

**Democratic Distortions:
A Postmortem on the Midterm Elections**

CLE Materials Packet

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Democracy's Deficits

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Barely a quarter century after the collapse of the Soviet empire, democracy has entered an intense period of public scrutiny. The election of President Donald Trump and the Brexit vote are dramatic moments in a populist uprising against the post-war political consensus of liberal rule. But they are also signposts in a process long in the making, yet perhaps not fully appreciated until the intense electoral upheavals of recent years. The current moment is defined by distrust of the institutional order of democracy and, more fundamentally, of the idea that there is a tomorrow and that the losers of today may unseat the victors in a new round of electoral challenge. At issue across the nuances of the national settings is a deep challenge to the core claim of democracy to be the superior form of political organization of civilized peoples.

The current democratic malaise is rooted not so much in the outcome of any particular election but in four central institutional challenges, each one a compromise of how democracy was consolidated over the past few centuries. The four are: first, the accelerated decline of political parties and other institutional forms of popular engagement; second, the paralysis of the legislative branches; third, the loss of a sense of social cohesion; and fourth, the decline in state competence. While there are no doubt other candidates for inducing anxiety over the state of democracy, these four have a particular salience in theories of democratic superiority that make their decline or loss a matter of grave concern. Among the great defenses of democracy stand the claims that democracies offer the superior form of participation, of deliberation, of solidarity, and of the capacity to get the job done. We need not arbitrate among the theories of participatory democracy, deliberative democracy, solidaristic democracy, or epistemic democratic superiority. Rather, we should note with concern that each of these theories states a claim for the advantages of democracy, and each faces worrisome disrepair.

INTRODUCTION

History confounds certainty. Barely a quarter century after the collapse of the Soviet empire, it is democracy that has entered an intense period of public scrutiny. The election of President

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Donald Trump and the Brexit vote are dramatic moments in a populist uprising against the postwar political consensus of liberal rule. But they are also signposts in a process long in the making, yet perhaps not fully appreciated until the intense electoral upheavals of recent years. A percentage or two change in the Brexit vote, or a few tens of thousands of votes cast differently in a few key US states, would certainly have postponed the confrontation but would not have altered the fundamental concerns. With the realignment of the Dutch and French elections, the emergence of a hard-right populism in Hungary and Poland, and the mushrooming of antigovernance alliances in Italy and Spain, deeper questions must be asked about the state of democracy. Italy may have had forty-four governments in a fifty-year span, but power generally rotated among a familiar array of parties, personalities, and policies—until former Prime Minister Silvio Berlusconi reoriented politics and the current nihilist trends emerged.

Today's moment is defined by the distrust of two key features of democratic governance: the centrality of institutional order and the commitment to what in game theory would be termed "repeat play," the idea that there is a tomorrow and that the losers of today may unseat the victors in a new round of electoral challenge. The central idea of contestation, of losers and winners engaged in common enterprise, is ceding to what Professor Jan-Werner Müller refers to as a "permanent campaign"¹ aiming to "prepare the people for nothing less than what is conjured up as a kind of apocalyptic confrontation."² In rejection of any pluralist account of democracy, "[t]here can be no populism . . . without someone speaking in the name of the people as a whole."³ Populist impulses shorten the time frame and turn everything into a binary choice, a political life at the knife's edge. Us or them, success or perfidy, the people or the oligarchs, Americans or foreigners. There can be no spirit of partial victory, of legitimate disagreement, or even of mutual gain through engagement.

At issue across the nuances of the national settings is a deep challenge to the core claim of democracy to be the superior form of political organization of civilized peoples. It is odd, and highly dispiriting, to have to engage this question so soon after democracy seemed ascendant as never before. With the collapse of the

¹ Jan-Werner Müller, *What Is Populism?* 43 (Pennsylvania 2016).

² *Id.* at 42.

³ *Id.* at 20.

Soviet Union and its empire, the twentieth century concluded with democracy having defeated its two great authoritarian rivals, and the popular election of governments spread across a greater swath of the earth than ever before. The imprecise contours of ascendant democracy included generally robust markets, welfarist protections for citizens, a broad commitment to secularism (even in countries with an established church), and liberal tolerance of dissent and rival political organizations. All of this was packaged in robust constitutional protections of civil liberties and the integrity of the political order. Francis Fukuyama's embellished claim that the end of history was upon us⁴ accurately captured the sense that electoral democracy alone seemed to lay claim to political legitimacy.⁵ Further, the opening to democracy invited economic liberalization, and the resulting market exchanges were allowing huge masses to rise from poverty, even in holdout autocratic states like China or Vietnam.

Clearly the era of democratic euphoria has ended. The rise of Islamic terrorism and the failure of the Arab Spring were certainly warning shots, but grave as these might be, they did not challenge the core of democratic government. The inevitable trade-off between security and liberty that accompanies external threats to democratic regimes is a serious challenge and can itself compromise core legitimacy. But democracies that withstood what Professor Philip Bobbitt terms the "long war" of the twentieth century⁶ were unlikely to come undone in the face of enemies who sought to target civilians but were in no position to pose a sustained military threat of any kind. Even the problematic military engagements in Afghanistan or Iraq bitterly divided democratic societies but did not threaten an epochal confrontation with democracy itself.

⁴ See Francis Fukuyama, *The End of History?*, 16 Natl Interest 3, 4 (Summer 1989) ("What we may be witnessing is not just the end of the Cold War, . . . but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.").

⁵ At the peak of the democratic wave, in 2000, Freedom House listed 120 countries, 63 percent of all nations, as meeting the baseline criteria for democratic governance. Adrian Karatnycky, *Freedom in the World 2000* (Freedom House, 2000), archived at <http://perma.cc/7DMN-H6EX> ("[E]lectoral democracies constitute 120 of the 192 internationally recognized independent polities.").

⁶ Philip Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History* xxi–xxii (Alfred A. Knopf 2002) ("This war . . . began in 1914 and only ended in 1990. The Long War, like previous epochal wars, brought into being a new form of the State—the market-state.").

Instead, the current moment of democratic uncertainty draws from four central institutional challenges, each one a compromise of how democracy was consolidated over the past few centuries. The four I wish to address are: first, the accelerated decline of political parties and other institutional forms of popular engagement; second, the paralysis of the legislative branches; third, the loss of a sense of social cohesion; and fourth, the decline in state competence. While there are no doubt other candidates for inducing anxiety over the state of democracy, these four have a particular salience in theories of democratic superiority that make their decline or loss a matter of grave concern. Among the great defenses of democracy stand the claims that democracies offer the superior form of participation, of deliberation, of solidarity, and of the capacity to get the job done. We need not arbitrate among the theories of participatory democracy, deliberative democracy, solidaristic democracy, or epistemic democratic superiority. Rather, we should note with concern that each of these theories states a claim for the advantages of democracy, and each faces worrisome disrepair.

I. PARTICIPATION: FAILING POLITICAL PARTIES

[P]olitical parties created democracy and [] modern democracy is unthinkable save in terms of the parties.

—E.E. Schattschneider⁷

[P]arties [are] the distinctive, defining voluntary associations of representative democracy.

—Nancy L. Rosenblum⁸

One indicator of the age of the American Constitution is the absence of any role for political parties, by contrast to Article 21 of the German Constitution, for example.⁹ The Framers of the US Constitution equated parties with factions, and aimed for a form of democratic politics that would rise above sectional concerns, immediate gratification of wants, and the risk of succumbing to the passions of greed and envy. But as early as the first contested presidential election in 1796, the Founding generation discovered the need to coordinate national candidacies in furtherance of a

⁷ E.E. Schattschneider, *Party Government* 1 (Farrar & Rinehart 1942).

⁸ Nancy L. Rosenblum, *On the Side of the Angels: An Appreciation of Parties and Partisanship* 459 (Princeton 2008).

⁹ See Ger Const Art 21.

political program. They quickly formed the very factions they had sought to avoid, now organized as incipient political parties. Even in the Founding era, partisan actors learned that they could not mobilize the rather inert mass of the population into a national campaign without coordination of resources, messages, and programmatic commitments for governing. Each of these undertakings required not only the right of citizens to participate electorally in self-governance, but the creation of intermediary institutions that could mobilize citizens into partisans.

Not until the twentieth century were political parties granted constitutional recognition as part of the fabric of democratic politics—indeed, the first nineteenth-century constitution that addressed the status of political parties was that of Colombia in 1886, and there in order to ban parties. By contrast, the constitutions of the twentieth century privileged political parties as the galvanizing force of democratic politics.¹⁰

As experience in electoral self-government grew, democrats throughout the world learned that parties provide a forum for the integration of the different interests that must coalesce for successful policymaking, more so in first-past-the-post elections than in proportional representation systems. Even in parliamentary systems, some form of aggregation is necessary to draw sufficient attention to the party platform and to make the party a desirable suitor in forming a governing coalition. But mostly parties were the institutional mechanism for translating interests and ideology into governance. Politics is the art of the possible, even if what is possible and necessary at any particular moment fails to inspire. Without parties, responsible and productive governance rested on the happenstance of enlightened leaders rather than an institutionalized mechanism for taking hard decisions, cutting deals, accepting short-term costs for longer-term gain, and all the mechanisms that define wise stewardship.

In the United States, parties served as the political expression of the spirit of voluntary associations critical to the young Republic. As Alexis de Tocqueville noted, “Americans of all ages, all conditions, and all dispositions, constantly form associations.

¹⁰ See Tom Ginsburg, *Constitutions as Political Institutions*, in Jennifer Gandhi and Rubén Ruiz-Rufino, eds, *Routledge Handbook of Comparative Political Institutions* 101, 106 (Routledge 2015) (“In our work on the Comparative Constitutions Project, [Zachary] Elkins, [James] Melton, and I identify certain core provisions to written constitutions. . . . In the nineteenth century . . . few constitutions mentioned political parties, while most written in the twentieth century do so.”).

. . . Wherever, at the head of some new undertaking, you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.”¹¹ By the time Tocqueville came to America, political parties were emerging as among the most salient of these associations. As they matured through the nineteenth and early twentieth centuries, parties provided the organizational resources for political campaigns, selected candidates, coordinated platforms, and disseminated information about politics.¹² In exchange, parties dispensed patronage and access to power, the glue that held the activist wings of the party in check and that allowed a coordinating discipline to be imposed on the party’s elected representatives.¹³ As I have written elsewhere, the organizational fabric of parties came undone in the United States in the late twentieth century, partially as a result of legal reforms that left significant aspects of party governance outside the control of party leaders,¹⁴ and partially through external factors, such as the rise of low-cost social media and the mechanisms of direct access to funding and the party constituency.¹⁵

Examined globally, the American experience of tottering political parties appears emblematic rather than exceptional. The result in country after country is the dissolution of the discipline of political parties in favor of a politics of free agency formed largely around the personae of individuals or momentary issues, devoid of a sustaining institutional presence. In the American context, Professor Richard Pildes describes this central feature of contemporary politics as the process of political fragmentation: “[T]he external diffusion of political power away from the political parties as a whole and the internal diffusion of power away from the party leadership to individual party members and officeholders.”¹⁶

¹¹ Alexis de Tocqueville, *Democracy in America* 979 (Floating Press 2009) (Henry Reeve, trans) (originally published 1840).

¹² See V.O. Key Jr, *Politics, Parties, and Pressure Groups* 210–11, 244 (Thomas Y. Crowell 1942).

¹³ See id at 243–44; Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, 54 *Houston L Rev* 845, 858 (2017).

¹⁴ See Issacharoff, 54 *Houston L Rev* at 864–66 (cited in note 13).

¹⁵ See id at 866–70.

¹⁶ Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 *Yale L J* 804, 809 (2014).

But the breaking up of central institutions extends far beyond the domain of politics—the economic conglomerates of yesterday, such as ITT and Gulf & Western, were long since dismantled in favor of independent specialized units.¹⁷ In the political domain, fragmentation is a fact of life in all democratic countries, meaning that attempts to find the causal roots at the national level will necessarily be incomplete. The process of what is termed “fissuring” in labor economics¹⁸ reflects the broad destabilization of large integrated organizations in the face of technological change, ease of communication, globalization, and other pressures on previous advantages of scale. Whether across supply markets or in the domain of politics, ease of communication and transportation puts pressure on broad horizontal organizations whose prime advantage was access to markets, economic or political. In Coasean terms, it becomes less administratively burdensome to buy rather than make, and firms can become a purer form of their particularized specialization.

The same is true in the political domain, in which access to voters and donors is no longer coordinated through the large umbrella of the political parties. Populists eschew political parties and social media allows direct appeals for both money and support.¹⁹ Part of the ability of populists to bypass established party structures is no doubt the failure of the political parties to adapt to the modern era. But the cumulative result is the decline of the parties as the locus of democratic politics and the rise of the individual-centered definition of politics. As parties fragment, a spiral ensues. Targeting specific groups of voters, activists, and donors requires more focused and generally more

¹⁷ See Gerald F. Davis, Kristina A. Diekmann, and Catherine H. Tinsley, *The Decline and Fall of the Conglomerate Firm in the 1980s: The Deinstitutionalization of an Organizational Form*, 59 *Am Sociological Rev* 547, 563 (1994) (discussing the rapid shift away from the conglomerate form in the 1980s, including Gulf & Western's reorganization as Paramount Communications); John G. Matsusaka, *Corporate Diversification, Value Maximization, and Organizational Capabilities*, 74 *J Bus* 409, 412–14 (2001) (charting acquisitions and divestments by Gulf & Western and ITT from 1958 to 1988). See also Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 *U Pa L Rev* 1907, 1921–22 (2013) (describing incentives for conglomerates to spinoff “unrelated businesses” and noting such spinoffs by Sears, CBS, DuPont, and AT&T).

¹⁸ See generally David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard 2014).

¹⁹ For a more detailed discussion of how direct-democratic procedures, such as direct appeals to voters by populist candidates, weaken political parties, see Emanuel V. Towfigh, et al, *Do Direct-Democratic Procedures Lead to Higher Acceptance Than Political Representation? Experimental Survey Evidence from Germany*, 167 *Pub Choice* 47, 49 (2016).

extreme messages. Broad-tent parties become an impediment to a new form of politics that channels passion rather than rewarding the necessarily limited returns from governance. More broadly, the disengagement from the parties leads to what Professor Emanuel Towfigh terms the “party paradox,” in which parties, though necessary to democratic functioning, become a contributing source of disenchantment with the political process: “This paradox of representation may reduce the acceptance of political decisions by the electorate and contribute to the overall disillusion with democracy.”²⁰ The result, well captured by Professor Peter Mair in his work on “hollowed out” European democracies, is that politics “has become part of an external world which people view from outside,” as opposed to the old world in which they participated.²¹

Weakened political parties do not have the institutional fortitude to withstand hostile challenges from outsiders, as evident in the United States, where President Trump and Senator Bernie Sanders (the former a marginal affiliate of the Republicans, the latter not even a member of the Democratic Party) were able to displace established party figures, and in the case of Trump, walk away with the party endorsement and ultimately the presidency. In place of programs and governance, candidacies are now centered on individuals and elections are framed as referenda on the leadership of those individuals. Even in Germany, the country that has best resisted the assault on democratic institutions, there is a noted increase in the personalization of the campaigns of Chancellor Angela Merkel.²² Candidate-driven elections are increasingly the norm in Europe as parties that emerged from the capacity to gain parliamentary representation

²⁰ Id at 48–49.

