

Great Divide

Marriage. Gun Control. The deficit. These are just some of the issues that split Democrats and Republicans. But is the widening gulf between parties actually a problem for our government? This spring, NYU Law magazine invited a distinguished group of political advisers and experts from both sides of the aisle to debate polarization, its causes and effects. The discussion, moderated by our own Richard Pildes, surprisingly showed more than a few areas of agreement.

RICHARD PILDES, SUDLER FAMILY PROFESSOR OF CONSTITUTIONAL LAW (MODERATOR):

As many of you know the defining feature of American democracy over probably the last 20 years but even more so today has been the emergence of extreme political polarization between the political parties within government, at the very least, and maybe among the rest of us. And the polarization of our time is unlike anything that we have had in American democracy since the late 19th and early 20th century, at least if we measure polarization by voting patterns of Republicans and Democrats in government. There is virtually no center or it's a very modest center. The most conservative Democrat now is considerably more liberal than the most liberal Republican, and political scientists have documented this process of polarization over many studies now and it's a process that basically seems to have begun in the late 1970s/early 1980s, has been accelerating, and continues to accelerate today.

Many people are of the view that this extreme polarization is making American democracy particularly dysfunctional, maybe ungovernable today, particularly in a system of separated powers with checks and balances, a House, a Senate, and a Presidency, elected from different constituencies on different time cycles, unlike a parliamentary system, which most other modern Western established democracies use. Can the American system function effectively in the face of these kinds of extreme political and polarized divisions?

So the first question I want to begin with is whether this extreme polarization is as bad as it is typically discussed in the media and public discussions like this. Is it as troubling a development as it's often described?

ROBERT BAUER, PARTNER, PERKINS COIE, GENERAL COUNSEL FOR OBAMA FOR AMERICA, 2008 AND 2012, DISTINGUISHED SCHOLAR IN RESIDENCE, NYU SCHOOL OF LAW: Well, let me, let me distinguish this very powerful, very extreme sorting out of ideologies into opposing political party camps from what I called polarized debate. Polarization per se, is not what creates the singular dysfunction that we're talking about. It is the way in which those differences are discussed and ultimately affect negotiation between opposing interests about public policy. The debate has become extreme. So the differences are one thing and we need to distinguish the differences from the way in which those differences are couched and debated. Polarized debate is what gives me the most concern.

PILDES: But why aren't you troubled about the actual polarization of the political parties beyond public debates, civility and discourse?

BAUER: Years ago I remember people saying boy, the biggest problem we have with the American political parties is that there isn't a dime's worth of difference between them. It was thought at the time that it

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meant that the voters weren't really presented with a sharp choice, debate didn't have a particularly gleaming edge to it, and therefore in that sense the political process suffered. It was lacking in some sense a vitality. But that's obviously not true anymore. We could argue that polarization isn't necessarily an evil.

BENJAMIN GINSBERG PARTNER, PATTON BOGGS, GENERAL COUNSEL, ROMNEY FOR PRESIDENT, 2008 AND 2012: There is something that has caused the elected representatives in Washington to change their relationships with each other over the course of the past 20 years. I mean there is a notable difference in the collegiality and indeed how much they talk to each other about golf or restaurants or families or anything. When it comes to the cause we need to deal with that very much.

There really are differences between the parties now in a way that hasn't happened before, and it helps to look at the three areas where that manifests itself in the policy realms. It's certainly true in the size of government, all of these dangerous fiscal cliff actions that are taking place. It's certainly true on the social issues by and large where there are just two concepts that are pretty far apart and hard to bridge the gap.

The military and our foreign policy muscle was the third area. Now interestingly enough you'd be hard pressed to really find great differences between the current president and the past president on most

foreign policy affairs. So we need to take a look within those particular issues on why this is happening and look for the symptoms.

PILDES: But why would certain issues be more polarizing today than in the past? That is, foreign policy, muscular U.S. use of military force, social issues, the size of government? Haven't we always been deeply divided at some ideological level on these kinds of issues? Why does it manifest itself now in such extreme polarization?

GINSBERG: The country is going through a growth spurt and hasn't quite come to grips with who it is. You've written about the Voting Rights Act and how that started breaking up the coalitions. The Vietnam War tore the Democratic coalition asunder and recast it so that instead of basic geographic coalitions that we have now, before there was sort of a much different feel to what those coalitions were. They've been breaking up over the last 40 or 50 years and just aren't quite formed yet. The media is a very different place today in terms of transmitting views than it was even ten years ago. That's much more polarized. The big sort of phenomenon where people are living much more with people like them over the last 40 years is a phenomenon beyond the political discourse but contributes to the political discourse.

MICHAEL WALDMAN '87, PRESIDENT, THE BRENNAN CENTER FOR JUSTICE: Well, in many ways the period of consensus that we think of as the norm that we've deviated from was itself unusual in American history. A number of the things that were the quirks and oddities of American politics as distinguished from European politics have worked themselves out and are no longer so different. It used to be said that Americans were ideologically conservative and operationally liberal, and now people tend to sort out more in both of those areas.

I have a book in my office, *The Deadlock of Democracy*, which not only talks about political parties not being responsible and you couldn't tell what the difference was between them, but that there were really multiple party systems that conservative southern Democrats and northern liberal Republicans. Those have vanished. I would attribute it to the mid-1960s with the move of southern White Democrats slowly first for the presidency and then for the Senate, then for the House into the Republican Party, and less noticed but just as significant, the disappearance of the Rockefeller Republicans in the Northeast. These are big trends that

make us look more like a European-style ideologically divided party system. And lots and lots of other countries have faced this but they don't have our institutional framework. So to me the challenge is not so much polarization but paralysis, and can we have a system as polarized as it is now without government being either paralyzed or lurching from one extreme to the other?

PILDES: That is one of the big questions then. If we are forming European-style parliamentary parties—a much more unified Democratic party, a much more unified Republican party, much sharper differentiations between the parties—can those changes be made to work within an institutional framework from 200 years ago or more that wasn't designed with the idea of political parties in mind at all? In fact, a framework hopefully designed to make it unlikely political parties would emerge, but one certainly not designed with these kinds of very hardened, unified, ideologically coherent, well sorted political parties, a framework in which one set of forces have to have sufficient control over the House, the Senate—including to overcome the increasing use of the Senate filibuster—and the presidency if popular opinion is behind a consensus of that sort to actually make those institutions work effectively. Sam, do you want to weigh in?

