible?, in Party Lines at 99 "(Protecting racial and ethnic minorities, an overriding federal requirement, can reduce the number of competitive seats and diminish the responsiveness of legislative elections to shifts in public sentiment.").

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 create more competitive districts than we currently have. 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.

Consider a recent illustration 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.[70] 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.[71]

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[70]The 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).

[71]On 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

VRA districts themselves are not competitive in partisan terms; and their creation can make it more difficult, as well, to create other districts that are competitive. This secondary effect will arise in states that have a Republican majority statewide; the byproduct of creating safe minority districts in those states will tend to be to enhance the size of the Republican majority in the rest of the state. Doing so makes it 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). Of the nine states that have an African American population of close to 20% or higher, six states – all of them Southern – have Republican governors (one indicator of a Republican statewide majority). Thus, in the South in particular, the VRA plays a role of minimizing the number of competitive districts that can be drawn, not just in the VRA districts themselves, but in other districts as an unintended consequence.

This is not to suggest in any way that we should abandon the VRA obligation to create safe minority election districts. Every matter of electoral-institutional design is a matter of tradeoffs. The need for safe minority districts in contexts of racially polarized voting, and the benefits of creating them, are powerful. 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. And even if more competitive districts are created, there is considerable dispute as to whether doing so would lead to more centrist candidates being elected and hence reduce polarization.

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

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[71](...continued)
1990s.

area.[72] 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 question how effective a congressional mandate would be. If shoved down the throats of state 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.

The Senate. Gerrymandering only directly affects House seats, of course, since Senate "districts" are fixed by unchanging state boundaries. Traditionally, nearly all studies of polarization focused only on the House. Recently, however, a spate of studies have explored polarization in the Senate.[73]

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[72]Vieth v. Jubelirer.

[73]Senate seats have also become safer over time. As judged by certain metrics, 21 Senators held safe seats in the 108th Congress, compared to 5 in the 99th Congress. Abramowitz, et. al.

Most studies find the parties have polarized almost as much in the Senate as in the House.[74] Moreover, a high degree of correlation exists between polarization in the two chambers.[75] Indeed, Frances Lee's major recent study, *Beyond Ideology,* concludes that the Senate parties strongly disagree on policies even when no major competing "value" issues are at stake: so called "good-government" issues produce as much partisan division now as more conventionally explosive social issues like race, abortion, and gay rights.[76] Moreover, *Beyond Ideology* shows that issues that do not otherwise divide the parties ideologically tend to do so when a President asserts leadership over the issue; at that point, Senators divide along partisan lines.[77] Like the House, but to a modestly less excessive extent, the Senate is now highly polarized along partisan lines.

But how could gerrymandering, or other institutional changes that directly affect only the House that I will discuss later, affect polarization in the Senate? 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

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[74]Most 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).

[75]Sean M. Theriault, The Case of the Vanishing Moderates: Party Polarization in the Modern Congress 17.

[76]Frances E. Lee, Beyond Ideology: Politics, Principles, and Partisanship in the U.S. Senate 128-29 (2009).

[77]Id. at 100.

Democratic and Republican Senators who did not serve in the House at all.
[78] While this does not conclusively demonstrate that House polarization
caused Senate polarization, it is certainly suggestive.[79] 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."[80]

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.[81] 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. If all that 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*

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[78]Putting 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.

[79]As 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.

[80]CQ 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).

[81]The leading analysis for the contrary view is McCarty, 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"[82] run by "petty baron[ ]"[83] 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.[84] The result of powerful leadership and these internal rule changes was disciplined party unity that lasted until World War I.[85]

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

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[82]Woodrow Wilson, Congressional Government 62 (Johns Hopkins Univ. Press 1981) (1885)

[83]Id. at 76.

[84]See 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).

[85]See 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.[86] 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.[87] 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.[88] 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.[89]

Some apparently thought these centralizing tactics would be the monopoly of one party,[90] 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

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[86]The 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).

[87]Hacker & Pierson, Off Center, at 146.

[88]Black and Black, The Rise of Southern Republicans 398.

[89]Off Center, at 147.

[90]This is the general theme of Off Center.

committees.[91] 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.[92] 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.[93] 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.[94] 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.[95] 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.

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[91]Brownstein, at 342.

[92]Id.

[93]Id.

[94]Id. at 344.