²¹ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* 43 (Verso 2013).

²² See Harald Schoen and Robert Greszki, *A Third Term for a Popular Chancellor: An Analysis of Voting Behaviour in the 2013 German Federal Election*, 23 *German Polit* 251, 251 (2014):

In the 2013 German federal election, the trend towards increased electoral volatility and fragmentation continued. . . . [I]n the 2009 election the conservative CDU/CSU fought a personalised campaign in which it aimed successfully to capitalise on Merkel's increased popularity. In the 2013 election, the CDU/CSU campaign was, once again, focused on Chancellor Merkel, who was now the unchallenged leader of her party.

are no longer needed as an electoral platform.²³ Even the desultory elections for the European Parliament witnessed an effort to attract personalities to the candidate roster in a vain attempt to boost voter turnout.²⁴ Direct candidate appeal to voters goes hand in hand with the documented fragmentation of political parties in, among other places, Bolivia, Bulgaria, Denmark, Ecuador, Finland, France, Guatemala, India, Israel, Italy, the Netherlands, and Thailand.²⁵ Mair summarizes this well:

Parties are failing, in other words, as a result of a process of mutual withdrawal or abandonment, whereby citizens retreat into private life or into more specialized and often ad hoc forms of representation, while the party leaderships retreat into the institutions, drawing their terms of reference ever more readily from their roles as governors or public-office holders.²⁶

In this sense, the desperate gambit of Prime Minister David Cameron to seek to solidify his political base by appealing to plebiscitary alternatives to parliament emerges from the failure of political discipline in the legislative setting.²⁷ It well follows the

²³ See generally Chris J. Bickerton and Carlo Invernizzi Accetti, *Democracy without Parties? Italy after Berlusconi*, 85 *Polit Q* 23 (2014) (describing fragmentation across the spectrum of Italian politics). See also Marc Bühlmann, David Zumbach, and Marlène Gerber, *Campaign Strategies in the 2015 Swiss National Elections: Nationalization, Coordination, and Personalization*, 22 *Swiss Polit Sci Rev* 15, 25 (2016) (“[T]he personalization with nationwide ‘party stars’ is a new phenomenon in Switzerland.”).

²⁴ See, for example, Hermann Schmitt, Sara Hobolt, and Sebastian Adrian Popa, *Does Personalization Increase Turnout? Spitzenkandidaten in the 2014 European Parliament Elections*, 16 *EU Polit* 347, 347–48 (2015):

The 2014 European Parliament elections were the first elections where the major political groups each nominated a lead candidate (*Spitzenkandidat*) for the Commission presidency in the hope that this would increase the visibility of the elections and mobilize more citizens to turn out.

. . .

The potential to increase political participation was . . . at the heart of the European Commission’s support for the *Spitzenkandidaten* innovation, as they hoped this could ‘contribute to raising the turnout for European elections.’

²⁵ See Pedro O.S. Vaz de Melo, *How Many Political Parties Should Brazil Have? A Data-Driven Method to Assess and Reduce Fragmentation in Multi-party Political Systems*, 10 *PLOS One* 1, 2 (Oct 14, 2015), archived at <http://perma.cc/27ZA-2EY2>.

²⁶ Mair, *Ruling the Void* at 16 (cited in note 21).

²⁷ See *David Cameron Promises In/Out Referendum on EU* (BBC, Jan 23, 2013), archived at <http://perma.cc/DAG4-RGHX> (describing pressures that Cameron faced from within his own Conservative Party and from challenger UKIP that pushed him to call for the Brexit referendum); Tom McTague, Alex Spence, and Edward-Isaac Dove, *How David Cameron Blew It* (Politico, Sept 12, 2016), archived at <http://perma.cc/X4AP-MGL2>

pattern in the European Union of seeking to alter its perceived democratic deficit through greater use of referenda and other tools of direct democracy.²⁸ Put less delicately, Nigel Farage, the leader of the UK Independence Party (UKIP), touted the Brexit vote as the story of the British people telling the political elite to stick it: “It is, after all, rather extraordinary that more than half the voting population defied a large majority of its own elected parliament, all of the traditional political parties, and virtually every important institution in the country—from the Central Bank to the leaders of industry to the trade unions.”²⁹ Nor did the Brexit fiasco prevent embattled Italian Prime Minister Matteo Renzi from turning to a constitutional referendum to shore up his government in 2016, with the same disastrous results.³⁰ The immediate need to seek political ballast through a plebiscite may reflect the momentary political crises in Britain or Italy. But the allure of referenda reflects the disenchantment with political parties, and the desperate effort to restore governing authority simply confirms the weakness of parliaments as authoritative institutions. Rather than offering a lifeline to government, these referenda are a desperate gambit reflecting the problems that gave rise to Brexit in the first place: “[T]ensions have grown in most Western nations between the existing processes of representative democracy and calls by reformists for a more participatory style of democratic government.”³¹

If Brexit highlights the perceived weakness of political parties as coordinators of democratic politics, it raises the question of the root cause of that weakness. In substantial part, the weakness follows from the simple fact that the parties cannot claim to speak for much of a constituency. In other words, they have significantly lost their participatory quality. To give but one example, in 1950, 20 percent of Britons were members of political

(describing organizational and legislative failures by Cameron’s Conservative Party preceding the Brexit referendum).

²⁸ See, for example, Andres Auer, *European Citizens’ Initiative: Article I-46.43* 1 Eur Const L Rev 79, 79 (2005) (outlining the EU’s “new device of participatory democracy”).

²⁹ Jeremy Shapiro, *Brexit Was a Rejection of Britain’s Governing Elite. Too Bad the Elites Were Right*. (Vox, June 25, 2016), archived at <http://perma.cc/9586-AQA7>.

³⁰ See Jason Horowitz, *Italy’s Premier, Matteo Renzi, Says He’ll Resign after Reform Is Rejected* (NY Times, Dec 4, 2016), online at http://www.nytimes.com/2016/12/04/world/europe/italy-matteo-renzi-referendum.html?smid=pl-share&_r=0 (visited Oct 11, 2017) (Perma archive unavailable) (“Prime Minister Matteo Renzi said he would resign after voters decisively rejected constitutional changes.”).

³¹ Russell J. Dalton, Wilhelm Bürklin, and Andrew Drummond, *Public Opinion and Direct Democracy*, 12 J Democracy 141, 141 (Oct 2001).

parties; as of 2014, that figure was about 1 percent.³² In the United States, according to the Pew Research Center's yearly studies of American political behavior, party identification is at an observed all-time low. Currently, 39 percent of Americans identify as independents, 32 percent as Democrats, and 23 percent as Republicans: "This is the highest percentage of independents in more than 75 years of public opinion polling."³³

Party failures are intrinsically connected to the demise of the institutional supports of those parties. Throughout the twentieth century, parties relied heavily on other forms of organization to provide their active constituency. For the Democratic Party in the United States, for the Labour Party in Britain, and for the social-democratic parties of Western Europe, that organizational backing came heavily from the labor unions.³⁴ For the Republicans in the United States and the Tories in Britain, and the Christian democrats and conservative parties in Europe, the organizational ties were to the chambers of commerce or other locally based representatives of small businesses and agricultural interests.³⁵

Taking the United States as an example, the decline of underlying institutions is as precipitous as the decline of parties. Union density today is at an all-time low since the New Deal created federally mandated rights of collective bargaining. Union decline captures only a part of the picture. Significant as well is the shift in composition of the unionized workforce reflected in the domination of unionization in the public sector. While about 11 percent of the American workforce is unionized, the figure for the private sector has fallen below 7 percent, while public sector unionization remains at about 35 percent.³⁶ Not only have unions declined outright, but perhaps more significantly, they have

³² *What's Gone Wrong with Democracy* (The Economist, Mar 1, 2014), archived at <http://perma.cc/2KWC-8XCH>.

³³ *Trends in Party Identification, 1939–2014* (Pew Research Center, Apr 7, 2015), archived at <http://perma.cc/N9C8-SZBM>.

³⁴ See generally J. David Greenstone, *Labor in American Politics* (Knopf 1969) (documenting American labor's symbiotic relationship with the Democratic Party through the first half of the twentieth century); Peter L. Francia, *Assessing the Labor-Democratic Party Alliance: A One-Sided Relationship?*, 42 *Polity* 293 (2010) (contrasting modern organized labor's continued support for Democratic candidates with Democratic failures to deliver pro-labor policy).

³⁵ See generally Daniel Ziblatt, *Conservative Parties and the Birth of Democracy* (Cambridge 2017) (chronicling the organizational rise of the British and German conservative parties).

³⁶ Megan Dunn and James Walker, *Union Membership in the United States* *2–4 (US Bureau of Labor Statistics, Sept 2016), archived at <http://perma.cc/5VPC-YDKB>.

ceased to be an independent source of support for political parties outside the state realm. To the extent that unions centrally become the expression of public employees, they no longer organize a constituency independent of the political realm. Instead, labor unions are largely an expression of the political party to which they are affiliated, and become another political actor whose fortunes are tied to that party's electoral capabilities.³⁷ Not surprisingly, efforts to consolidate Republican political power at the state level, as exemplified by Governor Scott Walker in Wisconsin, seek to undermine the power of public-sector unions as a proxy for the Democratic Party. These are not battles reflective of participatory engagement by diverse sectors of the society, but power struggles within the state itself.

On the other side of the ledger, we find a corresponding erosion of broadscale institutional engagement. In the United States the best example comes from the evolution of the Chamber of Commerce from the organizational representative of local enterprise to the exponent of the interests of concentrated capital: "Mention the Chamber of Commerce, and most people think of a benign organization comprised mostly of small business owners who meet for networking and mutual support in local chapters across the U.S. But today's Chamber is anything but that."³⁸ The Chamber's interests are now highly focused around a small number of industries and interests, including "tobacco, banking, and fossil fuels."³⁹ According to one article, 64 donors were responsible for more than 50 percent of all donations to the Chamber, while

³⁷ The concern over the legal implications of the distinct role of public-sector unionism in the United States goes back at least to Harry H. Wellington and Ralph K. Winter Jr., *The Limits of Collective Bargaining in Public Employment*, 78 *Yale L J* 1107, 1116, 1124–25 (1969).

³⁸ David Brodwin, *The Chamber's Secrets* (US News & World Report, Oct 22, 2015), archived at <http://perma.cc/8SJJ-E53D>. See also generally Alyssa Katz, *The Influence Machine: The U.S. Chamber of Commerce and the Corporate Capture of American Life* (Spiegel & Grau 2015).

³⁹ Brodwin, *The Chamber's Secrets* (cited in note 38):

Founded in 1912, the U.S. Chamber of Commerce has been shaped by its CEO Tom Donohue into a powerful lobbying and campaigning machine that pursues a fairly narrow special-interest agenda. It's now the largest lobbying organization in the U.S. (ranked by budget). It mostly represents the interests of a handful of so-called "legacy industries"—industries like tobacco, banking and fossil fuels which have been around for generations and learned how to parley their earnings into political influence. The Chamber seeks favorable treatment for them, for example, through trade negotiations, tax treatment, regulations and judicial rulings.

94 percent of its donations came from a pool of just 1,500 top donors.⁴⁰

Across the political spectrum, parties become tied not to broad-based constituency organizations, but to much narrower sectional interests, already well entrenched in the corridors of power. The claim of parties as a special arena of participatory engagement in the democratic project wanes accordingly. The parties emerge hollowed out, just as do their organizational bases of support.

II. DELIBERATION: THE WEAKNESS OF LEGISLATIVE BRANCHES

[Deliberative] collective decision-making ought to be different from bargaining, contracting and other market-type interactions, both in its explicit attention to considerations of the common advantage and in the ways that that attention helps to form the aims of the participants.

—Joshua Cohen⁴¹

[T]he democratic method is that institutional arrangement for arriving at political decisions which realizes the common good by making the people itself decide issues through the election of individuals who are to assemble in order to carry out its will.

—Joseph A. Schumpeter⁴²

Rarely would Professor Joshua Cohen and Joseph Schumpeter be lumped together in theories of democratic legitimacy. Yet they both look to a discursive element to raise the capacity of democratic governance to reach the common good, and to reach beyond mere sectional claims on spoils. For Cohen and the more classic deliberativist tradition, the domain of discourse is in public participation and direct engagement.⁴³ For Schumpeter and those in his tradition, myself included, elite competition in the electoral arena provides the foundations for citizen engagement and education, and the ensuing retrospective accountability for the exercise of governmental power.⁴⁴

⁴⁰ Id. See also Katz, *The Influence Machine* at xiii (cited in note 38) (discussing the “undisclosed financial contributions to the U.S. Chamber of Commerce” made by “industries that provide vital goods and services but at mounting costs to society”).

⁴¹ Joshua Cohen, *Deliberation and Democratic Legitimacy*, in Alan Hamlin and Philip Pettit, eds., *The Good Polity: Normative Analysis of the State* 17, 17 (Basil Blackwell 1989).

⁴² Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* 250 (George Allen & Unwin 1976) (originally published 1942).

⁴³ Cohen, *Deliberation and Democratic Legitimacy* at 21–26 (cited in note 41).

⁴⁴ See Schumpeter, *Capitalism, Socialism and Democracy* at 247–49 (cited in note 42).

Under either view, democratic political theory justly emphasizes the educational gains of deliberation in an engaged citizenry.⁴⁵ Even when citizens in modern democracies govern through representatives rather than as a collective body, periodic elections guarantee that citizens encounter political arguments that may be removed from their everyday lives.⁴⁶ Elections compel deliberation among the citizenry as candidates and parties attempt to sway and educate. That deliberation then translates into the legislative arena as elected officials seek to translate campaign promises into governing policies.

For present purposes, we limit our discussion to the institutionalization of deliberation in the legislative arena rather than in the lived experiences of the citizenry. Democracies are conceived around legislative power, from Magna Carta's parliamentary check on the Crown, to the expansive role of Congress defined by Article I of the Constitution, to the revolutionary emergence of parliamentary power throughout the nineteenth century. Colloquially, Americans once spoke of the Senate as the "world's greatest deliberative body."⁴⁷ It is no overstatement to say that this is the world's ennobling democratic inheritance. Or, put another way, the hallmark moments of twentieth-century authoritarian rule are intertwined with the rejection of parliamentary deliberation and with compromise in favor of the plebiscitary triumphs of a Hitler or Mussolini.⁴⁸

The legislative arena, at least in theory, is the clearest institutionalized setting for democratic deliberation. In its classic rendition, it is the arena in which "participants of deliberation, before counting votes, are open to transform their preferences in the

⁴⁵ See Cohen, *Deliberation and Democratic Legitimacy* at 18–20 (cited in note 41).

⁴⁶ Schumpeter, *Capitalism, Socialism and Democracy* at 248–49 (cited in note 42).

⁴⁷ See George Packer, *The Empty Chamber* (New Yorker, Aug 9, 2010), archived at <http://perma.cc/SR7D-72JJ>.