SAMUEL ISSACHAROFF, BONNIE AND RICHARD REISS PROFESSOR OF CONSTITUTIONAL LAW: I actually don't find the polarization disturbing in terms of certain key issues. People should disagree strongly about things like the death penalty or abortion or the size of the military or foreign interventions. What I find reassuring in this is that when you look at public opinion surveys you generally tend to get a bell-shaped distribution of views among the American population where the center still holds in terms of broad public views on even the most controversial issues including abortion, death penalty, size of government, what have you. The difficulty is that the institutional framework through which those social views are mediated reinforces the poles rather than the center so that the election system in the United States where we use the "first past the post,"—that you get one more than the other side and you get everything—means that you're going to end up with two basic parties. What has shifted is not the spread of views among the American population, which has always been largely centrist but, divided on critical issues throughout our history, whether it's federal government,

the national banks, slavery, you go on, it's always been there. What's happened is that the mediating institutions of our political framework have for various reasons reinforced the poles rather than the center, and that that has lent the government its current dysfunctionality.

PILDES: So that introduces the question of the relationship between the polarization we see in government, which many people here actually seem to be celebrating as a good form of Democratic competition and debate, and the extent to which the office holders are an accurate reflection of polarization in public opinion more generally, or the extent to which institutions enhance polarization and take a public which is more centrist and create office holders that don't reflect that greater centrism. And so I want to pursue that a bit, in part because it goes back to Ben's comment about the dramatic change in the media even over the last ten years. The tremendous fragmentation now of the media. We no longer have the three major broadcast networks with 25 million viewers and network anchors like Walter Cronkite or Tom Brokaw, who are centrists moderating representations of what's going on in politics. Instead, we have the rise of cable television. And of course we have the Internet which is a much greater source of political information for people but which it seems many, many people use mostly to confirm the beliefs they already hold, to search out information that confirms what they are pre-committed to believing for other reasons.

So Ben, maybe if I could come back to you and invite Monica into this discussion as well. How much is the public or public opinion actually much more polarized today? And how much are politics actually reflecting that polarization?

MONICA YOUN, BRENNAN CENTER CONSTITUTIONAL FELLOW, NYU SCHOOL OF LAW: People who study election law tend to be policy wonks and that that often leads to an assumption that people vote their policy preferences. Sam is absolutely right to say that in terms of policy preferences there still is a relatively bell-shaped distribution of views on a number of social issues. What the evidence of the Southern Democrats and the Rockefeller Republicans has hinted to me—and, you know, Chris Elmendorf circulated an interesting paper last week on the Election Law Blog about the way in which party labels often are working in opposition to policy preferences—is that

people will vote their party even despite their policy preferences. That people's affiliation towards parties may be less policy based than sort of tribal effective, more like a sports team or a religion than it is selecting off of a menu of policy options. To the extent that that's true the cultural and media factors that Rick is talking about become very primary in discussing what's going to affect polarization and what sorts of solutions should we look to.

SEAN CAIRNCROSS '01, FORMER DEPUTY EXECUTIVE DIRECTOR AND GENERAL COUNSEL, NATIONAL REPUBLICAN SENATORIAL COMMITTEE: Today we woke up and found out that the House is moving toward probably an immigration package that is going to look like the Senate's immigration package. And so one of the biggest most controversial issues of our current time where both parties have skin in the game looks to be moving forward. And that is just to say a little bit of perspective that we shouldn't necessarily stand on the panic button.

But I agree with what Ben is saying which is the relationships between the principals who negotiate these issues has changed. People travel home much more. There's a 24-hour news cycle and there's the Internet, and you can rest assured that if you are cutting a deal or you are moderating on an issue that that is going to come up and you are going to see that in a primary. And that is a very real force—I can tell you this after two cycles at the senatorial committee—where the potential for a primary challenge, and this is true on both sides of the aisle, is a significant constraint on your ability to negotiate.

PILDES: But what are the larger causes as far as we can understand them about the kind of polarization that we're facing? We've had some allusions to some of the causes. I wanted to ask particularly about some institutional features of the election system that maybe are contributing to polarization. How significant are they? And if we're troubled about polarization, should we consider changing some of these institutional structures?

So you all brought up primary elections, which is perhaps the single biggest institutional factor that contributes to the polarization of office holders today. And the reason for that is that although primary elections were celebrated as great democratic achievements, wresting control of the choice of candidates from the smoke-filled back rooms of the party bosses in the late 19th and early 20th century, over time

what's happened is that voter turnout in primary elections, even for very significant races like the Senate, is shockingly low compared to the even low turnout in the general election. About a third of the turnout in the general election. And not surprisingly the people who show up for primary elections in both parties are the most committed party activists, the most ideological wings of the parties. We've seen many more moderate candidates or long-serving incumbents who might be viewed as more moderate, who have been defeated by insurgent forces from the furthest sides, the more ideologically extreme. Certainly it's a plausible argument that the Republicans would control the U.S. Senate today were it not for the primary election process over the last couple of cycles in which more extreme Republican candidates emerged—defeating sometimes long-serving incumbents—but those candidates were not electable in the general election and so Democrats picked up seats that they might very well have lost had the more moderate Republican emerged from the primary process. So, do you see primaries as a major contributor to polarization, at least when we focus on the institutional features? And second, how disturbing is that?

CAIRNCROSS: Let's not lose sight of the voter in this. When you have a primary and only 10% of the or 3% or whatever the percentage is shows up to vote, you know, the people who show up in a democracy are going to determine what the governing structure looks like. And so, to some degree the frustration is low turnouts, and I'm not sure that you change that by going back to the smoke-filled room. Part of what's happening with technology, we saw this in the recent campaign, is it makes it easier to reach out and contact particular voters and motivate them to go to the polls. These new means of reaching people and persuading them to get out and vote will have an impact on primaries. And it wouldn't take much. It doesn't take an enormous amount of turnout to change the course of a primary where there is very little turnout to begin with.