[95]Rohde, 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.[96] 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.[97]

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.[98] 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 the benefits. These other power centers in the House, from which party

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[96]The 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.

[97]See Nelson, supra note __, at 114-19.

[98]Constn. Art. I, sec. 5.

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, though 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.

D. Campaign Finance

Changes in the ways elections are financed have also contributed to party polarization. These changes have led to parties and their leaders playing a more significant role in the financing of individual candidates for office, which in turn has enabled party leaders to exert greater party discipline over those elected.

During the 1970s, when parties were at their weakest, "campaign finance was largely a matter of everyone for him or her self."[99] The parties played little role in financing or assisting individual campaigns. By the late 1980s, the parties had begun to revive, and in the 1990s, they raised large amounts of "soft money," two-thirds of which came from unions or corporations.[100] When Congress banned these soft-money contributions in the McCain-Feingold Act of 2002, many scholars thought the Act would

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[99]Gary C. Jacobson, A Collective Dilemma Solved: The Distribution of Party Campaign Resources in the 2006 and 2008 Congressional Elections 4 (unpublished draft, 2009).

[100]Id. at 8.

weaken the role of parties in elections. But with the emergence of organizations like the two parties' national congressional and senatorial campaign committees, the parties have created a way to make themselves far more central players in election financing today than they were in the 1970s, before modern campaign-finance regulation began. These various committees – such as the Democratic Congressional Campaign Committee or the National Republican Senatorial Committee – are extremely efficient at targeting their money to competitive races[101] and they bring a lot of weight: the party committees added 46% more, on average, to the total money spent trying to get candidates elected in competitive races. Because these "Hill" campaign committees are controlled by party leaders, their control over such an important element in election financing translates into a greater capacity to insist that members elected vote the party line. Yet it is hard to see anything pernicious in party committees raising money to support their members or candidates, even if the effect is to increase partisanship. And even if one were troubled, the First Amendment protects the right of political parties to make independent expenditures on behalf of candidates.

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.[102] When Eisenhower assumed office for his second term confronted by a Democratic 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

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[101]Jacobson concludes that 87% of party money, but only 42% of candidate funds, was spent on competitive races. Id. at 15.

[102]See Fiorina, at 7.

controlled by the opposite party.[103] 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).[104]

Divided government has been characterized as producing a politics of "confrontation, indecision, and deadlock."[105] To the extent anything gets done, dilute, discrete compromises replace ideologically coherent, large initiatives.[106] 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.[107] But whatever the merits of that historical debate,[108] 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. Moreover, I see no institutional or legal changes that could overcome the

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[103]See Sundquist, Constitutional Reform, at 93.

[104]These 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.

[105]CCS Report, at 3; Sundquist, at 96-97.

[106]See Tushnet, at 22-25.

[107]Mayhew, Divided We Govern, , at ___.

[108]I have questioned it elsewhere. See Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311 (2006).

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.[109] 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,[110] 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

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[109]For example, no congressional committee subpoenaed the White House for the first six years of the Bush II presidency, when Republicans controlled the House and controlled the Senate (for all but about 18 months of that period), despite the momentous issues engaged in the aftermath of 9/11. Brownstein, at 274.

[110]Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311 (2006). Ackerman; David Fontana, Government and Opposition, Yale L. J. (2009).

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 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 legislation[111] 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

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[111]I 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.

to 60).[112] Doing so, however, would itself require a two-third Senate majority.[113] 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).[114]

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

Intense partisanship, to be sure, can have many virtues. And over the decades, particularly in eras of fragmented and ideologically incoherent parties, partisanship has had many defenders. In the 1950s leading political scientists, such as E.E. Schattschneider, urged that American democracy needed a stronger dose of "responsible party government,"[115] a view endorsed by the well-known American Political Science Association Committee on Political Parties in 1950 (chaired by Schattschneider).[116] Responsible party government theorists, then and now, argue that strong parties with coherent, sharply differentiated ideologies are critical to a healthy democracy.[117] On this view, stronger and more programmatic

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[112]See 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 legislative impact of obstruction today is to expand the 'gridlock interval' to include an additional ten senators (up to the 60the 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.

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

[114]Wawro and Schickler, at 279-80.

[115]See E.E. Schattschneider, Party Government (1942).