⁴⁸ Hitler's regime consolidated power through a number of direct referenda in the 1930s, including those withdrawing Germany from the League of Nations and combining the offices of chancellor and president into that of the *führer*. These referenda were initiated and controlled by the German executive branch. See generally Arnold J. Zurcher, *The Hitler Referenda*, 29 Am Polit Sci Rev 91 (1935). In Italy, Mussolini maneuvered to give the Fascist Grand Council the power to approve election lists throughout the 1920s, shifting the Italian parliament from a deliberative (though gridlocked) electoral body to a single-party "Corporative Chamber" approved by popular plebiscite: "Our aim is to create a Corporative Chamber without an opposition. We have no desire nor need for any political opposition." *The Fascist Grand Council and the Italian Election*, 5 Bull Intl News 3, 4 (1929) (quoting Mussolini).

light of well-articulated and persuasive arguments.”⁴⁹ On this view, the process of deliberation transforms democratic politics because it “requires the participants to display the reasons why they support a particular stand. It comprehends an exercise of mutual justification that allows a thorough type of dialogue before a collective decision is taken.”⁵⁰

Yet, in the modern era, the words “Congress” and “dysfunction” seem to go together like a horse and carriage, with some apology to Frank Sinatra. Consider that the total enacted legislation annually by the US Congress has declined considerably from the 1970s, in which as many as 804 bills were passed, to the most recently finished Congress, in which only 329 bills were passed.⁵¹ But focusing on the United States misses much of the picture. Across a number of markers, the legislative branches of mature democracies have declined as centers of policy debate and formation. In their place, executives have adopted more muscular policymaking roles, checked primarily by courts.

This is a large topic to which I have devoted an entire monograph.⁵² But for the current presentation, consider just one partial indicator of the trend over time in the United States. Since President Franklin D. Roosevelt’s fabled first hundred days in office ushered in the transformative New Deal, presidents have routinely devoted themselves to hitting the ground running, using the initial period of pride among the partisans and disorganization among the vanquished to show muscular leadership. The effort to blaze through the first hundred days has not changed, but the form has. The number of legislative initiatives of the first hundred days has dropped steadily, from seventy-six new statutes under Roosevelt, to seven and fourteen under Presidents George W. Bush and Barack Obama, respectively.⁵³ Even though, of course, presidents do not pass legislation, and even though they might often confront a Congress or a chamber with an opposition majority, the drop-off does not mean presidential

⁴⁹ Conrado Hübner Mendes, *Constitutional Courts and Deliberative Democracy* 14 (Oxford 2013).

⁵⁰ *Id.* at 15.

⁵¹ *Statistics and Historical Comparison* (GovTrack), archived at <http://perma.cc/3BVH-AT7D> (showing that the 95th Congress passed 804 bills while the 114th Congress passed 329).

⁵² See generally Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge 2015).

⁵³ Julia Azari, *A President's First 100 Days Really Do Matter* (FiveThirtyEight, Jan 17, 2017), archived at <http://perma.cc/852T-G5DF>.

inaction. While legislation has dropped, executive decrees have increased throughout the modern period. Consistent with this trend, President Trump had no significant legislative activity at all during his first hundred days in office, and the number of substantial legislative initiatives amounted to zero.⁵⁴

The failure of the participatory side of democratic politics ties directly to the difficulties encountered on the deliberative side. Parliamentary democracies are centered on the parties. Candidates run as part of a slate, and the demand for a larger share of seats in parliament is what offers the prospect of national stewardship. In theory, there are so many competing interests, and such inconsistency in potential political outcomes depending on who has control of setting the agenda and deciding what is presented in what form, that there is a risk of complete incoherence in the legislative process.⁵⁵ The cycling-of-preferences problem, the great insight of Professor Kenneth Arrow and the ensuing study of public-choice theory, threatens to collapse the capacity of any legislative body charged with policy leadership.⁵⁶ The need for coordination is apparent, with the Supreme Court long ago observing that parties emerged “so as to coordinate efforts to secure needed legislation and oppose that deemed undesirable.”⁵⁷

The result of parliamentary dysfunction is correspondingly rising executive unilateralism,⁵⁸ the increased dependence on administrative law to set policy, and the central checking role of the courts as restraints on presidentialism—even in formally parliamentary systems. Doctrinally, the absence of congressional action not only removes the central democratic branch from the reins of

⁵⁴ The major congressional actions took the form of an expedited procedure to withdraw regulatory decrees within a fast-track window. There were no new legislative initiatives of any substance. See David Leonhardt, *Donald Trump's First 100 Days: The Worst on Record* (NY Times, Apr 26, 2017), online at <http://nyti.ms/2pleYVE> (visited Oct 11, 2017) (Perma archive unavailable).

⁵⁵ See Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J Polit Economy 328, 328–31 (1950) (discussing the confusion attendant to any attempt to amalgamate the social and voting preferences of a diverse whole).

⁵⁶ See generally *id.* (laying out Arrow's impossibility theorem and the inevitability of preference cycling). See also Richard H. Pildes and Elizabeth S. Anderson, *Slingshot Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 Colum L Rev 2121, 2183–86 (1990) (arguing that institutional arrangements may mediate Arrow's predicted cycling).

⁵⁷ *Ray v Blair*, 343 US 214, 221 (1952).

⁵⁸ See generally Samuel Issacharoff and Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Approach to Rights during Wartime*, 5 Theoretical Inquiries L 1 (2004) (surveying the response of American courts in periods of crisis when the executive asserts a need for unilateral action).

government, but also makes judicial constraint more difficult. Following Justice Robert Jackson's famous *Steel Seizure* typology, the power of the executive is at its "lowest ebb" when the president seeks to countermand the actions of Congress.⁵⁹ The unstated flip side of Jackson's observation is that the pathway for judicial repudiation of executive action is correspondingly easier when Congress has blazed the trail. When Congress fails to act, the mechanisms of democratic constraint are compromised.

For Jackson, congressional inaction posed the most difficult issues for democratic governance and, by extension, for the judiciary. As he framed the problem:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.⁶⁰

In the absence of legislative initiative, executive power naturally rushes to fill the void, whether through governance by direct decree or by indirect administrative command. Without the legislative branch offsetting the powers of the executive, the job of defining the boundaries of prerogative power and regulatory authority falls to the judiciary. As Jackson cautioned, the lines of judicial engagement are least clear—the "zone of twilight"⁶¹—when there is institutional failure in the legislature, and the "least dangerous branch" finds itself at risk of open conflict with the executive.⁶²

There is nothing distinctly American about hypertrophic executive power in the modern era. Even before the UK Supreme

⁵⁹ *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 636–38 (1952) (Jackson concurring).

⁶⁰ *Id.* at 637 (Jackson concurring).

⁶¹ *Id.* (Jackson concurring).

⁶² How this conflict plays out is the subject of Rosalind Dixon and Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 Wis L Rev 683, 706.

Court had to engage the authority of the prime minister to implement Brexit, a topic to which I shall return in concluding,⁶³ the British government confronted the military consequences of executive unilateralism in the disastrous Iraqi campaign.⁶⁴ One proposal, from the House of Lords Select Committee on the Constitution, would have implemented limitations similar to those of the American War Powers Act,⁶⁵ obligating parliamentary approval for any long-term military engagement.⁶⁶ As future Prime Minister Gordon Brown observed at the time, “Now that there has been a vote on these issues so clearly and in such controversial circumstances, I think it is unlikely that except in the most exceptional circumstances a government would choose not to have a vote in Parliament [before deploying troops].”⁶⁷ The lack of accountability and the absence of parliamentary engagement was confirmed by the 2016 Chilcot Report, whose many condemnations of Prime Minister Tony Blair included criticism of unilateral decisionmaking by the executive.⁶⁸

It is not possible in this one exposition to engage the extensive discussions at the level of national democracies on parliamentary failure to check the executive. A review of the literature shows a persistent theme among both academic commentators and pundits to be the collapse of responsible government at the

⁶³ See notes 108–12 and accompanying text.

⁶⁴ See generally House of Lords Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility* (HL Paper 236-I, July 26, 2006), archived at <http://perma.cc/MF99-F78K>.

⁶⁵ Pub L No 93-148, 87 Stat 555 (1973), codified as amended at 50 USC § 1541 et seq.

⁶⁶ *Waging War* at *5 (cited in note 64) (“The purpose of our inquiry has been to consider what alternatives there are to the use of the Royal prerogative power in the deployment of armed force . . . and in particular whether Parliamentary approval should be required for any deployment of British forces outside the United Kingdom.”). In the following years, the interplay between the prime minister and Parliament developed informally, until the point in 2014 when “the prime minister acknowledged that a convention of Commons approval now existed.” Philippe Lagassé, *Parliament and the War Prerogative in the United Kingdom and Canada: Explaining Variations in Institutional Change and Legislative Control*, 70 *Parliamentary Aff* 280, 289 (2017).

⁶⁷ *Brown Calls for MPs to Decide War* (BBC News, Apr 30, 2005), archived at <http://perma.cc/86MH-QDHX>.

⁶⁸ See *The Report of the Iraq Inquiry: Executive Summary*, HC 264, 58, 83 (July 6, 2016), archived at <http://perma.cc/H5T3-EWNR> (critiquing Blair’s actions, the report noted that “there should have been a collective discussion by a Cabinet Committee or small group of Ministers on the basis of inter-departmental advice agreed at a senior level between officials at a number of decision points which had a major impact on the development of UK policy before the invasion of Iraq”).

parliamentary level.⁶⁹ The causes for that collapse identified in the academic literature include concerns about thresholds of representation, party fragmentation, increasing presidentialism and semipresidentialism, and the displacement of parliamentary authority by international accords or, in the case of Europe, the overreach of Brussels.⁷⁰ Pundits are more inclined to point to the venality or corruption of parliamentary officials, though in some countries, such as Brazil, the two come together.⁷¹

⁶⁹ See, for example, Michael Foley, *The British Presidency: Tony Blair and the Politics of Public Leadership* 108 (Manchester 2000) (noting “that Blair and his followers operated on the assumption that parliament was no longer a central force of political significance”); Zachary Karabell, *How the GOP Made Obama One of America's Most Powerful Presidents* (Politico, Apr 14, 2016), archived at <http://perma.cc/AN8D-BBHE> (positing that Republicans in Congress as “the so-called Party of No only provoked the Obama administration into finding innovative ways to exercise [greater unilateral] power . . . Rather than containing the White House, congressional Republicans liberated it”).

⁷⁰ See generally, for example, Anu Bradford, *The Brussels Effect*, 107 Nw U L Rev 1 (2012) (describing how regulations passed in Brussels can result in the globalization of standards); Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 Colum L Rev 1689 (2015) (synthesizing political science literature about congressional polarization); Mattias Kumm, *The Legitimacy of International Law: A Constitutional Framework of Analysis*, 15 Eur J Intl L 907 (2004) (discussing conflicts between international law and national domestic self-government); Juan J. Linz, *The Perils of Presidentialism*, 1 J Democracy 51 (Winter 1990) (arguing that presidentialism is less conducive to democracy than parliamentarism); Melanie Amann, Thomas Darnstädt, and Dietmar Hipp, *Is Germany's Parliamentary Hurdle Obsolete?* (Spiegel Online, Oct 4, 2013), archived at <http://perma.cc/9GG5-RT8Z> (surveying political scientists' critiques of the Bundestag's 5 percent hurdle to seat parties). See also, for example, Pildes, 124 Yale L J at 809 (cited in note 16) (positing that political fragmentation is a cause of recent government dysfunction, such as “the inability of party leaders to bring along recalcitrant minority factions of their parties”).

⁷¹ An astonishing number of Brazil's members of Congress have faced indictment in recent years. See, for example, Anthony Boadle and Alonso Soto, *Brazil's Indicted Senate Head Removed by Supreme Court* (Reuters, Dec 5, 2016), archived at <http://perma.cc/34HH-ER3N> (reporting the removal of the Senate president following an indictment); Paul Kiernan, *Brazil Former Official Is Sentenced*, Wall St J A7 (Mar 31, 2017) (reporting the sentencing of the former House Speaker Eduardo Cunha to prison for corruption “in a case that has landed scores of politicians and businessmen behind bars”); Dom Phillips, *Prominent Leader Is Sentenced in Brazil*, NY Times A9 (Mar 31, 2017) (reporting the sentencing of the former House speaker to “one of [the] stiffest penalties meted out to a top political figure in Brazil in recent years,” as part of an investigation that “has shaken Brazil's political and business establishments to their core”). The problem is not limited to Congress, as shown by the conviction and sentencing of former President Luiz Inácio Lula da Silva, see Ernesto Londoño, *Ex-President of Brazil Sentenced to Nearly 10 Years in Prison for Corruption* (NY Times, July 12, 2017), online at <http://www.nytimes.com/2017/07/12/world/americas/brazil-lula-da-silva-corruption.html> (visited Oct 11, 2017) (Perma archive unavailable), and by the explosive public removal trial of current President Michel Temer, resulting in a divided vote of the Electoral Court on his removal. See Simon Romero and Dom Phillips, *Court in Brazil Clears President Michel Temer in Campaign Finance Case* (NY Times, June 9, 2017), online at <http://www.nytimes.com/2017/06/09/world/americas/brazil-michel-temer.html> (visited Oct 11, 2017).

Parliamentary democracies are centered on the parties. Candidates run as part of a slate and the demand for a larger share of seats in parliament is what offers the prospect of national stewardship. The collapse of parliaments compounds the consequences of the collapse of parties, and the two are both the cause and effect of each other. Invariably, the locus of political activity shifts to the executive, and the defining feature of democratic politics turns to the triumphalist claims of the victorious head of state. Consider this account of contemporary politics:

What we are seeing in the presidential campaigns . . . is that the more chance the candidates have of winning—or the more chance they think they have of winning—the more they are prepared to play the game that I call “national presidentialism.” They go in for speeches that amount to saying: “If I’m elected, then everything . . . is going to be different because I’m the only one able to lead this country.” . . . All that matters is how the candidate is going to be able to restore [the nation’s] image once he or she has been given supreme power.⁷²

This account of contemporary politics would ring true in many democracies around the world, the United States clearly included. In my native Argentina, such “caudillo politics”⁷³ has generally been the mark of the demise of democracy rather than its fulfillment. That this particular statement happens to be about France and that the speaker is Daniel Cohn-Bendit, the leader of the 1968 student uprising, only makes it a bit more piquant.⁷⁴

(Perma archive unavailable). See also Dom Phillips, *President Michel Temer of Brazil Is Charged with Corruption* (NY Times, June 26, 2017), online at <http://www.nytimes.com/2017/06/26/world/americas/brazil-temer-corruption-charge-joesley-batista.html> (visited Oct 11, 2017) (Perma archive unavailable) (detailing new bribery allegations against Temer).

⁷² Daniel Cohn-Bendit, *Presidentialism: The French Disease* (Esprit, Feb 22, 2012), archived at <http://perma.cc/BCS7-HHDT>.

⁷³ The *caudillo* is the military man on a horse leading a highly personalized political movement based on swashbuckling individual authority, rather than lasting political institutions. The nineteenth-century form of caudillo command, called the *caudillaje*, is the precursor of both populism and military rule. See Eric R. Wolf and Edward C. Hansen, *Caudillo Politics: A Structural Analysis*, 9 *Comp Stud Society & Hist* 168, 168–69 (1967). See also Diego von Vacano, *Trump Embraces Caudillo Politics as Latin America Shuns It* (NBC News, Nov 22, 2016), archived at <http://perma.cc/4MMG-4TAV>.

⁷⁴ See Cohn-Bendit, *Presidentialism* (cited in note 72).