GINSBERG: It's too early for me to sign onto the return to the smoke-filled backroom but I agree with Sean that you can't forget the voter in this, that in point of fact the mobilization efforts that have created a bad set of results for Republican primaries in terms of being able to control the Senate and have better general election candidates is one of those things that the voters have brought about.

Overall on the state level you can't overlook the impact that McCain-Feingold has had. And the weakening of State parties, I think on both the Republican and Democratic side is profound. The change in personnel at State parties over the last decade has been different. They're different sort of folks. They by and large have migrated from people who were very involved in campaigns to people who care very much about policy. And the nuts and bolts of campaigns at the State level is much, much weaker today than it was in the past. That's created the situation where whatever the State party brand is on the local level is much more diffuse. The leaders are much more diffuse when it comes to actual politicking, and the inevitable result in an era with the media as it is and the ability to organize a few people online at a cheap cost kind of results in this as well.

PILDES: Can you just explain for the rest of the audience exactly how you think the McCain-Feingold campaign finance reforms are a significant cause of the decimation of State and local political parties? If that's the view you're pushing.

GINSBERG: There very much is a terminology difference here. What the proponents of campaign finance called the elimination of the State Party was in fact the elimination of money that's legal under State law. So that under McCain-Feingold it is now a felony for the chairman of the Democratic or Republican National Committees to make a contribution to a candidate for governor with money legal under that state law. To even go out and raise the money for that candidate is now illegal. The result is that the party building programs, the nuts and bolts, the voter registration, the voter persuasion, the get out the vote activities must all now be done with federal money. State parties are uneven in their ability to raise especially federal money. State parties do not really get involved in primaries in the way that they once did nor in fundamental grassroots organizing.

PILDES: Are you also saying that the decimation of state parties as a result of campaign finance regulation is contributing to political polarization at the state level?

GINSBERG: It's contributing to it not only on the state level but also on the national level. This is a much longer conversation but what parties have historically done for candidates, which is raised the money, mobilized volunteers to be able to mobilize voters to

come out to vote, and messaging—which is basically advertising and these days independent expenditures—is not only much less by the parties, but into that vacuum caused by the absence of money mobilization, and messaging has sprung special interest groups. And so it is much easier for a special interest group to go in, raise money for a state candidate, provide them volunteers to go out and get other people out to vote to do independent expenditure ads for them. It has tended to be, at least in our party, groups further in what you would call the polarization zone that have been more adept at doing that.

PILDES: I want to push back a little bit at both Sean and Ben when you say this is what the voters have brought about because what's really happening is that the voters are passive, they're not showing up, it's a very small percentage of voters who are determining what's going on in primary elections. And I'm not prepared to say that the people who are staying home are passively endorsing all of this. My question is should we recognize we have a serious problem at this point? That given how low turnout is in these elections, unless you hope with Sean that maybe it will change dramatically with the Internet, should we face reality and say there's something going on here that isn't working the way the system was originally designed. It's not healthy for democracy to have candidates chosen by such low turnout electorates, and let's start thinking about whether there are other ways of organizing the choice of candidates.

Sam offered to defend the smoke-filled backrooms so maybe we'll start with that alternative, and then I want to raise at least one other.

ISSACHAROFF: Well, I used to be much more distrustful of elites choosing on behalf of the people and so forth but I've grown accustomed as I've grown older.

PILDES: As you've grown more elite, of course.

ISSACHAROFF: Yeah, sitting at this table with the party elites here and I don't actively dislike them.

BAUER: We're not actively hostile to you either.

ISSACHAROFF: I want to push back on what Sean said about it's just a question of mobilizing the voters because it's not. There are structural barriers to being able to mobilize the voters. Ben's point is absolutely critical on the weakness of the state-level parties.

And it's not just that they don't perform the functions that Ben identified. They don't groom the candidates. They don't train. They don't do all of the things that they used to do. They just don't have the resources. We learned in the last two election cycles, when I was working for Bob, how an effective political organization can bring people out who might not have voted otherwise. This is something that the Republicans did effectively in 2004 and the Democrat did much more effectively in 2008 and 2012. The problem is you need a centralized organization with resources to do this. At the primary stage you don't have that. It was interesting that in 2004 on the Republican side, 2008 and 2012 on the Democratic side when they needed to mobilize the voters, the national campaigns didn't work through the state parties. They went out and organized it themselves because the state parties couldn't perform that function any longer. Unless you have an incumbent who's probably not going to be challenged at the presidential level, it's unlikely that any candidate for office can mobilize the resources necessary to pull people into the process at the primary level except on an ideological basis. So the primaries right now are accentuating this process and there are certain structural features of the primaries and you get it more in closed primary states than you do in open primary states. There's been an effort on behalf of both parties to push toward open primaries at this point to draw a bigger swath of voters, hoping that just the ease of doing so will get them there. You're seeing different candidates even emerging within the parties depending upon whether it's an open or closed primary. So the primaries are a big source of the problem.

PILDES: Can you push a little bit towards the alternative, giving it back to the party leadership? Are you prepared to go that far?

ISSACHAROFF: Sure. I mean look, the problem that we had is that we have a problem that there's two and only two parties that can emerge as a stable factor in this system and that's why we wanted to take away the selection process from the bosses and give it over to the voters. I understand the impulse of 100 years ago. It wasn't part of the original design. The original design was that elections were supposed to be a free-for-all and there was a market of support and the market was represented on Election Day. So you nominate kooks, you lose. You nominate better candidates, you win.

We've done 100 years of this experiment, are we doing better for it or not? In

1972 the Democrats pushed very far in the direction of no party control of the nomination process and they paid the cost for it. The Republicans are paying the price right now for ceding too much control, and there were certain reform efforts, and Ben was obviously central in these, to rein that in a little bit to impose more institutional filters in the Republican process. So it's not a question of going back completely to smoke-filled rooms—because we don't allow smoking there anymore—but it is a question of recognizing that there have to be other institutional leverages to be played to keep the primary system from degrading in the way that it is now.

PILDES: So Michael, as the President of the Brennan Center that is very committed to increasing popular participation in politics and in elections, how do you feel about the suggestion to go back to the non-smoke-filled backrooms as a way of addressing this problem? Is the problem of primary elections as profound now as several people at the table have endorsed?