[116]See Am. Political Sci. Ass'n, Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties, 44 Am. Pol. Sci. Rev. (Supp. Sept. 1950).

[117]See Austin Ranney, The Doctrine of Responsible Party Government (1954). This view goes back at least to Woodrow Wilson, who had called for stronger parties as part of a package of reforms that would have effectively done away with divided government. See Ranney, supra note 54, at 25-47 (describing Wilson's views).The most fully developed

political parties are essential to making American democracy electorally accountable to citizens in a meaningful way. Only if the parties stand for clear ideologies and policies, and are sharply differentiated from each other, will voters be able to assess how government performs and decide which party to keep in or throw out.

This kind of party clarity and differentiation is particularly critical in American democracy because political power is otherwise so diffuse: at the national level, political power is divided between the House, Senate, and Presidency, while power is also divided between states and the national government. Voters thus find it exceptionally difficult to make informed decisions about which actors and institutions to blame or credit for government's performance. The responsible party government view maintains that only if the party labels represent clearly defined and differentiated brands do voters stand a chance of holding government accountable in a knowledgeable way. Highly polarized parties might also increase participation in politics generally and turnout in elections specifically.[118] Indeed, voter turnout in the last two presidential elections has been higher than in any presidential election since 1968.[119]

If this is true, perhaps we should conclude that democracy involves a tradeoff between accountability and governability. The qualities of partisan politics that enable voters to best hold political leaders responsible are qualities that make it more difficult for those leaders to govern effectively. But keep in mind, as well, two features of our political landscape today that differ from those in the heyday of responsible party government theory. In the 1950s, the filibuster, which required the minority to stop all Senate business and hold the floor, was much less

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[117](...continued)
recent articulation of this view is found in Nancy L. Rosenblum, On the Side of the Angels: An Appreciation of Parties and Partisanship (2008). See also Lloyd N. Cutler, Some Reflections About Divided Government, 18 Presidential Stud. Q. 485, 489 (1988); Michael A. Fitts, The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process, 136 U. Pa. L. Rev. 1567, 1603-04 (1988); Elizabeth Garrett, Is the Party Over? Courts and the Political Process, 2002 Sup. Ct. Rev. 95, 101-03; Elizabeth Garrett, The Law and Economics of "Informed Voter" Ballot Notations, 85 Va. L. Rev. 1533, 1548-49 (1999).

[118]See, e.g, Red and Blue Nation, Vol. I, at 75("Various measures of political interest and involvement indicated that the American public was more engaged in the 2004 campaign than in any presidential campaign in the past half-century.").

[119]For the data from one of the leading experts on voter turnout, see Professor Michael McDonald's website: http://elections.gmu.edu/voter_turnout.htm

common than it has become today. And as I have emphasized throughout, the political parties of the 1950s – or the parties that any responsible party government proponents could have experienced – were far removed from the homogenous, hyperpolarized parties of today. While responsible party government proponents might have urged that parties become more programmatic than they were in the 1950s, they might not have imagined highly-unified majority and opposition parties in a world where filibusters are routine.

Notice that I have not directly argued that extreme partisanship is necessarily or always bad. To some extent, that argument depends on the policy ends for which intense partisanship is used; in the service of "good" causes, partisanship can be desirable (of course, democracy entails that we often disagree about which ends are "good"). Like all institutions of governance – and I believe political parties should be understood as among our institutional structures of governance, just as the House or the Senate or federalism is – we can only judge by the tendencies of these institutions over the long run. Studies do show that significant legislation is less likely to be enacted as the parties become more polarized and the percentage of moderate legislators declines.[120] The intuition fueling this essay, which I doubt is provable or falsifiable in any rigorous way, but which I expect will resonate with at least some readers, is that public policy in the United States will be better, in the long run, if it is made with the participation of some degree of cross-party support.[121] Given the central role political parties play in modern democracy, such cross-party participation is one of the major forms that actual checks and balances within government can take place.

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

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[120]Sarah A. Binder, *The Dynamics of Legislative Gridlock*, 1947-1996, 93 Am. Pol. Sci. Rev. 519, 527 (1999).

[121]This conclusion is reflected in the leading political science study of polarization. *See* Barbara Sinclair, Party Wars 184 (2006) ("Surely this [hyperpolarized] atmosphere forecloses principled compromises that might otherwise be possible.").

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.

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.