III. SOLIDARITY: THE THREATS TO SOCIAL COHESION

A central theme of my work on *Fragile Democracies* concerns the inherent difficulty in democratic governance in the absence of a democratic polity. Strikingly, and perhaps paradoxically, elections are seen in post–World War II state formation as the means toward the creation of a democratic state rather than a system of choice among those already committed to a common enterprise of collective governance.⁷⁵ In countries emerging from colonial rule or despotic regimes, elections were the confirmation of a democratic transformation, even as they often served as the marker of who would hold state authority in a world of unfinished “us-versus-them” business.⁷⁶ Our era of diversity may applaud the benefits of such broad democratic aspirations, but citizens of Burundi or Bosnia-Herzegovina or Iraq would well understand the frailties of democracy without a solidaristic commitment to a collective future.

The role of communitarian solidarity suffers from the traumas of the twentieth century, from Nazism to the ethnic slaughter in the Balkans. One reads back with horror at Carl Schmitt proclaiming that “[d]emocracy requires [] first homogeneity and second . . . elimination or eradication of heterogeneity.”⁷⁷ The unmistakable message is that “[a] democracy demonstrates its political power by knowing how to refuse or keep at bay something foreign and unequal that threatens its homogeneity.”⁷⁸

Yet, a look back at our democratic inheritance shows how central earlier generations thought the sense of shared identity, and that the ties between social cohesion and self-government are not an invention of twentieth-century reaction. In the background of the Founding documents of constitutionalism in the United States is the claim, no doubt jarring from a slave society, that the American blessing of liberty could be traced to the conception of homogeneity of the population, a claim that hauntingly echoes in Schmitt. In the words of John Jay, in *Federalist 2*:

Providence has been pleased to give this one connected country, to one united people, a people descended from the same ancestors, speaking the same language, professing the same

⁷⁵ See Issacharoff, *Fragile Democracies* at 2 (cited in note 52).

⁷⁶ See *id.* at 2–3.

⁷⁷ Carl Schmitt, *The Crisis of Parliamentary Democracy* 9 (MIT 1988) (Ellen Kennedy, trans) (originally published 1923).

⁷⁸ *Id.*

religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms and efforts, fighting side by side throughout a long and bloody war, have nobly established their general Liberty and Independence.⁷⁹

Jay may today be the least celebrated of the authors of *The Federalist Papers*, but the sentiment was widely shared, with John Stuart Mill later extending the argument to make it not simply an observation about America but a prerequisite for democracy: “Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion necessary to the working of representative government can not exist.”⁸⁰

Liberal theorists, notably including John Rawls, continued into the twentieth century the tradition of making claims for just treatment of citizens turn, at least in part, on a shared sense of “political traditions and institutions of law, property, and class structure, with their sustaining religious and moral beliefs and underlying culture. It is these things that shape a society’s political will.”⁸¹ The arguments do not sound in the need for consanguinity so much as the continued importance of a sense of collective identity in order to sustain citizen self-government. Democratic politics has long provided a critical forum in which solidarity could blossom. Across democratic societies, political parties provided the organizational framework for sports leagues, adult education projects, and newspapers—all of which served as intermediaries between citizens and the broader society. These agencies of civil society are weakened and leave citizens increasingly disengaged from political life, as reflected in declining voter participation rates across the democratic world. The problem of a lack of collective identity is more acute at the higher levels of efforts at European governance being compromised by trying to craft a democracy without a *demos*.

Among the contemporary challenges in advanced democratic societies are significant erosions in the sense of collective solidarity that provided the historic glue for the common project

⁷⁹ Federalist 2 (Jay), in *The Federalist* 8, 9 (Wesleyan 1961) (Jacob E. Cooke, ed).

⁸⁰ John Stuart Mill, *Considerations on Representative Government* 344–45 (Floating Press 2009) (originally published 1861).

⁸¹ John Rawls, *The Law of Peoples* 106 (Harvard 1999).

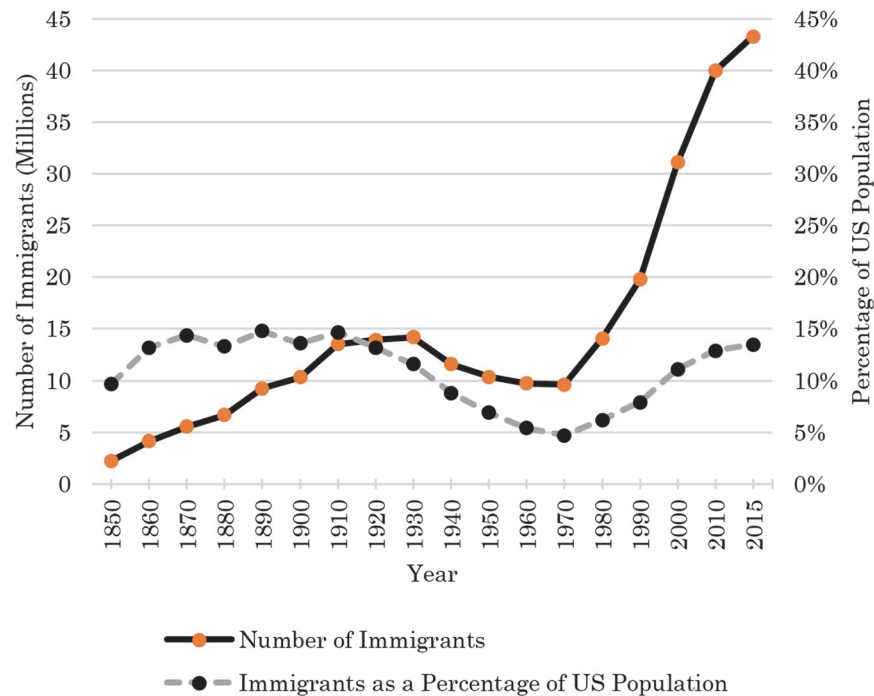
of democratic governance. For immediate purposes, I focus on two: the challenge of immigration and the challenge of declining living standards of the broad mass of the population—the toilers and voters of democratic states. There are many manifestations of contemporary social dissolution. But the combination of economic insecurity and the presence of perceived outsiders seems invariably to lead to fear of the other as taking over and blame on the other for a corresponding loss in social standing and wealth. The point here is not the normative claim that this sense is or is not justified, or even the positive claim of a causal relation between immigration and economic malaise. Rather, the issue is the democratic challenge posed by widespread sentiments among the laboring classes of being under siege. There is not a populist movement in a western democracy at present that does not play to both xenophobia and economic insecurity. The immediate question is why these strains have such force at present, and why they seem to operate in tandem.

While the answers are no doubt complex, they must begin with an assessment of the empirical realities of modern democratic societies, still reeling from the financial meltdown of 2008. The brute fact is that there is a loss of cohesion that accompanies high periods of immigration until the new immigrants are integrated into the national consensus.⁸² What Americans celebrate as the melting pot is undoubtedly a process of change and recreation of the national identity, but provides for mechanisms of integration of waves of immigrant populations. Even in the best of circumstances, the process of integration and the corresponding accommodation of prior governing values will take time. What hopefully ends up a richer cultural environment (oftentimes with side improvements from food to music) invariably begins as a project of social and linguistic strain.

Taking the United States as the key example, Figure 1 shows that there is no escaping the fact that immigration has risen dramatically in the past quarter century and that the level of foreign-born Americans is at its highest in a century—precisely the time of the last great burst of nativist populism in the United States.

⁸² See Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 *Scandinavian Polit Stud* 137, 141–54 (2007) (discussing the relationship between diversity—and, by extension, immigration—and social isolation in American communities). See also Dora L. Costa and Matthew E. Kahn, *Civic Engagement and Community Heterogeneity: An Economist's Perspective*, 1 *Persp Polit* 103, 105–07 (2003) (charting heterogeneity and voluntary civic participation in twentieth-century America).

FIGURE 1. NUMBER OF IMMIGRANTS AND THEIR SHARE OF THE TOTAL US POPULATION, 1850–2015⁸³



What is striking here, apart from any concerns about the distribution of immigrant labor skill levels, or even the number of legal versus illegal immigrants, is just the sheer number. The last immigration-fueled nativist turn transformed American politics for a generation, including closed-border constraints on immigration, isolationist politics, and even Prohibition directed at the drinking habits of recent immigrants.

The challenge of immigration emerges politically in tandem with the sense of loss in the economic sphere. In what is referred to as the “elephant curve,” produced by the World Bank and reproduced in Figure 2 below, there is a graphic depiction of a global redirection of wealth over the twenty-year period leading into the

⁸³ *US Immigrant Population and Share over Time, 1850–Present* (Migration Policy Inst), archived at <http://perma.cc/3Q6T-6AY8>.

financial meltdown, perhaps as significant as any ever recorded.⁸⁴ The graph shows a stunning rise in the real incomes of the great majority of the world's population, with huge numbers being lifted from poverty—primarily, though not exclusively, the result of the Chinese economic transformation.

FIGURE 2. GLOBAL INCOME GROWTH FROM 1988 TO 2008⁸⁵



With the exception of the very poorest of the poor, the past thirty years have witnessed a transformation of lives around the world from extreme poverty to levels of income, health, material possessions, and life prospects that begin to challenge those of the advanced industrial democracies. The graph further reflects the rise of finance and the dominance of the top 1 percent, a subject of democratic challenge for some form of equitable redistribution. But the most important part of this chart is the downward curve at which real levels of income variously increased at significantly lower rates, stagnated, or even decreased over the same twenty-year period. This is the two deciles of the world's population found

⁸⁴ See Branko Milanovic, *Global Income Inequality by the Numbers: In History and Now* *7–8 (World Bank 2012), archived at <http://perma.cc/Q3U3-5EL8> (comparing different measures of global inequality and concluding that the period of globalization running from 1988 to 2008 witnessed “a decline in global inequality” for “perhaps [] the first time since the Industrial Revolution”).

⁸⁵ *Id.*

at roughly the 65th to 85th percentiles of world income distribution. That group is roughly the working classes and lower middle classes of the advanced industrial countries that form the longest-standing core of democratic societies.

As a normative matter, redistribution from wealthier nations to poorer ones in a period of rising wealth must be applauded. The economic dislocations in the advanced industrial countries translate on the ground into hundreds and hundreds of millions of people being lifted from truly destitute conditions. But the global processes that have done much to alleviate human suffering do not dampen the consequences of the inability of the advanced societies to cushion the domestic effects of international migration and global economic integration or to redistribute internally from the winners to the losers of globalization.

The democratic sense of solidarity comes under siege as the laboring backbones of the advanced industrial countries find themselves challenged by a lost sense of recognizing their country amid rapidly changing demographics. It also comes as the rest of the world is exerting downward pressures on their living standards and as wealth shifts markedly to other parts of the world. As voters, these threatened groups in advanced societies were the backbone of the major parties of twentieth-century democracy—the labor and social-democratic parties on the left, and the Christian democratic and center parties on the right.

Both labor and the center-right parties were traditionally cautious to be negative on immigration and cross-border trade.⁸⁶ While their policies differed, each saw a central part of its political role as protecting the always vulnerable working class and small entrepreneurial class, including the highly subsidized agricultural classes in countries like France, from economic dislocation. Both immigrants and the entry of cheaper goods from abroad threatened the less dynamic sectors of the advanced world economies. This is especially true for the working classes. Private-sector labor unions saw immigration as a source of downward pressure

⁸⁶ This tradition is clearest in the breach. See Thomas R. Rochon and Ravi Roy, *Adaptation of the American Democratic Party in an Era of Globalization*, 31 *Intl J Polit Economy* 12, 18–24 (Fall 2001) (documenting the Democrats' shift from a primarily working-class to middle-class party and the ensuing changes in trade policy in the 1990s). Thus NAFTA was pitched by not only the Reagan and Bush administrations, but by the Clinton administration as protecting not only jobs but ensuring popular demand for accessible consumer goods. See Michael Wilson, *The North American Free Trade Agreement: Ronald Reagan's Vision Realized* (Heritage Foundation, Nov 23, 1993), archived at <http://perma.cc/6Q46-LFN5>.

on wages and resisted it as such. By contrast, public-sector unions primarily attend to the level of government expenditures on employment and tend to be neither protectionist on trade nor cautious on immigration.⁸⁷ When we look to the upper Midwest voting for President Trump, the decayed industrial north of England voting for Brexit, or the frayed industrial towns of northern France voting for the National Front, the message of governmental failure to provide for basic social security rings loudly. And, when coupled with the sense of the traditional institutions being disengaged from working class concerns, the field is left open to populist anger, whether from the right or left.

Indeed, the message resonates in those communities feeling left behind. One simple measure in the United States is to break down the vote by county, the basic unit of local governance. Trump won roughly five times as many counties as Hillary Clinton, but the counties that Clinton won included almost all the largest and most dynamic urban areas of the country—indeed, although a numerical minority, the counties won by Clinton generated 64 percent of the national gross domestic product.⁸⁸ In Britain, the same pattern obtained in the Brexit vote. Leaving aside Scotland and the eastern precincts of Northern Ireland (where voters were probably more inclined to leave the United Kingdom than the European Union), the Brexit vote matched the economic prospects of the local populations. Brexit lost in London and the relatively prosperous South, and carried most of the rest of the country, save for a few areas of economic resurrection in Manchester and Liverpool.⁸⁹ Put another way, Brexit was the dominant choice of those over forty, the generations that had felt declining wage

⁸⁷ See, for example, Alana Semuels, *Why Are Unions So Worried about an Upcoming Supreme Court Case?* (The Atlantic, Jan 8, 2016), archived at <http://perma.cc/AQU2-EQHG> (noting the argument that a change to public-sector unions' fee structures would pressure them to take more "hardline negotiating positions" on issues like salaries in order to prove their worth to employees).

⁸⁸ See Mark Muro and Sifan Liu, *Another Clinton-Trump Divide: High-Output America vs Low-Output America* (Brookings, Nov 29, 2016), archived at <http://perma.cc/63QB-BS4J>; Jim Tankersley, *Donald Trump Lost Most of the American Economy in This Election* (Wash Post, Nov 22, 2016), archived at <http://perma.cc/3U86-WRUD>.

⁸⁹ See *EU Referendum: The Result in Maps and Charts* (BBC, June 24, 2016), archived at <http://perma.cc/4JN2-55SM>.

prospects, but not the generation under forty.⁹⁰ Comparable distributions could be found in the French presidential elections, as well.⁹¹

The groups threatened by declining economic prospects, a sense of isolation in their own countries, and the combined effects of foreign threat delivered Brexit and Trump's victories in the upper Midwest. Now feeling vulnerable, these voters are increasingly deserting their former political affiliations in favor of angry populist reactions, frequently led by demagogic appeals to isolation and the sense of lost horizons. From Brexit to Italy's Five Star Movement to Trump to the National Front to Spain's Podemos, the trends are dramatic. The historic array of postwar political parties offered neither economic security nor a sense of political protection from outsiders, and were displaced by those much closer to the sense of populist dismay.

In particular, the financial crisis of 2008 appears to have been the defining blow that exposed the frailty of democracies. The sudden economic dislocation stressed the already weak political institutions of governance and the ability of traditional political parties to offer prospects of remediation.⁹² For the laboring classes of the advanced democracies, for whom the decades leading to 2008 had often offered a steady decline in relative real-wage growth, confidence in any remnant of the political status quo to cushion the further postcrisis economic decline was exceedingly low.⁹³ Without functioning politics, democracies are ill prepared

⁹⁰ See *id.*

⁹¹ While President Emmanuel Macron bested Marine Le Pen in all but two departments during the final round of voting, Le Pen's support was strongest in the rural, deindustrialized northeast and the southern coast. *French Presidential Election May 2017—Full Second Round Results and Analysis* (The Guardian, May 26, 2017), archived at <http://perma.cc/6VKE-8BPS>.