WALDMAN: First of all the era of primaries I would not date back 100 years because while there were primaries they were sporadic and certainly not at the state level so much, but much more going back to the late 60s and the early 70s. And the purpose of the creation of the modern primary regime was in fact to punish the elites of the Democratic Party for being for the Vietnam War.

There's been some real benefits in terms of participation. One of the intended consequences of McCain-Feingold was to encourage a small donor model of hard money which we saw grow in the years after McCain-Feingold. McCain-Feingold was really only in full effect for two or three years before the Supreme Court started pulling back on it. Where we're going to see a real confluence of campaign finance law and doctrine in the primary system is in the wake of Citizens United because the real new forces are the independent forces who have a much greater impact in primaries than state parties ever did, at least in my memory. And they incessantly pull people toward the extremes.

There's also interestingly an asymmetry right now. It isn't the case that there are many Democratic senators who've been primaried successfully or pulled all the way to the left by primary threats in the last ten years the way you have repeatedly these days with Republicans. I can only think of Joe Lieberman losing his primary, and of course he got elected anyway as an

independent. Part of problem right now is that there's an asymmetric impact of these trends on one party, more than on the other. That doesn't mean it won't affect the Democrats down the road.

I don't think that we ought to aim for a return to the smoke-filled rooms but look at ways to build on the mass participation model of the last few presidential cycles, which started with McCain in 2000 and then especially with Obama and Clinton in 2008, find ways to use the new money and the new technology to make the primaries less the smoke-filled room of the super PAC and more something that actual voters are participating in.

PILDES: Let me ask the group about my alternative for primary elections. And any time you mention novel voting systems you sound like an eccentric crank. But there are efforts to reform the primary structure that are taking place in various parts of the country, fairly radical kinds of reforms. California and Washington now have this Top-Two primary structure.

But the institutional change I wanted to ask the panel about is the use of instant run-off voting for Senate elections or maybe House elections, maybe more broadly. Instant run-off voting has the attraction of essentially eliminating the two-stage election process. It folds the election into one day so the low turnout problem of primary elections is dealt with by having just one general election day. Everybody who gets on the ballot through some sort of qualification process is on the ballot. They could be listed with the party label as a Republican or a Democrat, perhaps if they attain enough signatures from members of the party. And then what voters do is they don't just vote for a candidate, they rank the candidates in order of preference. So your first choice might be a Tea Party Republican if you're a Republican insurgent but your second choice would be a more moderate Republican over any of the Democratic alternatives. And the advantage of this system as I see it is it allows voters to express their strong preferences for insurgents within the parties, challengers to the dominant forces in the party, but if that force isn't large enough in a general election electorate then as these voters are forced to have their second and third choices kind of activated by this process, as votes are transferred from their first choice to their second choice candidate it means that the more moderate forces if they are preferred by the general electorate from either party are more likely to do well in the system.

Now one of the problems with this system, which I just ran into, is that it's very difficult to describe how the counting process works. That's a serious problem actually for an election system in a democracy. If it can't be described easily and made fairly transparent it will make voters nervous even beyond the anxiety that comes with talking about any sort of change to long established election systems and voting rules. But I'd be curious to get some input from the panel. I assume the panelists are familiar at least with instant runoff voting. As I say the main attraction it seems to me is that you give voters a range of choices, so you don't have the smoke-filled or non-smoke-filled backrooms but you eliminate this perhaps antiquated early first-stage, very low turnout primary process through this mechanism. So if I could go back to our longstanding political, I'll call them veterans and not operatives, Bob, Ben, if you want to react first and then others.

BAUER: Well, I'd like to react also because we've had a surprising degree of consensus, although as the conversation goes on it's becoming a little bit more muddled about things. I'm happy to enter a few notes of dissent on some comments previously made, which by the way go to the history of successful institutional designs in this area.

But let me begin by saying—whether it was direct democracy, the top-two system, or frankly some of the engineering that was intended by McCain-Feingold—that these things typically don't work out the way the sponsors have in mind. There's simply no linear relationship between the problem they've identified, the institutional design feature that they craft, and the outcome that they're looking for.

PILDES: It sounds like you're against government action.

BAUER: No, if I happen not to agree with you on a particular issue then you view the objection as being much more widely cast. I've been somewhat critical of aspects of McCain-Feingold but I'm not here to carry the war against one particular reform proposal or in favor of another. But take for example Stand by Your Ad. After all we're having a conversation about polarized debate and the notion was there was too much negative advertising and therefore if we make candidates own the negative content of their ads by forcing them to take four seconds to personally state that they've approved the ad it will reduce the quantum of negative speech in the political process.

And of course it didn't. Period. That's because very frequently with the best of intentions we design these features with an enormous amount of optimism that frankly experience belies. So you've already started with something that you admitted you couldn't explain to the audience and therefore you're going to have a tremendous difficulty explaining it to the voters.

The second thing I wanted to say, briefly, goes to institutional design because there was a discussion of campaign finance and state parties. Here I actually significantly disagree with a couple of the comments that were made. I don't think McCain-Feingold weakened the state parties. In fact, McCain-Feingold was intended in some respects to create incentives for them to do better in a world in which the national parties couldn't essentially become the big bullies on the block and dominate the soft parties, the soft money supply. But the truth of the matter is that the world had changed to the disadvantage of state parties for decades. So if you look at a book on money and politics like the one that Alexander Heard authored many years ago, in 1961, party money flowed from the states up to the federal government, to the federal system. That's where the money flow was within the party system from the states up to the federal. By the time I began practicing, by the time Ben began practicing, that wasn't true anymore, and the fact of the matter was critics would say that State parties and election cycles were pumped up with national activists who were sent to the states to run the state parties and with national resources that were sent to state parties. McCain-Feingold didn't create that set of circumstances. It may have accelerated the difficulties of all of the parties. It certainly created some difficulties for the national parties by shutting off a main source of financial support, but it's very difficult to say in my view given the history of the diminishing significance of State parties, the resource difficulties they've had for years, that McCain-Feingold was responsible for it. So, the plea I'm issuing here is for recognizing A. how often we fail with these institutional design issues. We become terribly excited at a particular moment by the source of panic of the day. In Ben's Republican Party not too many years ago the view was that Republicans would never ever obtain control of the Congress unless they had term limits, and then they gave up term limits once they gained control of the Congress. But that's something that on both sides you can see. So I'm skeptical not about the good intentions behind your proposal but its likely efficacy.

PILDES: Okay I acknowledge that explaining it can be difficult. First deciding whether it's a good idea is important and then if it's a good idea one could try to figure out how to explain it. But Ben and maybe Sean is it a good idea?

BAUER: But Rick, can I just ask you a question?

PILDES: Yes.

BAUER: How is it a good idea if you can't explain it to anybody?

PILDES: Because most people don't understand how the voting systems work anyway but if it produces good outcomes and good governance then that's a very significant benefit. And you can explain it. The easiest way is: This is how people vote for the Oscars in Hollywood.

GINSBERG: I agree with Bob on the laudable academic notion of the runoff voting. First of all I would find its path to passage and adoption limited to probably a few city councils and counties, and pretty tough to do beyond that for a result that I'm not sure would produce the electoral nirvana that we're seeking. The closest analogy is the California Open Primary Rule, which combined with a redistricting commission, was supposed to make for a much more competitive, open state. In fact, it led to the re-election of almost all incumbents except where they ended up primarying each other in parties. Republicans lost the ability to even veto things in the State house. So it's tough to argue it was non-partisan, and the search for the moderate candidate to come out of that is still unproven.

CAIRNCROSS: I generally agree with what both Bob and Ben said in that the unintended consequences don't meet the idealistic starting point. And I can't imagine what a ballot would look like in a recount when you went through phase one and phase two challenged.

GINSBERG: A new career.

CAIRNCROSS: A cottage industry.

PILDES: Okay, let's come back to the issue that Bob put on the table earlier that the problem, at least in his view, is not polarized parties but the nature of debate, discussion about issues, discourse, and the like. Monica, do you share Bob's view about that? Is that a significant problem that's emerged now? Is this something politicians in office

can't control? Do they no longer want to get together because they're spending so much time raising money or because polarization itself makes it politically costly to get together with people from the other side of the aisle?

YOUN: I certainly agree with Bob's observation of the problem, and that people who have spent more time in D.C. than I can, can talk about some of the softer cultural factors that might have contributed to the problem. But a lot of it does reflect the polarization on the part of the electorate. I mean the electorate will always say, Oh yes we want reasonable, moderate, bipartisan solutions, but when push comes to shove the electorate will say what we really want is for our party to trounce the other guys and to win this debate that we're working on. And if you take it to the level of the individual voters, the politicians are responding to demand rather than otherwise.

PILDES: Michael, you've written in particular about the very polarized debates about voter identification issues and laws that have been emerging over the last two or three years. And what we see there is that at least within legislative bodies the votes on these laws break down on completely partisan lines, although public opinion polls generally seem to suggest that three quarters of voters endorse these kinds of laws. Whether they know the specifics of these laws or not is a separate question. But with that as a specific example what's your perspective on polarization in legislatures on an issue like this, the extent to which public debate is polarized on this issue, our inability to find solutions?

WALDMAN: It's an interesting question. I regard the voting wars of the past decade as a symptom rather than a cause of the polarization. There have always been challenges and questions about who could vote but they have not been as much the subject of a sharp red/blue divide as is the case now. The public has broad but not particularly deep views on these matters. On the one hand there's broad public support for something like voter ID, on the other hand when you point out that a lot of people don't have the particular kind of ID that's being proposed, the public voted against it, as in Minnesota. The real challenge is how to take something where there is in fact a solution that meets the concerns of both parties or both sides in the debate, as I would argue is the case here.

PILDES: What is that solution here?

WALDMAN: Well, if you for example, if you took seriously the idea that our electoral system is especially marred by an antiquated electoral, by antiquated practices, by a voter registration system that hasn't really changed a whole lot in 100 years you could have a system that as we've argued registers just about every voter and is less susceptible to fraud. And even on the issue of voter ID where it's very polarized, you're now starting to see ideas and proposals around the country, as in Nevada where the Democratic Secretary of State has proposed a voter ID system where you have to have an ID but if you don't have it your photo gets taken at the polls. That has the potential to calm concerns about security without disenfranchising people, obviously the details matter.

There are some real solutions. We're seated at the table with the co-chairs of the President's new commission on electoral reform, which I realize has a distinct mandate, not covering the whole waterfront. But one of the reasons this could be a very positive development is that if we could find a way to take these issues out of the partisan crossfire it's far more likely to get a solution that actually meets the concerns of both parties, and all parties.

PILDES: Can we take these issues out of the partisan crossfire, especially at the national level?

WALDMAN: Sometimes things like that can happen when both parties want something, whether it's a grand bargain between, or, as in immigration, where suddenly both parties for entirely different reasons want exactly the same thing.

But I do want to say, it's important not to neglect some of the soft matters of leadership that have to make a system like this work. The filibuster rules are the same as they've been for a long time but all of a sudden they're used so incessantly that you suddenly need an impossible super majority to do anything in the Congress. There are numerous things where the rules are what they are on paper but if leaders of both parties aren't willing to stand up to their base or exert leadership then the system breaks down. The polarization that we've seen is not only a function of the voters pulling people or even the money in the system pulling people but the difficulty that people inside the system have had resisting it. And I don't know how much of that is institutional and how much of that is temperamental and personal. But until we all hold those leaders accountable for doing it they're not likely to change.

PILDES: Ben, you're the one who opened up the personal side of polarization, and you and Bob have both spent years in Washington, participating in the system but also observing the changes in Congress over long periods of time. What in your view accounts for the situation Michael is describing? You mentioned some of the large historical forces that have changed the nature of the political parties, the sorting of parties into clear ideological frameworks. But you also mentioned various personal kinds of relationships that have changed. What accounts for some of that in your perspective?