⁹² See Steven Mufson, *Why Obama Says Bank Reform Is a Success but Bernie Sanders Says It's a Failure* (Wash Post Wonkblog, Mar 7, 2016), archived at <http://perma.cc/6N6T-9BSN> (discussing internecine debates surrounding the failure to prosecute bankers and break up banks postcrisis). See also Justin Fox, *What We've Learned from the Financial Crisis* (Harvard Business Review, Nov 2013), archived at <http://perma.cc/9L4E-TP4L> (noting how "unanimity [of opinion on macroeconomic policy] quickly unraveled" among economists after the 2008 financial bailout).

⁹³ For an exploration of the postcrisis class rift on the American right, see Vanessa Williamson, Theda Skocpol, and John Coggin, *The Tea Party and the Remaking of Republican Conservatism*, 9 *Persp Polit* 25, 32–34 (2011) (noting that Tea Party conservatives' embrace of social-safety-net spending is at odds with Republican orthodoxy). See also David Frum, *The Great Republican Revolt* (The Atlantic, Jan–Feb 2016), archived at <http://perma.cc/Y2CD-TBDZ> (tracking the class divide in the Republican Party through Trump support in the 2016 primary).

to offer security, redistribution, or optimism about life prospects for their citizens. That huge numbers of the populations of the democratic countries no longer trusted in the solidaristic commitment of the society or its capacity to protect them fueled the current populist backlash.

IV. GETTING IT DONE

Democratically produced laws are legitimate and authoritative because they are produced by a procedure with a tendency to make correct decisions.

—David M. Estlund⁹⁴

Over the past two centuries, democracies have outfought, out-innovated, and outproduced their rivals. With singular capacity, democracies raised the living standards of the broad masses of their populations, raised education levels to permit citizen engagement, and at the same time were able to trust powerful militaries to protect them from foreign assault without succumbing to military rule. History is obviously much more complicated and this is a somewhat tendentious reading, but it captures the ideological consensus that prevailed after the collapse of the Soviet empire and the brief era of presumed democratic universalism.

As Professor Branko Milanovic's elephant curve chart on income distribution⁹⁵ shows, however, the optimistic story is under serious challenge. The China/Singapore models⁹⁶ of authoritarian rule coupled with high state competence highlight an emerging feature of democracies: the presence of multiple veto points blocking the creation of public goods and equitable policies. Mature democracies include mechanisms of transparency, due process, and participation that provide an entry point for private interests to

⁹⁴ David M. Estlund, *Democratic Authority: A Philosophical Framework* 8 (Princeton 2008).

⁹⁵ See note 84 and Figure 2.

⁹⁶ In Singapore, initial firm state oversight of financial and labor markets coupled with aggressive solicitation of foreign investment achieved rapid growth in the decades following independence. See generally W.G. Huff, *What Is the Singapore Model of Economic Development?*, 19 *Camb J Econ* 735 (1995). While China's general rise is well known, less focus has been placed on its advances in infrastructure. It has spent 8.5 percent of its GDP since the 1990s on infrastructure, and now outpaces both the United States and the European Union in absolute spending. While gains are lopsided by sector, it has rapidly built its infrastructure stock to compete with developed nations. See Yougang Chen, Stefan Matzinger, and Jonathan Woetzel, *Chinese Infrastructure: The Big Picture* (McKinsey Q, June 2013), archived at <http://perma.cc/3U7V-2SF7>.

block undesired governmental action.⁹⁷ Under such circumstances, it is easier to block than to build and the result is to raise the costs of public endeavors dramatically. Fukuyama terms this the rise of “vetocracy,” defined as “a situation in which special interests can veto measures harmful to themselves, while collective action for the common good becomes exceedingly difficult to achieve. Vetocracy isn’t fatal to American democracy, but it does produce poor governance.”⁹⁸ Easy confirmation can be found in the wobbly efforts of the Republicans in the US Congress to pass from a party of opposition to a party of governance on their signature demand for the repeal of the Affordable Care Act.⁹⁹ After seven years of campaigning on a promise to repeal Obamacare, a clear Republican majority in the House of Representatives had trouble even proposing legislation to be submitted to a congressional vote.¹⁰⁰

The central claim to superior competence of democracies is not the process of governance but the outputs that result; deliberation is necessarily slower and more complicated than decree. At some point, however, deliberation is not a process of citizen inputs but a public-choice nightmare in which vested sectional interests can marshal resources to overwhelm the passive majority. The result is a failure of public policy leadership and a collapse into rewards for privileged access to the strongest forces in government, almost invariably the executive. As I have described the process elsewhere, “the ‘three C’s’ of consolidated power take hold: clientelism, cronyism, and corruption.”¹⁰¹ The result is “weak democracies with autocratically minded leaders, who govern through informal, patronage networks [C]lientelism binds many citizens to ruling elites through cooptation and coercion.”¹⁰² Such failing democracies have no necessary organizational superiority to more decisive regimes, and indeed the presence of numerous veto points to action may actually make democracies less capable.

⁹⁷ See Francis Fukuyama, *The Failed State*, Prospect 30, 31 (Jan 2017).

⁹⁸ Id at 31.

⁹⁹ Patient Protection and Affordable Care Act, Pub L No 111-148, 124 Stat 119 (2010).

¹⁰⁰ See Alexander Bolton, *GOP Facing Likely Failure on ObamaCare Repeal* (The Hill, Sept 25, 2017), archived at <http://perma.cc/M3W9-5SP3> (discussing Congressional Republicans’ likely prospect of failing in a “nine-month odyssey” to repeal Obamacare).

¹⁰¹ Issacharoff, *Fragile Democracies* at 158 (cited in note 52).

¹⁰² Balkans in Europe Policy Advisory Group, *The Crisis of Democracy in the Western Balkans. Authoritarianism and EU Stabilitocracy* *7 (Mar 2017), archived at <http://perma.cc/3W9S-3SM8>.

Consider an example from major new airport construction, a massively complex undertaking that has not even been attempted in the United States since the opening of the Denver airport in 1995. An international traveler to Beijing cannot help but be awed by the majestic beauty of the Terminal 3 international arrivals. Built for the opening of the Beijing Olympics, and designed by English architect Norman Foster, its dramatic arches evoke both the red lacquer motifs of Imperial China and the bird's nest design of the Olympic stadium. The new terminal was constructed, from design to completion, in four years, a massive effort that included three work crews a day, laboring on rotating eight-hour shifts.¹⁰³

By contrast, compare Terminal 3 with Heathrow's Terminal 5 in London. Like Terminal 3 in Beijing, Heathrow's Terminal 5 is designed by Norman Foster. Yet it is at best functional, a desperately needed additional space for an overcrowded airport. It has no grandeur, no inspiration, no sense of tribute to a rising power—and it took twenty years to complete.

When pressed about this in a BBC interview, Foster acknowledged the gains in completion time in China from more efficient labor use, lower regulatory demands, ease of siting, and a host of other factors. But even on Foster's account, there were years of delay that could not be accounted for. Instead what emerges is the capacity of Chinese authorities to simply get the job done: "[Y]ou've taken out the democratic process, you've taken out the plan, so that comes down to decision making, it comes down to having a very, very clear idea of objectives and getting on with it."¹⁰⁴ At the end of the day, the capacity to produce turned on the difficulties of democracy, an observation that challenges democratic claims of superior capacity. Thus, Foster contrasts the British perspective—" [O]h well, it took a long time but we are a democratic society"—with the societal "hung[er] for change and [] for progress" driving rapid production in China.¹⁰⁵

Of course, my home airport in New York is LaGuardia, which makes Terminal 5 look like paradise. Among New York's signature contributions to democratic dysfunction is the much ballyhooed opening of the Second Avenue subway extension in 2017, a mere eighty-eight years after it was initially proposed. Even more

¹⁰³ *BBC Dream Builders with Norman Foster* *10 (Foster + Partners, June 16, 2013), archived at <http://perma.cc/G5V6-W3R7>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at *10–11.

striking than the delay were the extravagant costs, themselves a self-imposed problem of poor governance. Digging a subway in a dense urban environment necessitates disrupting delivery of gas, water, telecommunications, and so forth. Doing so efficiently in turn requires coordination so that service disruptions and alternative sources can be adjusted. The builder of the subway found coordination among the various utilities and regulatory agencies that covered each service so daunting that it decided the only solution was to dig deep into the bedrock of Manhattan so as to avoid having any contact with any other utilities or administrators.¹⁰⁶ The result is that more than eighty years after first proposed, the Second Avenue subway finally opened in 2017, encompassing a total of four subway stops, running a grand total of about three kilometers, and pricing in at a whopping figure of almost \$2 billion per kilometer.¹⁰⁷

The capacity to cushion the dislocations of the modern global economy and the press of immigration is another measure of state competence. Germany's capacity to integrate the former East Germany confirms the difficulty of the enterprise, even among people who already shared a language and a clear national identity. It is here that all the themes of democratic stress come together. The inability of institutional political actors to debate policy, to appeal to collective interest, and to assure through competent leadership all drain the vitality of the democratic project. Populist anger is stoked by state incompetence and increased clientelism for those with privileged access to the executive. Weakened forms of participation and deliberation, in turn, compound the sense of democratic failure.

CONCLUSION

The picture of democracy presented here is certainly somber, but it need not be funereal. The identified deficits in democratic governance are serious, no doubt. But the advanced industrial democracies are sophisticated societies with great internal resources. Three are worth noting here because they are significant sources of resilience. Undoubtedly there are many more, but these

¹⁰⁶ Matthew Yglesias, *NYC's Brand New Subway Is the Most Expensive in the World—That's a Problem* (Vox, Jan 1, 2017), archived at <http://perma.cc/XT5A-BJJZ>.

¹⁰⁷ See Alon Levy, *US Rail Construction Costs* (Pedestrian Observations, May 16, 2011), archived at <http://perma.cc/MNW2-RWKB>.

three flow immediately from the discussion above, and the last points back to the rule of law, a topic thus far not addressed.

First, waves of populist anger tend to be conjunctural. The immediate spark for the latest political tide appears to be the consequences of the financial crisis of 2008. Economic recovery is the likeliest source of any easing of enraged politics. But populist reaction translates poorly into governance, as the US Republican Party has shown in its hesitating transition from opposition to ruling. The current populist wave began at least a decade earlier in Latin America than in Europe or the United States, and it is now sputtering out amid corruption scandals and the inability to achieve deliverance.

Second, democratic states abound in civil-society institutions that resist the anti-liberalism of caudillo politics. One of the main failings of the Founding constitutional vision in the United States was the lack of any space for intermediating institutions that stood between the state and the citizenry. Tocqueville's observations about the notable abundance of association in the young Republic may be generalized to all democratic countries, including the more state-oriented political orders of Europe. Even a strict Montesquieu-inspired division of government powers proved not to anticipate the manner in which democratic societies function. From the press to community associations to political parties to churches there is far more resilience than just a formal account of the separation of powers between the legislature and the executive.

Third, democratic societies develop thick legal institutions bounded by the rule of law. Moments of populist passion confront constitutional constraints and the restraining force of constitutional courts, as I addressed at length in *Fragile Democracies*.¹⁰⁸ The Brexit vote provides a useful illustration. Although advocacy for popular initiatives in Britain has a long history, going back at least to Professor A.V. Dicey more than a century ago,¹⁰⁹ the process is relatively unutilized and the relation between the subjects of referendum and ensuing governmental action remains unclear. As the House of Lords Select Committee on the Constitution concluded, "[W]e regret the *ad hoc* manner in which referendums

¹⁰⁸ See Issacharoff, *Fragile Democracies* at 189–278 (cited in note 52).

¹⁰⁹ See generally A.V. Dicey, *Ought the Referendum to Be Introduced into England?*, 57 *Contemp Rev* 489 (1890).

have been used, often as a tactical device, by the government of the day.”¹¹⁰

In the aftermath of Brexit, Prime Minister Cameron departed the scene and a chastened Tory government formed under Prime Minister Theresa May, itself further weakened by a disastrous gamble on rapid-fire elections. The government allowed the Brexit vote to stand as the will of the people and took the first steps toward unwinding Britain’s participation in the European Union. This provoked a legal challenge leading to a remarkable discussion in the UK Supreme Court on the nature of British democratic governance. In an approach that hearkens back to Justice Jackson’s careful dissection of the delicate balance of powers between the executive and the legislature, the Court framed the inquiry: “[The] Act envisages domestic law, and therefore rights of UK citizens, changing as EU law varies, but it does not envisage those rights changing as a result of ministers unilaterally deciding that the United Kingdom should withdraw from the EU Treaties.”¹¹¹

That a weak government had appealed directly over the head of Parliament to enraged voters did not alter the institutional commitments to the democratic supremacy of Parliament. Nor could the prime minister invoke plebiscitary approval as a substitute for proper institutional process:

The question is whether that domestic starting point, introduced by Parliament, can be set aside, or could have been intended to be set aside, by a decision of the UK executive without express Parliamentary authorisation. We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation. This conclusion appears to us to follow from the ordinary application of basic concepts of constitutional law to the present issue.¹¹²

Rule-of-law principles may not serve to brake the more worrisome manifestations of populist anger. In some countries, as in

¹¹⁰ House of Lords Select Committee on the Constitution, *Referendums in the United Kingdom: Report with Evidence*, (HL Paper 99, 2009–2010), archived at <http://perma.cc/XX64-D9ES>.

¹¹¹ *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, *28 at ¶ 83.

¹¹² *Id.* at *28 at ¶ 82.

Hungary and increasingly in Poland, the institutions may be overwhelmed by the concerted forces of politics. But they can provide a necessary challenge and an avenue of repair. In the words of the US court confronting the Trump administration's proposed travel bans and the administration's claims to unaccountable executive discretion:

There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy.

...

[Our cases] make clear, courts can and do review constitutional challenges to the substance and implementation of immigration policy.

...

[T]he Government's "authority and expertise in [such] matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals," even in times of war.¹¹³

¹¹³ *Washington v Trump*, 847 F3d 1151, 1161–63 (9th Cir 2017) (per curiam), quoting *Holder v Humanitarian Law Project*, 561 US 1, 34 (2010).

Opinions

Why geography makes it difficult for Democrats to get along

By Richard Pildes and

Jonathan Rodden

October 22 at 7:13 PM

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Democrats have engaged in a passionate debate leading into the midterms on Nov 6. “Progressives” argue that the path to victory this year and beyond lies in motivating their youthful urban base by moving the party to the left. “Pragmatic” centrists, on the other hand, argue that victory requires ideological moderation that will attract independents.

Paradoxically, both sides might be right, which is why this tension is unavoidable and likely to endure. To understand this, we must grasp how electoral geography shapes politics. President Trump won [230 congressional districts to Hillary Clinton’s 205](#), even though she outpolled him by more than 3 million votes nationwide. This reflects, in part, the fact that progressive voters are increasingly concentrated in the areas that make up urban congressional and state legislative districts, while moderates and conservatives are more evenly dispersed in exurban and rural districts.

As a result, in competitive states, the decisive *voter* in a statewide election is to the left of the decisive *district*. This means that a Democrat with a relatively progressive platform might be able to facilitate high turnout and win the statewide popular vote. But an identical platform would be too far left for the pivotal districts that determine the make-up of the state’s congressional delegation or state legislature.

In other words, even within a specific state, the strategies preferred by progressive leftists and centrist pragmatists can both make sense electorally, depending on what type of election they are most concerned about winning. Relatively progressive candidates can win Senate races in states such as Ohio, but the same liberal reputation drags down Democratic candidates in the decisive districts needed for overall control.

To win control of Congress and state legislatures, Democrats must capture relatively conservative districts that support Republicans in presidential elections. Structurally, this is nothing new. Democrats have been relatively concentrated in urban districts since the New Deal, and for decades, their geography made it necessary for them to field congressional candidates who could win on “Republican” turf in the suburbs and countryside.

The Democrats achieved this not by nudging their platform to the left or right, but by avoiding a coherent platform altogether. In the 1950s and 1960s, the party of Northern urban workers — including African Americans — was simultaneously the party of Southern segregationists. When religion and social issues became politicized in the 1970s and 1980s, pro-life, pro-gun Democrats were able to win congressional seats in suburban and rural districts around the country.

These idiosyncratic Democrats with locally tailored platforms often initially found their way into Congress as part of “blue waves” following perceived Republican failures. They managed to sustain themselves in Republican districts with a mix of moderate roll-call votes, pork-barrel politics and constituent service. Democrats controlled Congress for decades, including during Republican presidencies, not because their party chose the right national platform, but because they allowed their candidates to craft local “brands” that differentiated them from the party’s urban candidates.

The Democrats’ geography problem has become far more acute in recent decades. Since the late 1980s, votes for Democrats have become ever more concentrated in cities. In addition, Republicans now control more state legislatures than at any previous time, and [partisan gerrymandering](#) in several states has manipulated the underlying political geography to make matters far worse for Democrats. Local races have also become more nationalized as politics has become more polarized, with outside money now playing a much larger role in legislative races.

This makes it harder for individual candidates to detach themselves from the party’s national image. Some Democrats, such as [Rep. Conor Lamb \(Pa.\)](#), have pulled it off, but it’s significant that Lamb was nominated to run in his special election not through a primary race, but by local party officials who were particularly sensitive to these dynamics.

To be sure, the nationalization and polarization of elections might benefit Democrats in this cycle if enough Republicans and independents in pivotal districts cast “anti-Trump” votes for Democrats who would otherwise seem too far left. An exceptionally powerful wave election can overcome Democrats’ underlying geography problem and Republican partisan gerrymandering and thus enable victories in suburban districts that typically vote for Republican presidential candidates.

But any such wave is unlikely to wash the Democrats’ geography problems out to sea. It is not yet clear whether the Republican Party’s reputation has suffered significant damage in pivotal suburbs and, if so, how enduring such damage might be.

Whatever the outcome this fall, the Democrats’ basic geography problem is likely to endure. To maintain control of the House or state legislatures beyond the isolated wave election, self-styled exurban and rural Democrats will feel the pressure to craft local brands that distance themselves from their party’s liberal reputation, even if that reputation serves the party well in winning the national or statewide popular vote.

Political geography — not just ideological conflict on its own — thus makes it likely that tensions between the progressive and centrist wings of the Democratic Party will endure.

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THE YALE LAW JOURNAL

RICHARD H. PILDES

Romanticizing Democracy, Political Fragmentation, and the Decline of American Government

ABSTRACT. This Feature was delivered originally as the 2013-14 Ralph Gregory Elliot Lecture at Yale Law School.

AUTHOR. Sudler Family Professor of Constitutional Law, NYU School of Law. I am grateful for comments received there and at a presentation of these views at the NYU Faculty Workshop. I would also like to thank H el ene Landemore and Nick Stephanopoulos for comments. For excellent research assistance, I thank Nabil Ansari, as well as the NYU library reference team, particularly Gretchen Feltes. I am also indebted to discussions with former Senators and members of the House, all of whom requested anonymity.



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INTRODUCTION

For many years now I have been interested in developing more of an institutionalist and realist perspective on the dynamics of democracy and effective political power, particularly in the United States. By this I mean a focus on the systemic organization of political power and the ways that legal doctrines and frameworks, as well as institutional structures, determine the modes through which political power is effectively mobilized, organized, and encouraged or discouraged. This perspective emphasizes, among other elements, the dynamic processes through which winning coalitions are built or destroyed in the spheres of elections and governance. The mutually influential relationship between these spheres ultimately determines the ways in which our democratic institutions function or fail to function.

This focus on the organization, structure, and exercise of actual political power in elections and in governance is what, in my view, characterizes “the law of democracy” – a systematic field of study in law schools for only the last twenty years or so.¹ To sharpen up this initial description, I would contrast the “law of democracy”’s focus to those approaches to constitutional law and theory that center on protecting and developing the dignity, or the autonomy, or the “personhood” of the individual, and ensuring the equal treatment of particularly vulnerable groups. These are the aspirations of *Taking Rights Seriously*, for example – the arresting book title that defines the approach of someone who has been much on my mind lately, my recently deceased colleague, Ronald Dworkin.²

Even more, however, I want to contrast my focus on the systemic organization of political power to rights-oriented approaches applied to democracy itself.³ By rights-oriented approaches, I mean approaches that focus on interpret-

1. For my most comprehensive development of that approach, see Richard H. Pildes, *The Supreme Court, 2003 Term – Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 55–64 (2004). The first edition of the casebook, *The Law of Democracy: Legal Structure of the Political Process*, which I co-authored with my friends and colleagues Sam Issacharoff and Pam Karlan was published in 1998. Throughout this essay, and in all of my work, I remain deeply indebted to both Sam and Pam. For a good historical account of the field, see Heather K. Gerken, *Keynote Address: What Election Law Has to Say to Constitutional Law*, 44 IND. L. REV. 7 (2010).

2. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1977).

3. In *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998), Sam Issacharoff and I described this focus on the systemic organization of political power as a structural approach to the law of democracy. In particular, we emphasized the systemic value of promoting competitiveness in democratic politics as a key structural value that ought to inform the law of politics. See *id.* at 646–48; see also Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605 (1999) (elaborating the structural approach). For

THE DECLINE OF AMERICAN GOVERNMENT

ing and elaborating in normative or doctrinal terms the general, broad, political values of democracy, such as participation, deliberation, political equality, and liberty, or the associated legal rights to political association, to free speech, to the vote, or to political equality. These rights-oriented approaches typically pay less attention to the structural or systemic consequences—the effects on the organization of political power—of concretely institutionalizing these abstract ideals in specific settings. Rights-oriented perspectives also often rest, implicitly, on a conception of democracy that envisions individual citizens as the central political actors. We can see these approaches in constitutional doctrine, in reformist advocacy about democracy, and in scholarship on democracy in political theory, philosophy, and law.⁴ My suggestion, however, is that these approaches can spawn, and have spawned, doctrines and policies that undermine the capacity of the democratic system as a whole to function effectively. Instead of this rights-based orientation, I want to encourage more focus on how political power gets mobilized, gets organized, and functions (or breaks down).⁵

a critique of that structural approach and an endorsement of a more traditional rights-oriented approach to these issues, see RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 143–56 (2003). For an insightful review of the debates between structural and rights-oriented analyses of legal issues concerning the organization of democracy, see Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099 (2005) (reviewing HASEN, *supra*).

4. As I have put it before, the Court's approach to cases involving claims of rights concerning the democratic process often "is conventional because it imports into the law of democracy the same doctrinal tools, legal tests, and ways of framing the issues from more fully developed areas of constitutional law" Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 ELECTION L.J. 685, 687 (2004) (reviewing RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003)). For specific examples within constitutional law, see Pildes, *supra* note 1, at 101–30. For a similar recent criticism of the Court for failing to recognize that interpretations of the "rights" of democracy must derive from an underlying structural conception of the purposes of the democratic system as a whole, see Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385 (2013).
5. For examples of this approach applied to the Voting Rights Act, in which I emphasize the importance of focusing on forming winning political coalitions capable of exercising actual governmental power, rather than on enhancing the descriptive representation of minority groups, see Richard H. Pildes, *Political Competition and the Modern VRA*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 1–19 (David Epstein et al. eds., 2006); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002); and Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359 (1995) (reviewing *QUIET REVOLUTION IN THE SOUTH* (Chandler Davidson & Bernard Grofman eds., 1994)) [hereinafter Pildes, *The Politics of Race*]. For a kindred view, see Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1716–20 (2004). For dissenting views, see Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1105, 1108–09 (2005); Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734 (2008); and Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21 (2004).

In this Feature, adapted from a lecture I gave at Yale Law School in November 2013, I will illustrate this approach by addressing a problem on many of our minds, what my title calls “The Decline of American Government.” In making this statement, I mean to appeal to a broad consensus of such a decline. Therefore, I do not refer specifically to an inability to act in areas of partisan conflict in which one side has a substantive policy preference for the status quo (climate change policy, for example). Rather, I refer to arenas where there is broad consensual agreement that government *must* act, in some fashion, but where American government now seems incapable of doing so—or where government does act, but only after bringing the country or the world to the edge of a precipice: government shutdown, the regular dancing on the knife’s edge of the first U.S. government default, and the like. I do not want to suggest that American government is in some state of extreme crisis; American democracy has faced far more dramatic challenges before,⁶ and as democratic observers from de Tocqueville to today have recognized, democracy is rarely “as bad as it looks” at any particular moment.⁷ It is enough to recognize serious dysfunction even in only particular areas to motivate a search for deeper explanations, as well as directions for possible paths forward.

I. POLITICAL FRAGMENTATION

I want to offer two main ideas about how to think about the decline of America’s governance capacity and effectiveness.

First, I want to suggest that we cannot understand how our democratic institutions are designed and how they function without recognizing that a uniquely American *cultural* sensibility and understanding of democracy—one that I view as excessively romantic, particularly in the forms it takes today— informs a good deal of the ways we design and reform our democratic institutions. This uniquely romantic conception of democracy has, I believe, perverse-

6. For a moving account of the powerful challenge authoritarian styles of government were perceived to pose in the 1930s to the desirability of democracy in America and more widely, see IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 3–58 (2014).

7. DAVID RUNCIMAN, *THE CONFIDENCE TRAP: A HISTORY OF DEMOCRACY IN CRISIS FROM WORLD WAR I TO THE PRESENT* 2 (2013). For a discussion of de Tocqueville’s views about how democracies should be understood to respond to crises, see *id.* at 1–34. On a similar note, while recognizing that American government currently is going through an era of “sustained dysfunction,” Jack Balkin argues that this is best understood as a period of “constitutional transition,” in which a new “constitutional regime” will eventually replace the current one and in which government will no longer seem dysfunctional. Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 101, 102–03, 134 (2014).

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ly contributed to the decline of our formal political institutions. This will be one of my themes: the dangers of democratic romanticism.

Second, in diagnosing the causes of government's limited capacity to function effectively, there is a widespread temptation to focus on how polarized the two dominant political parties have become (as well as on whether polarization is asymmetric between the two parties).⁸ Much of the commentary on polarization has focused on the difficulty of fitting America's increasingly parliamentary-like political parties into the Constitution's institutional architecture of a separated-powers system.⁹ The understandable concern that many have today is whether in times of divided government—but not only then, given the Senate filibuster rule, which remains in place on policy matters—the absence of a “majority government” will make it too difficult to generate the kind of concerted political action required for legislation.

If the concern about polarization is best understood as one about effective governance, then we should perhaps refine the concern, particularly for pragmatists searching for potentially productive directions of plausible reforms. To do so, we should identify the issue not as *political polarization* alone but as one of *political fragmentation*. By “fragmentation,” I mean the external diffusion of political power away from the political parties as a whole and the internal diffusion of power away from the party leadership to individual party members and officeholders. My claim is that, for pragmatic reformers, political fragmentation of the parties (most obviously visible, at the moment, on the Republican side, but latent on the Democratic side as well) is a more important focus of attention than polarization if we are to account for why the dynamics of partisan competition increasingly paralyze American government. The government shutdown and near financial default were not a simple product of party polarization; they reflected the inability of party leaders to bring along recalcitrant minority factions of their parties and individual members to make the deals that party leaders believed necessary. The problem is not that we have parliamentary-like parties. Rather, it might well be that our political parties are not parliamentary-like *enough*: party leaders are now unable to exert the kind of effective party leadership characteristic of parliamentary systems.

If this analysis is correct, stronger parties—or parties stronger in certain dimensions—ironically might be the most effective vehicle for enabling the compromises and deals necessary to enable more effective governance despite

8. See, e.g., Christopher Hare et al., *Polarization is Real (and Asymmetric)*, VOTEVIEW BLOG (May 16, 2012), <http://voteview.com/blog/?p=494> [<http://perma.cc/GD7J-UJRK>].

9. In earlier work, I have contributed to framing the issue in these terms. See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2316–30 (2006).

the partisan divide. I will offer a quick sketch of a few policy proposals designed to re-empower political party leaders in order to make government more functional. But the specific proposals are less important in themselves than as illustrations of a direction of reform that might enable more effective governance in the enduring context of highly polarized political parties.

II. DEMOCRATIC ROMANTICISM

Let me begin by impressing upon you the uniqueness of America's practices and institutions of democracy, taken as a whole, compared to those of other mature, stable democracies.

Jacksonian-era reforms have bequeathed us the world's *only* elected judges and prosecutors.¹⁰ Indeed, we elect more than 500,000 legislative and executive figures, vastly more than any other country per capita (one elected official for every 485 persons): we elect insurance commissioners, drainage commissioners, hospital boards, community college boards, local school boards, and on and on.¹¹ Furthermore, we lack independent institutions to oversee the election process, such as specialized electoral courts, independent boundary-drawing commissions, and independent agencies – institutions common in most democratic countries.¹² This leaves partisan, elected, and mostly local officials in control of much of the regulation and administration of the electoral process, out

10. On America's unique history of elected judges, see JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 5 (2012), which notes that "almost no one else in the world has ever experimented with the popular election of judges"; and Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 691 n.3 (1995). For a recent critique of elected judiciaries, see James Sample et al., *The New Politics of Judicial Elections 2000-2009*, BRENNAN CTR. FOR JUST. (Aug. 2010), <http://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf> [<http://perma.cc/6PYB-26X4>]. For a defense, see CHRIS W. BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* (2009). On the central role of elected prosecutors at the state and local level in the criminal justice system, see DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* 47-48 (2010); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

11. The 1992 Census of Governments, published by the U.S. Department of Commerce, puts the number of elected officials at 513,200, which comes to one elected official for every 485 inhabitants in 1992. Gov't Div., Bureau of the Census, *1992 Census of Governments, Volume 1: Government Organization, Number 2: Popularly Elected Officials*, at v, U.S. DEP'T COMMERCE (1995), https://www.census.gov/prod/2/gov/gc/gc92_1_2.pdf [<http://perma.cc/K3KB-43J5>]. Federal and state officials account for only 3.8% of the total. *Id.* There does not appear to be a more current version of this Census.

12. See, e.g., Fabrice Edouard Lehoucq, *Institutionalizing Democracy: Constraint and Ambition in the Politics of Electoral Reform*, 32 COMP. POL. 459, 468 (2000); Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 783-86 (2013).