GINSBERG: I'm honestly not sure. It puzzles me a great deal because one of the contrasts with the atmosphere in Washington, which is a lot more style than substance necessarily because somehow the government is still functioning and there are a number of broad areas in which there's been a lot of movement. But the interesting contrast is on the State level where there are any number of governors from both parties in either unified or divided legislatures who have managed to get an awful lot done in their respective states. So despite the polarization that we're talking about, and we're really talking about it as a national phenomenon, in any number of states it's not true. And so I'm not really sure what the differences are temperamentally and in the relationships between people, and why it is different in Washington from the way it is in so many state capitols. I honestly don't know the answer to your question.

PILDES: Bob, do you have any views on that? I assume you've observed the same thing in your time?

BAUER: I have over that same period of time and I agree with Ben. I don't think it is the largest reason. It's more of a reflection of other pressures on the political process that are producing this sometimes paralyzed debate particularly over large national issues. But there's no question that the tenor of relationships in the city has changed. When I came to Washington D.C. full time in 1976, there was a very different quality to relationships across the aisle. Sometimes the rhetoric was still very hard edged but there was more of a likelihood that you would see the previous combatants walking off the floor of the Senate and then sort of in the corner joking with each other. And that's very different than the reported period, post-1994 election, when the Democratic leader of the House and the Speaker

of the House did not speak to each other for a year and a half directly. And that's a very, very significant difference. It's hard to imagine Mike Mansfield and Everett Dirksen not speaking to each other for 18 months, or for that matter John McCormack, pick an old Speaker of the House and whoever was the Republican leader at the time. Who?

WALDMAN: Carl Albert.

BAUER: So there's a difference but I have to say again to go to Michael's distinction between causes and symptoms that in many respects it's more of a symptom than a cause of the larger divide.

PILDES: Sam, are you troubled by the decline of discourse about public policy issues that Bob was putting on the table here? Is that the thing that we ought to be worrying about? And if so what do you see as the causes of that and more importantly is there anything that can be done about it? Or is this the culture we're left with at the moment?

ISSACHAROFF: Well, it's a terrible decline in the quality of the ability of government to respond. It's harder to put together an institutional coalition that responds to problems as effectively as we might have in the past. Some of it is that you read a biography like Caro's biography of Johnson and there just seemed not to be the same figures with the command of the institutions that there were in prior periods. But you don't want to put too much just on individual strong forces. American government has traditionally depended upon two different things, which both are in short supply right now. One is people who rise above the partisan divides in the institution and are the deal brokers, and there seem to be fewer of those than there were before. That has to do with the decline of the center. You just need a few people in the center to figure out where the deal is, and that doesn't seem to be there as much.

The other is something that you've written about Rick, and it's that there seems to be less identification with the institution than with the party to which one is a member, and so if you look at the structure of separation of powers it is thought that there will be a Senate that has an institutional understanding of its role as a Senate, and a house in the same way, and a presidency that is organized around the Executive in opposition to some extent to the Congress and to the Judiciary. And that seems to have broken down. There seems to be willingness to disable the various institutions in favor of

an immediate partisan objective that may have been different at prior times. And we see this in the filibuster debates. We see this, over the past 20 years so both parties have been on both sides of these debates. I'm not pointing fingers at the current situation. The causal stuff is hard to figure out because there's so many factors that life is more transparent, that our source of information are more available. The monopoly of information under Walter Cronkite was a terrible thing, horrible. I mean I liked watching him. I watched him every night when I was a kid.

PILDES: Another confession of age?

ISSACHAROFF: Yeah, when I was a kid and that's where I learned about the Vietnam War was from Walter Cronkite, but that can't be the right image to hold onto in this era.

It goes back to the question of the way in which people come up in politics these days, and that either because of the sorting, because of the money pressures, because of the news cycle, whatever it is they are less groomed in the institutional exercise of political authority which includes the ability to get things done and they're increasingly groomed in ideological stances that play well in a media cycle. And that then as they move up the ladder to be congressman or congresswomen and senators and representatives that changes. That changes the dynamic of the institution although I'm heartened by Ben's point that some governorships seem to have stayed outside of this process.

PILDES: Bob, did you want to comment?

BAUER: Well, I just wanted to say one thing about the kind of polarized debate at least that has most gotten my attention, and it is what I call a negotiating inflexibility clothed in high moral principle. And I'm mindful of a keynote recently delivered at a party conference.

I won't identify which party. I'm not here by the way as an official partisan. I'm here like everybody else, as just your--

PILDES: A colleague at NYU Law School.

BAUER: Yes, exactly right. But at a recent keynote the fundamental choice that was put to the audience, and the audience responded very enthusiastically, was that there were large issues facing the country and the choice was between standing up for the United States constitution or surrendering. And so in other words compromise

is depicted in this scheme, as potentially a moral failing. So why do you have that? Why do you have a situation where compromise is a moral failing? Increasingly there is a view that the large national issues that we are dealing with are essentially a zero sum game, somebody wins/somebody loses. And therefore you're not splitting the difference when you compromise, you're giving up, you're losing, and nobody comes away from the compromise in some way benefited equally or benefited to some degree, somebody comes away the winner, somebody comes away the loser. To defend that point of view that you can't give in, that you have to resist successful negotiation there is an impulse to adopt a very stern moral tone. The refusal to negotiate is not being unreasonable, it is being principled. And that has a significant amount to do with the way in which arguments are increasingly framed around issues that Tom Edsall in his most recent book he published calls "the age of scarcity." Where we think on the national level we're dealing with issues where somebody walks away the winner, somebody walks away the loser. We don't have the resources or the capacity to spread evenly, or in fair allocation among all of the potential participants. And therefore in some sense, polarized debate is a negotiating strategy but it's an anti-negotiating strategy, and it serves a function in this particular political environment or so it has seemed to me.

Just in closing, what struck me about Sam Issacharoff's reference to Lyndon Johnson and Robert Caro—it's been very interesting in this day and age to both listen to this kind of uncompromising moral debate on a number of key issues, and then read the acclaim given to the depiction of Lincoln in Steven Spielberg's movie. Here was somebody who played hardball as depicted by Spielberg there was a feeling as there was in the response to the Johnson biography that this is what politics should be about. People have significant goals to achieve and therefore their means should be supple. They should be flexible. And the debates that we're currently, seeing with this inflexible negotiating strategy cloaked as high moral principle would be gridlocked. That gives me the most concern because that's the spirit of anti-politics, that there's some issues that simply can't be negotiated because to negotiate them is to essentially fall into a form of moral error.

PILDES: Sean, I don't want to put you on the spot too much but since you have not Bob or Ben's experience in Washington but certainly substantial experience with the

culture of the Senate and Senate candidates and the like does Bob's description ring true to you about the nature of political conflict, political discourse today?

CAIRNCROSS: To some degree it does. It's also important to remember where you stand on this depends on where you sit, which is to say the filibuster is a big problem if you support an administration that's trying to move judicial nominees through or whatever the case may be. It's not necessarily if it's a prior administration. And so this takes on an acute relevance when it's your policy preference that you are trying to move that you feel is being frustrated. But, the tables always, always turn eventually so this radical change to this system or reform for reform's sake just needs to be approached with some level of caution.

WALDMAN: I'll say for the record that presidents should be able to make judicial appointments regardless of what party they are, and that will be for the record even when there's a Republican president or a Democratic president. There's not really a way to make our courts let alone the rest of the system work.

But I want to go back to something Sam said. I want to strongly defend Walter Cronkite.

GINSBURG: Brave.

WALDMAN: Very brave. And Huntley-Brinkley after that. When we talk about Walter Cronkite what we're really talking about is a period when there was a sense of journalism that spoke to the whole country that was more or less regarded as fair and that facts were more or less regarded as facts. And that was unusual. In the 1800s that was not the way it was. Newspapers were clearly and highly partisan. Among the challenges to making the kind of compromises that inevitably are necessary given the way our government is structured, there has to be some basic agreement on facts, and so this especially is challenging on things that involve short-term pain and long-term gain. As I look at the whole panoply of things that are affected by the polarization and dysfunction right now, you know, budgets come and go, taxes come and go. It's true that we have a country that wants a certain level of government and doesn't want to pay for it and that in itself reflects a problem. But climate change, we will look back on this era as a time when our political system was unable to grapple with a looming catastrophe, and part of the reason is that there is

no more shared space where people can persuade the media that something is a problem and force political actors to do something about it.

YOUNG: One thing that's happened is that the people's expectations of Congress at this point are so low that it's become a self-fulfilling prophecy. No one expects Congress to govern anymore. So the more interesting question to your average voter is did my representative back down out of a negotiation? And you have both sides. You have Planned Parenthood and the NRA both with their ideological purity tests on which you want your candidate to score 100% ideally. You have political parties suggesting their own versions of the purity test, and it becomes, this spiral in which you start to wonder at the end of the day: Are we going to lose a certain amount of democracy in our democratic institutions because more and more responsibility gets pushed onto less accountable institutions such as administrative agencies, such as executive action of various kinds and to the courts. And you start to wonder, what is Congress meant to do? Is it meant to be this Democratic thing or is it meant to be just kind of an ideological battlefield?

GINSBURG: In Bob's formulation, people don't compromise because that's perceived as abandoning principle, which is an accurate way to look at it in a number of instances. But let me also call attention to three issues which in the last 20 years, which were positions of principle on both sides, where there's now been a seat change. Number one is immigration, number two is same-sex marriage, and number three is the gun debate which even though the gun debate is still current where the goalposts are in that debate is really different from where it was 20 years ago. So three instances where if we were having this discussion a few years ago we would say, were locked in concrete, that there will be no compromise because people have their principles on both sides. Through the electoral wars, through discussions, through whatever it is the debate shifted on them.

BAUER: I can't resist. That is true but we were having a conversation here about what happens when you have the leadership and interest and others were engaged in the national debate trying to thrash issues out on some presumably compromised basis before the electorate weighs in decisively. And in two of three cases that you've mentioned, and to some degree the third, what

really shifted was public opinion, and it drove the two parties together because if there's one thing we expect from our political actors it's a keen sense of survival. So I don't think it's a shock for example that we're moving toward immigration reform, and I don't think it's a shock that we're moving toward acceptance of gay marriage, but it's not a result of reasoned discourse over time in which both parties sat down and listened closely to each other. It's a result of a fundamental change in the electorate's judgment that has moved the political actors.

PILDES: So, we have a little bit of time here at the end for questions. Go ahead.

AUDIENCE MEMBER: [Inaudible question]

PILDES: That's an argument against the filibuster. Right? In the Senate. And Sean has spoken to that already. Do you want to respond a little bit more?

CAIRNCROSS: Well, to some degree it depends on what it is you're voting up and down on. It's the case quite frequently that things are brought to the floor for an up or down vote for the specific purpose of making a political point that is going to then be turned around and used to beat the other side over the head with, whether in a primary or in a general. So it depends on what piece of legislation you're talking about.

PILDES: Michael, you're a big critic of the filibuster I take it?

WALDMAN: Yeah, I mean we've had these rules, rule 22 hasn't changed really since the mid 1970s but the use of it has changed so dramatically that it's no longer something to slow down debate or to on the big, big issues attain a consensus or super majority even as one could argue it might have been on civil rights. But it is now a de facto 60-vote requirement for just about anything, and that is if that were a constitutional change we would, written down on paper we would regard it as monumental, and contrary to what the framers believed was possible. That to me is one of the sticking points here where polarization is less the worry than paralysis. You've had Democrats and Republicans but we haven't had a system until recently where the Senate was unable to function as much as it--

PILDES: And so why do you think Democrats, you know, with control of the Senate to the extent they have it right now having

gone through the experience of the first term of President Obama are unwilling to push aggressively to modify that rule given the majority that they have? They have the power presumably to do it through a majority vote at the beginning of the new session of the Senate. Why do they not use that power?

WALDMAN: You'd have to ask them. I think that a number of the longer serving Senators see the benefit. It's sort of a calculus that as individuals they have more power being able to threaten the filibuster or use a hold, but I wish—we certainly have encouraged them—to take stronger steps than they did.

PILDES: Randall Johnston?

RANDALL JOHNSTON: I am curious. One of the causes I've heard of political polarization that I'm sure you all have heard is that senators and congress people work in Washington two and a half, three days a week, they go, fly back home, so they're no longer socially interacting with their colleagues nearly as much. Their children don't all attend Georgetown Day School and Maret anymore, their wives and husbands don't serve on PTA together. So what effect do you think, if any, that has played on social interactions and is there anything, I mean leave it to a southerner to think a party will fix everything, but like is there anything that can be done about it?