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of a perverse belief that doing so makes the process more democratically accountable to “us.”¹³

Our administrative state, in general, is far more subject to democratic control than those of other well-established democratic countries. Although there have been periods in which we embraced independent administrative agencies based on ideals of political independence and expertise, such as in the Progressive and New Deal Eras, the dominant and distinct characteristic of American administrative government has been the emphasis on political control (legislative or executive) over administrative agencies or what is often called “democratic accountability.”¹⁴ Indeed, the ever-increasing American skepticism of “expertise” and pressure for more and more “popular” or “democratic” control over our institutions makes it doubtful, in my view, that the political force could be marshaled today to create an independent central banking system, such as the Federal Reserve System created in 1913, if we were facing the issue for the first time now.

As another reflection of the degree of political control over public administration perceived to be necessary in the United States, there are roughly 1,300 positions in the federal government that require Senate confirmation, from the Supreme Court to the fifteen members of the National Council on Disability, not to mention the vast amount of time that administrators spend after appointment subject to the political pressures of myriad congressional committees before which they testify constantly.¹⁵ As another institutional example, our democratic culture produced an extraordinarily fragmented banking system for most of American history, from the 1830s until around the 1990s; this made American banking exceptionally unstable and prone to crises relative to the banking systems of some other democratic countries (averaging one crisis

13. Richard H. Pildes, *Disputing Elections*, in *THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000*, at 69 (Arthur J. Jacobson & Michel Rosenfeld eds., 2002); Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 *HARV. L. & POL'Y REV.* 71 (2014).

14. The classic account of this transformation is Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1667, 1669 (1975), which “traces the development and disintegration of the traditional model” of administrative law and its replacement with the “emerging interest representation model” of legitimacy for the American administrative state.

15. For data on the number of presidentially appointed, Senate-confirmed positions (known as “PAS” positions), see DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 22–23, 81–89, 100, 203 (2008). See also MAEVE P. CAREY, *CONG. RESEARCH SERV.*, R41872, *PRESIDENTIAL APPOINTMENTS, THE SENATE’S CONFIRMATION PROCESS, AND CHANGES MADE IN THE 112TH CONGRESS* 7 (2012) (noting that there were 1,200–1,400 PAS positions before 2012 legislative changes that eliminated Senate confirmation for 163 of these positions).

every decade).¹⁶ Democratic understandings and politics made our banking system uniquely subject to local, popular political control; our laws generated a highly disaggregated, decentralized system of tens of thousands of “unit” banks (individual local banks, with no branches) that were regulated overwhelmingly at the state level and thus politically controlled by coalitions of local bankers and agrarian populists. Indeed, the leading political history of banking systems in different countries characterizes the American banking system throughout the 1830-1990 period as “crippled by populism.”¹⁷

Even more to the point for my purposes now, Progressive Era reforms, such as the state-imposed requirement that political parties choose their nominees through primary elections, have long made our political parties more subject to “popular control” than in virtually any other democracy.¹⁸ We take for granted both that we vote for individual candidates, rather than for political parties, and that the parties must choose their candidates in primary elections, including for the most powerful elected office in the world. But primary elections are not the norm around the world—parties and their leadership choose their standard-bearers in many democracies.¹⁹

16. CHARLES W. CALOMIRIS & STEPHEN H. HABER, *FRAGILE BY DESIGN: THE POLITICAL ORIGINS OF BANKING CRISES & SCARCE CREDIT* 168, 183, 201-02 (2014).

17. *Id.* at 153-203. One stunning statistic to illustrate: “In 1914 there were 27,349 banks in the United States, 95 percent of which had no branches!” *Id.* at 181. The prohibitions on branch banking that precluded the rise of nationwide banking entities (as existed in countries with more stable banking systems, such as Canada) meant that our local banks could not diversify risk broadly, including across regions, and made coordinating responses across banks during liquidity crises all the more difficult. The causes in the late 2000s of the worst banking crisis since the Great Depression, after the bank consolidation era that started in the 1990s, is still much debated. For Calomiris’s and Haber’s views on that, see *id.* at 203-56; for a recent review of a number of books on this issue, see Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 *HARV. L. REV.* 1991 (2014).

18. See LEON D. EPSTEIN, *POLITICAL PARTIES IN THE AMERICAN MOLD* 159-60 (1986) (“Nowhere else in the western democratic world did parties look so evil, at least to middle-class citizens, as they did in the United States.”).

19. For a brief summary of the gradual weakening of American political parties since the nineteenth century, see JOHN B. JUDIS, *THE PARADOX OF AMERICAN DEMOCRACY: ELITES, SPECIAL INTERESTS, AND THE BETRAYAL OF PUBLIC TRUST* 5-9 (2000). See also Susan E. Scarrow et al., *From Social Integration to Electoral Contestation: The Changing Distribution of Power Within Political Parties*, in *PARTIES WITHOUT PARTISANS: POLITICAL CHANGE IN ADVANCED INDUSTRIAL DEMOCRACIES* 138-41 (Russell J. Dalton & Martin P. Wattenberg eds., 2002) (listing data from seventeen democracies, of which the United States is the only country regularly permitting non-members to participate in candidate selection, and noting that “[i]n most countries parties’ selection processes remain largely unregulated by the laws which carefully govern aspects of public elections”); Gideon Rahat, *Candidate Selection: The Choice Before the Choice*, 18 *J. DEMOCRACY* 157, 161-62 (2007) (candidate selection mechanisms that allow all voters to take part, even those outside the party, are used primarily in the United States).

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Indeed, our parties are unique in other ways that reflect our unusual understanding of popular sovereignty. Our parties have long been relatively “skeletal” organizations that do not require the regular payment of party dues, in contrast with political parties in most other countries, as well as most non-party organizations.²⁰ To “join” a party in the United States is simply to check a box on a form or take a party ballot during a primary election. Patronage hiring and firing once played a role analogous to the role that membership dues in other countries play, but that, we have concluded, violates the First Amendment.²¹ In the absence of dues and the power of party leadership to choose the parties’ nominees, our parties have always been less tightly structured than those in European democracies. The discipline of party control is particularly firm in countries that use closed-list proportional representation electoral systems, in which voters can vote only for parties, not individual candidates. But weakened political parties do not empower “the people”; they empower the organized interests that are most able to take advantage of a system of political parties lacking sufficient organizational strength to countervail private forces.

20. EPSTEIN, *supra* note 18, at 144–47. Indeed, because the Voting Rights Act applies to certain actions of the political parties, *see Morse v. Republican Party of Va.*, 517 U.S. 186 (1996), it is conceivable that a party’s requirement of dues payments might be considered an illegal poll tax. Whether *Morse* survives later decisions, such as *California Democratic Party v. Jones*, 530 U.S. 567 (2000), remains uncertain.

21. *See Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668 (1996) (banning patronage decisions in the transfer and promotion of independent contractors); *Rutan v. Republican Party*, 497 U.S. 62 (1990) (doing the same for public employees, reasoning that “[t]o the victor belong only those spoils that may be constitutionally obtained”); *see also Branti v. Finkel*, 445 U.S. 507 (1980) (banning patronage firing where party affiliation was not required for effective performance of office); *Elrod v. Burns*, 427 U.S. 347 (1976) (banning patronage firing). For a dissenting view on the patronage cases, *see* Justice Scalia’s argument that the constitutional ban on patronage “reflects a naive vision of politics and an inadequate appreciation of the systemic effects of patronage in promoting political stability and facilitating the social and political integration of previously powerless groups.” *Rutan*, 497 U.S. at 103 (Scalia, J., dissenting). Justice Scalia further argued:

[P]atronage stabilizes political parties and prevents excessive political fragmentation—both of which are results in which States have a strong governmental interest. Party strength requires the efforts of the rank and file, especially in the “dull periods between elections,” to perform such tasks as organizing precincts, registering new voters, and providing constituent services. Even the most enthusiastic supporter of a party’s program will shrink before such drudgery, and it is folly to think that ideological conviction alone will motivate sufficient numbers to keep the party going through the off years. Here is the judgment of one such politician, Jacob Arvey (best known as the promoter of Adlai Stevenson): Patronage is a “necessary evil if you want a strong organization, because the patronage system permits of discipline, and without discipline, there’s no party organization.”

Id. at 104 (quoting *Elrod v. Burns*, 427 U.S. 347, 385 (1976) (Powell, J., dissenting)); and M. TOLCHIN & S. TOLCHIN, *TO THE VICTOR* 36 (1971)).

In at least twenty-three states we bypass formal institutional politics altogether through practices of direct democracy such as ballot initiatives, referenda, and recall tools that no other democracy uses to such an extent, especially since the revival of direct democracy in America that began in 1978 with the symbol of the “property tax revolt,” California’s Proposition 13.²²

One of the best comparative accounts of the way in which the unique features of American democracy combine to affect both elections and governance remains Anthony King’s book, *Running Scared: Why America’s Politicians Campaign Too Much and Govern Too Little*.²³ Using the concrete experiences of specific candidates and elected officials in the United States, Great Britain, and Canada, King identifies several features of the American democratic process that make American politicians “more vulnerable, more of the time, to the vicissitudes of electoral political politics than are the politicians of any other democratic country.”²⁴ The unique features that combine to create this extreme vulnerability are the extremely short terms of office in the House; the use of primary elections in addition to general elections; the weakness of American political parties, which requires American candidates to be much more dependent on their own ability to raise money and get their message out; and the high costs of campaigns in the United States compared to those in several other democratic countries.²⁵

The fact that American democracy exhibits these unique structures and features across so many different institutions in so many different domains is no accident. Underlying our institutions and practices is a singular democratic political culture that has *always* rested on a unique vision and understanding of the ideas of “popular sovereignty” and “self-government.” Indeed, I believe the very term “popular sovereignty” is invoked much more commonly in the United States than anywhere else. Put simply, I would say that American democratic culture has long had a distinctively *individualistic* way of understanding the “right” of self-government. This vision and the design of our political institutions have been mutually constitutive and reinforcing; as this unique understanding of popular sovereignty has led to institutional structures more subject

22. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS* 935-38 (4th ed. 2012) (giving an overview of direct democracy); Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 MICH. L. & POL’Y REV. 11 (1997) (describing the dominance of plebiscitary forms of American democracy utilized in the American West).

23. ANTHONY KING, *RUNNING SCARED: WHY AMERICA’S POLITICIANS CAMPAIGN TOO MUCH AND GOVERN TOO LITTLE* (1997).

24. *Id.* at 3.

25. *Id.* at 29-30.

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to unusually direct popular control, the longstanding existence of these institutions has helped entrench and validate the cultural understandings. I will refer to the feature of American democratic culture embodied in the ideas and institutions that I have been describing as the “individualistic conception of democratic government.”

More specifically, our culture uniquely emphasizes – I would say, romanticizes – the role and purported power of individuals and direct “participation” in the dynamics and processes of “self”-government. This culture too often envisions an individualized form of political action, in which the key democratic elements are individual citizens, often pictured in splendid isolation, and a democratic politics that arises through spontaneous generation. This vision obscures the ways in which participation must be mobilized, organized, and aggregated to be effective; even worse, the pull of this vision often has led reformers and scholars to fail to appreciate the way in which “reforms” are likely to work in practice, given that the most effectively organized and mobilized actors will seize the advantage these reforms open up. As part of this romanticized picture of democracy, we uniquely distrust organized intermediate institutions standing between the citizen and government, such as political parties.

We can observe elements of this idealized image as far back as the Federalist Papers. Despite the brilliance and realist convictions of the Federalist Papers, these documents conceive of elections and government essentially in a kind of political vacuum. They offer no account of the critical role for intermediate political actors in mobilizing and organizing voters in elections (indeed, they conceived of elections as affairs of acclamation, not competitive political contests). Similarly, they do not provide an account of the need for organized, intermediary groups within elected government, such as caucuses and parties, to enable the concerted action necessary for government to function effectively.²⁶ Like other eighteenth-century political thinkers, the Framers disdained political parties; recoiled when government soon divided into two distinct and warring Federalist and Republican camps; and viewed this division as a necessary temporary evil, not a permanent, legitimate feature of democracy.²⁷ The

26. See ISSACHAROFF, KARLAN & PILDES, *supra* note 22, at 7, 215; NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP 89-92 (2008).

27. As Richard Hofstadter famously put it, the “root idea” of English and American political thought in this era was that political parties were “evil.” RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840, at 9 (1970). See generally GERALD LEONARD, THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS (2002) (writing about the political landscape in the late eighteenth century). For a broad synthetic account of the central and powerful role of “antipartyism” in Western political thought, see ROSENBLUM, *supra* note 26.

worldview at the time of the Constitution's framing encompassed citizens, elections, and government—but not the connective tissue of political parties, caucuses, and organizations that are so essential to organizing effective political power within the spheres of elections and governance. Of course, the eighteenth century's vision of political representation was more elitist than ours, but its blindness to all of the critical intermediate organizations among citizens, elections, and government reflects a characteristically American way of thinking about democracy that has endured. We can see this in American foreign policy as well, in the naïve view that immediate elections will bestow legitimate and meaningful democracy on places emerging from non-democratic pasts, without regard to whether various underpinnings of democracy, such as a plurality of organized political groups competing for power, or a robust, independent press, have had a chance to develop.

The individualized conception of democratic government has pervasively shaped, and continues to shape, American democracy. We see this in institutional design, common critiques of democracy, and reformist efforts to “improve” American democracy. The conception is largely taken for granted, if recognized at all, let alone questioned. Since at least the Jacksonian era, the appeal to more “popular empowerment” or participation as the cure for political corruption has been a constant cultural and political theme in American democracy²⁸—even as we struggle to correct for the dysfunctions that previous generations of reform in this direction have brought about.²⁹ For example, in 1974 when Congress overturned the old seniority-based congressional committee system to dilute the power of committee chairs—at the time, conservative Southern Democrats—the result was the proliferation of committees and subcommittees. Yet some have argued that by undermining the power of commit-

28. See SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* (2005). Among other things, Wilentz details the practice that President Andrew Jackson celebrated as “rotation in office,” which, when it turned out to look less appealing, we came to call patronage, and was a reformist effort to purge government of an “insider political establishment.” *Id.* at 315-17. See also DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848*, at 488-98 (2007) (discussing voting during the Jackson administration).

29. For a similar view, see KING, *supra* note 23, at 172:

The paradox that has resulted is an obvious one. It is easily stated. Recent history suggests that when large numbers of Americans become dissatisfied with the workings of their government they call for more democracy. The more they call for more democracy, the more of it they get. And the more of it they get the more dissatisfied they become with the workings of their government. And the more they become dissatisfied with the workings of their government, the more they call for more democracy. And the more they call for more democracy, the more of it they get. And the more of it they get, the more dissatisfied they become. . . . And so it goes, the cycle endlessly repeating itself.