PILDES: I thought you meant a political party at first. You meant a good old fashioned--

JOHNSTON: Social party.

PILDES: Mint julep party.

JOHNSTON: Obviously.

PILDES: Our Washington hands? Bob? You look like you want to, you were stirred.

BAUER: I recall that in the Gingrich era, and Ben will correct me, there was a move toward trying to—at the very beginning before things turned rancid again—develop some sort of family friendliness and social interaction. Ray LaHood was a part of that and whatever and it didn't seem to have yielded much fruit. And I suspect that tells you something. That's why I go back to the point that it's symptomatic. But I don't think that for example to speak to Randall's point that if you structured a wider range of socially attractive engagements that somehow it would have a meaningful effect on the atmosphere in Washington.

AUDIENCE MEMBER: So bringing the conversation back to campaign finance reform some of the candidates that have been most successful in the post-Citizens United, post-McCain-Feingold era are ideologically extreme candidates who have been able to raise massive sums of small donations from out-of-state donors, people like Sharon Angle or Alan Grayson on the left. And I'm wondering what can we do to change the incentives so that moderate candidates also want to raise a large sum of small donations so that it's not just the ideological extremes that are reaching out to the activists?

GINSBURG: I can assure you that moderates have no less desire to raise the money of an Alan Grayson or somebody on the right. It is the response mechanism and it is just a phenomenon that again is a symptom more than anything else. That it's the shriller the plea the more money you raise. If you look at any direct mail piece or Internet message from a group on the right or on the left the more the rhetoric is hyped up the more successful the fundraising package is. So it's really a symptom of the overall coarseness of the discourse more than incentives for moderates that you could impose.

PILDES: Michael, since the Brennan Center has been very involved in campaign finance issues.

WALDMAN: Ben has made an interesting point and it has been the assumption that direct mail pieces and those sorts of things tend to pull toward the extremes. Interestingly, at least the campaigns in the Democratic presidential primaries that raise the most small donor contributions weren't particularly extreme or ideological when they did it.

PILDES: Just to interject, I see Ben frowning. I'm not sure Republicans would agree with that characterization. But go ahead.

WALDMAN: In contrast to some of the other candidates who could have been running among the Democrats, Hilary Clinton and Barack Obama were not the most extreme. But one of the things that is possible to make it so that moderate or less partisan candidates can take advantage of small donor interest is actually something that is in the law in New York City—and what Governor Andrew Cuomo is encouraging the legislature to do in New York State—which is a system of public financing but one that's different from the old style public financing where everybody gets a big grant of money. This is rather a matching fund system for

small contributions, a multiple match in New York City. And it's interesting. It really has not led to extremists taking over the city council. It's just actually changed the way people raise money so that they tend to raise it more in living rooms in their own district than before.

AUDIENCE MEMBER: I was wondering if anybody on the panel could comment on the argument that the professionalization and modernization of political campaign techniques over the last several decades has been one of the causes of polarization. I'm specifically referring to the class or professional consultants that has developed over the last several decades that consistently have very powerful and very effective opposition research teams and consistently push candidates towards negative campaigning as a very, very effective messaging tactic.

CAIRNCROSS: Negative campaigning is nothing new. The technological means of communicating with voters, every iteration is better and better but I'm not sure that the professional class of consultants has driven the negativity and the discourse very much. I mean, these are political issues. You are going to have contrast between candidates whether it's a primary or a general, and the means of communicating those have become easier and more easily mass marketed. But I don't think it's necessarily driven by the consultant class.

BAUER: I fundamentally agree with that. The consultants are delivering and are paid to deliver winning strategies to candidates. Obviously sometimes they win, sometimes

they lose or their strategies sometimes win or succeed and sometimes fail, but the point here is that candidates adopt them when they prove effective and when they're an appropriate reading or an effective reading of what the likely response in the electorate will be, and so essentially to look to the political class as evil is to confuse the messenger with the message

AUDIENCE MEMBER: Going back to two of the three issues that were identified where there's been a decline in polarization, immigration and gay marriage. First on gay marriage, it's interesting that there is no credible effort in Congress to do anything about the Defense of Marriage Act. It's all just broad bipartisan negotiations to legislatively repeal that, but on immigration there is this bipartisan working group of eight in the Senate and Sean mentioned a group that according to today's newspapers is starting to meet in the House, and it's interesting that one of the key players is Marco Rubio who as opposed to the Ted Cruz line that Bob Bauer spoke about is someone who clearly sees negotiation and compromise as a political win for him and something that will be selling with voters. Is that a bellwether, does that give us one little bit of hope to cling to that perhaps polarization could be, at least on consensus issues, waning?

PILDES: Let me actually take a crack at that as a closing kind of comment. So, you know, it's fascinating and we forget that George W. Bush when he came in and Barack Obama when he came in arguably had track records in the past and certainly positioned

themselves as exactly the kind of figures that maybe Marco Rubio is trying to position himself as being for a potential presidential run. Remember George W. Bush's compassionate conservatism, his bipartisanship as Governor of Texas? President Obama, at least many of us who are sympathetic to him, see him as having tried to reach out across the aisle. I view both of them as having discovered that the structure of the larger system is such that it makes it extremely difficult even for a successful president or candidate who becomes president to actually be able to implement that because the larger forces are so deep and so profound, so much a function of historical changes, so locked in that to become President it's important to present yourself as a compromiser, a moderate, someone who reaches across the aisle. But to actually govern as that is much more difficult than even the people in office would like it to be. And so my own view is that we are experiencing something that's a product mostly of historical forces going back to the 1960s, the opening up of the American system to full political participation, the eventual ideological reorientation and sorting of the parties, and then I suspect the polarization we have now is likely to be enduring for some period of time.

With that I want to particularly thank the people who came in from out of town. It's a real tribute to their commitment to these issues, to each other, to NYU. So I want to thank them as well as everybody else. This is the biggest issue in democracy and these are some of the best people to talk about it. So thank you.