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tee chairs and diffusing power within Congress in this more “democratic” way, the net result has been to increase the power of private interest groups to block legislation by expanding further the number of veto points in the system, thereby diluting political power.³⁰

Indeed, the central impulse behind many of our democratic reform efforts is not to criticize or challenge the individualist conception of democracy, but to insist on yet more “participation” and other ways of “empowering” individual citizens as the solution to our democratic disaffections. We require so many of our institutions to be chosen through elections, for example, on the view that “citizen” control will keep officials hewing closer to the common good, without any realistic assessment of how the electoral process actually works; with romanticized views of how much interest most citizens will take (or rather, fail to take) in voting for lower-level offices; and without regard for the degree to which organized private interests will be able to dominate in low turnout, low-salience elections. This approach is a longstanding one. For example, not only do we elect school boards in many parts of the United States, but Progressive Era policies urged that these (and other) local elections be held on a separate timetable from general elections, so that local decision making would be “more pure” and not entangled in broader political issues.³¹ Yet if turnout in school board elections is exceedingly low, it is even lower when these elections are held off-cycle; not surprisingly, the one interest that is always well represented in school board elections, no matter when they are held, is that of teachers, who have among the most direct stake in school board policies. Perhaps also not surprisingly, recent empirical work “is strikingly clear” in demonstrating that the lower the turnout in such elections, the more electoral and political influence teachers have – and the higher teacher salaries become as a result.³² Our culture seems to reel from one democratic dysfunction, to which the solution is more citizen empowerment, to another, in which we must face up to the perverse consequences of this prior solution, only to try yet another way to ensure more transparency and citizen control.

I want to push back a bit against that culture and the romantic vision of individualistic self-government animating it.

30. See David Frum, *The Transparency Trap: Why Trying to Make Government More Accountable Has Backfired*, THE ATLANTIC, Aug. 13, 2014, <http://www.theatlantic.com/magazine/archive/2014/09/the-transparency-trap/375074> [<http://perma.cc/SXJ2-2KEA>].

31. SARAH F. ANZIA, TIMING & TURNOUT: HOW OFF-CYCLE ELECTIONS FAVOR ORGANIZED GROUPS 167 (2014).

32. *Id.* at 166.

III. THE CAUSES OF POLARIZATION

To begin to do that, I now turn to my analysis of why our political institutions have become so paralyzed in recent years.

It is well-known that our era of governance is constituted by what I have called “hyperpolarized political parties.”³³ By all conventional measures, the parties in government are more polarized than at any time since the late nineteenth century.³⁴ But keep in mind that partisan polarization is not necessarily bad, or all bad, from a broader democratic perspective. Political polarization, from my point of view, is a concern primarily insofar as it affects the capacity for governance. Others might be troubled with a political culture characterized by divisiveness, lack of civil disagreement, and the like, but my dominant concern is polarization’s consequences for effective governance. Indeed, polarization might well involve tragic conflicts between the domains of voting and governance, a much more general conflict in democratic practice than democratic theory has recognized. As responsible party government advocates have long argued, coherent and sharply differentiated political parties increase voter turnout, make the most salient cue in voting—the political party label—more meaningful, and through that cue enable voters to hold officeholders more meaningfully accountable.³⁵ As a result, party polarization has distinct electoral benefits; it is not a matter of all cost and no benefit. We should therefore view partisan polarization as a significant problem only if and when its costs are substantial enough to outweigh these electoral benefits. Preventing government from taking effective action, even when broad agreement exists to the effect that government must act in some form, signals that the costs of polarization outweigh its benefits substantially enough to justify searching for measures that could mitigate these costs, including institutional design measures.

33. Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 330 (2011).

34. See NOLAN MCCARTY ET AL., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 15–70 (2006); DAVID W. ROHDE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE 13–16 (1991); BARBARA SINCLAIR, PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING 3–35 (2006); JEFFREY M. STONECASH ET AL., DIVERGING PARTIES: SOCIAL CHANGE, REALIGNMENT, AND PARTY POLARIZATION 18 (2003); Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in AM. POL’Y SCI. ASS’N, NEGOTIATING AGREEMENT IN POLITICS 19, 20 (Jane Mansbridge & Cathie Jo Martin eds., 2013).

35. See AUSTIN RANNEY, THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT: ITS ORIGINS AND PRESENT STATE (1954). See generally Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011 (2003) (describing how voters glean meaning from political party labels and other signals).

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To understand what measures might be most effective—and to justify my argument that our search should move in a dramatically different direction than is typically suggested by those troubled by extreme partisan polarization—I need to begin by explaining the causes and suggested “cures” for our world of hyperpolarized political parties. What has caused the dramatic partisan polarization of our era? Polarization is not, in my view, a product of recent, or relatively contingent, forces or individual personalities.

I have argued that the hyperpolarization of today’s parties is overwhelmingly a product of long-term historical and structural forces.³⁶ These forces were launched into motion with the Civil Rights Era of the 1960s, particularly the Voting Rights Act, as African Americans (and many poor whites) began the process of becoming full political participants.³⁷ It is easy to forget that, from roughly the 1890s until the Civil Rights Era, the entire South was an artificially created one-party monopoly of the Democratic Party.³⁸ The process of ending this unnatural political monopoly began in 1965, but the full effects of this change did not take place overnight; it took several decades of dynamic and mutually reinforcing processes for the Democratic Party in the South to move toward the left, for a robust and fully competitive Republican Party to rise, and for conservative whites to shift their party identification for Senate, House, state, and local elections to the Republican Party.³⁹

Not until the 1990s, remarkably enough, do we see the kind of two-party political system in the South that the rest of the country had throughout the twentieth century.⁴⁰ In my view, the racial redistricting regime of the Voting Rights Act (VRA) contributed to this process. The VRA took hold for the first time in the redistrictings of the 1990s as a result of the 1982 amendments to Section 2 of the VRA and, perhaps even more importantly, the Supreme Court’s 1986 *Thornburg v. Gingles* decision.⁴¹ The post-1990s redistricting regime shifted the political representation of the Democratic Party in the South towards its most liberal wing, dramatically reduced the number of officehold-

36. See Pildes, *supra* note 33, at 287-97.

37. *Id.* at 287-88.

38. *Id.* at 297.

39. See Richard H. Pildes, *Democracy, Anti-Democracy and the Canon*, 17 CONST. COMMENTARY 295, 301-04 (2000) [hereinafter Pildes, *Democracy, Anti-Democracy*]; Pildes, *supra* note 33, at 288, 292-93.

40. See EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* (2002) (accounting for the lack of Republicans in the South until the twentieth century).

41. 42 U.S.C. § 1973 (2012); 478 U.S. 30 (1986) (holding that a redistricting plan that resulted in dilution of black citizens’ votes violated Section 2 of the Voting Rights Act).

ing moderate white Democrats in the South, and facilitated the rise of many more overwhelmingly conservative and Republican districts.⁴²

Through this revolutionary set of historical changes, the two political parties, at both national and state levels, became “purified” into far more ideologically coherent entities. Voters now sort themselves into the two parties overwhelmingly, and correctly, by ideology, so that nearly all liberals are now Democrats, all conservatives now Republicans.⁴³ This simply had not been the case for most of the past century.

If you accept my view on this, then it follows that the highly polarized partisan structure of our democratic politics should not be seen as aberrational. It should be understood as the “new normal.” Instead of being the product of contingent features of our present institutions or our present political moment, it is the result of deep and long-term historical processes. In other words, polarization should be accepted as a fact likely to be enduring for some time, not something that we can design away.

Nonetheless, a great deal of intellectual and reformist energy has been spent on the search for reformist solutions to extreme partisan polarization. This energy has been directed to restoring “the disappearing center” in American democracy.⁴⁴ Given the recommended remedies for polarization that I describe below, it becomes necessary to explore briefly why certain solutions for polarization are likely to be unavailing and indeed, why such “fixes” might even be perverse, if the goal is to enable a more effective set of political institutions capable of overcoming current paralysis.

“Fixes” for polarization can be categorized into two forms. The first involves changes to the *institutional structures* of elections that will shift the mix of candidates and officeholders to empower a critical mass of more centrist officeholders who can bridge partisan divides. These institutional-design proposals include familiar ones that have been offered—open primaries; independent commissions to perform redistricting, perhaps with instructions to maximize

42. In 1991, the last year before redistricting, the South’s congressional delegation consisted of seventy-two white Democrats, five black Democrats, and thirty-nine white Republicans; a decade later, under the districts created in 1992, there were thirty-seven white Democrats, sixteen black Democrats, and seventy-one white Republicans (and one Independent). BLACK & BLACK, *supra* note 40, at 13; *see also* Pildes, *The Politics of Race*, *supra* note 5, at 1364-65 (describing the changes that occurred after redistricting). Of course, there were significant secular changes that were the most important set of forces driving the rise of Republicanism in the South, but the extreme, nearly overnight change in a few years after the redistricting of the 1990s accelerated those secular forces.

43. MATTHEW LEVENDUSKY, *THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS* 38–77 (2009).

44. *See, e.g.*, ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* 139–57 (2010).

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competition; changes to internal legislative rules – and less familiar ones: eliminating laws banning “sore-loser” candidacies;⁴⁵ moving to instant-runoff voting; or even more radically, abolishing primaries altogether and returning to a system of candidate selection by party leaders.

On the institutional front, the two fixes that have received the most attention are ending gerrymandering and opening up primary elections to a broader electorate than just party members. These changes might be desirable for many reasons, but in determining whether institutional-design changes in these areas are likely to make a meaningful contribution to reducing partisan polarization, we ought not be too sanguine about this prospect as more empirical evidence mounts.⁴⁶ I continue to be more optimistic that changes to the structure of primary elections could make a difference, but there is little systematic empirical evidence to support this hope.⁴⁷

The second category of reforms, on which I would like to focus more, seeks to reduce polarization in government by empowering “the people” more effec-

45. For a critique of bans on sore-loser candidacies, see Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L.J. 1013 (2011).

46. On gerrymandering, much of the discussion tends to conflate the issue of increasingly “safe seats” for one party or the other, which has occurred, with gerrymandering as the cause for the rise of these safe seats. Many empirical studies now conclude that the increasing geographic concentration of Democrats in urban areas, and their geographic isolation in college towns and certain other areas, is the major cause for the rise of these safe seats. See, e.g., NOLAN MCCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2006); Nolan McCarty et al., *Does Gerrymandering Cause Polarization?* 53 AM. J. POL. SCI. 666 (2009); Jowei Chen & Jonathan Rodden, Op-Ed, *Don’t Blame the Maps*, N.Y. TIMES, Jan. 24, 2014, <http://www.nytimes.com/2014/01/26/opinion/sunday/its-the-geography-stupid.html> [<http://perma.cc/QPG5-E8DY>]. The most comprehensive study to date, which focuses only on elections to state legislatures and not Congress, examines both effects within states that change their primary system and the behavior of state legislators selected via different primary election structures. This study reveals no effect of different primary election structures on partisanship of those elected. Eric McGhee et al., *A Primary Cause of Partisanship? Nomination Systems and Legislator Ideology*, 58 AM. J. POL. SCI. 337 (2014).

47. We have only anecdotal evidence at this stage from more novel forms of primaries, like the “top-two” primary used recently in California and Washington, and the data analyses tend to be in tension with each other thus far. Compare Thad Kousser et al., *Reform and Representation: Assessing California’s Top-Two Primary and Redistricting Commission* (Aug. 27, 2013) (working paper), <http://ssrn.com/abstract=2260083> [<http://perma.cc/LYX5-LVDW>] (concluding that for California’s congressional delegation, the gap between voter and legislator ideology actually expanded from 2010 and 2012, after California had adopted the top-two primary and redistricting reform), with Christian R. Grose, *The Adoption of Electoral Reforms and Ideological Change in the California State Legislature*, SCHWARZENEGGER INST., UNIV. S. CAL, <http://schwarzeneggerinstitute.com/electoral-reforms-report> [<http://perma.cc/4P5D-Y75P>] (concluding that the California state legislature become more moderate and less polarized after these reforms went into effect).

tively. The idea is that greater citizen participation will be a solvent for political dysfunction and polarization. This idea is premised on the assumption that partisan polarization is not in us, but in our political parties; polarization in our formal politics is a corruption or distortion of the more moderate, centrist politics that we would have if only we could find ways to give “the people” more direct control or influence over elections and governance. The idea is part of a recurring wish or vision throughout American political history. But there are good reasons to distrust this idea and even to think that institutional efforts to reflect popular empowerment would make polarization worse, not better.

While earlier academic work suggested that “the public” was more centrist than those holding public office, more recent works reveal that polarization in government is not so obviously a distortion or corruption of the larger public’s less polarized views. Alan Abramowitz has shown that “politically engaged citizens” are just as polarized as the parties in government.⁴⁸ Being “engaged” in this sense means little more than taking part in the most basic forms of democratic participation, such as: voting; trying to persuade a friend or neighbor to vote; displaying a bumper sticker or yard sign; giving money; or attending a campaign rally or meeting. Abramowitz’s findings therefore pose a serious challenge to the idea that more participation will translate into less polarization.⁴⁹

Shanto Iyengar and his co-authors have found that partisans are far more uncomfortable today than in the past with their children marrying those who identify with the other party.⁵⁰ And while citizens overall might not be as ideologically extreme as they are partisan, we are highly sorted along partisan terms today; 92% of Republicans are more conservative than the median Democrat, while 94% of Democrats are more liberal than the median Republican (twenty years ago, the figures were 64% and 70%, respectively).⁵¹ The percentage of

48. ABRAMOWITZ, *supra* note 44.

49. Abramowitz’s findings about politically engaged citizens were recently replicated in the major study from the Pew Research Center, which concluded that “[o]n measure after measure—whether primary voting, writing letters to officials, volunteering for or donating to a campaign—the most politically polarized are more actively involved in politics, amplifying the voices that are the least willing to see the parties meet each other halfway.” *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affects Politics, Compromise, and Everyday Life*, PEW RESEARCH CTR, (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public> [<http://perma.cc/MD3M-HX9H>] [hereinafter Pew Report].

50. Shanto Iyengar et al., *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OPINION Q. 405, 415–18 (2012) (concluding that data demonstrate “that both Republicans and Democrats increasingly dislike, even loathe, their opponents”).

51. Pew Report, *supra* note 49. On the difference between political extremism and political sorting along partisan lines, see Morris Fiorian, *Americans Have Not Become More*

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those who are consistently liberal or conservative, rather than having a mix of such views, has doubled from 10% to 21% over the past two decades.⁵² As Marc Hetherington and others report, those who identify with one party express far more negative feelings about the other party than in the past; those of the opposite party to the President now largely report not trusting the government at all.⁵³ A major recent study by the Pew Research Center finds that in 1994, only 17% of Republicans and 16% of Democrats had “very unfavorable” views of the opposite party, while today 43% of Republicans and 38% of Democrats hold such views.⁵⁴ Other social scientists suggest that the public is even more extreme in its policy views than those in office or, at the least, that those whose views are categorized as “moderate” are actually ideologically polarized too.⁵⁵ In addition, citizens, activists, and elected officeholders now see more issues in one-dimensional, partisan terms. As Carsey and Layman find: “The data are clear: across all three major domestic issue areas – social welfare, race, and culture – there has been a steady increase in the gap between Democratic and Republican citizens, elected officials and activists.”⁵⁶ In state politics, we see a pattern similar to that in Congress. On average, state legislatures are becoming significantly more polarized.⁵⁷

Polarized, WASH. POST: MONKEY CAGE (June 23, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/06/23/americans-have-not-become-more-politically-polarized> [<http://perma.cc/87L6-PSB7>] (critiquing the Pew Report, *supra* note 49, as having mischaracterized its findings).

52. Pew Report, *supra* note 49.
53. Marc Hetherington & Thomas Rudolph, *Why Don't Americans Trust the Government? Because the Other Party Is in Power*, WASH. POST: MONKEY CAGE (Jan. 30, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/01/30/why-dont-americans-trust-the-government-because-the-other-party-is-in-power> [<http://perma.cc/6H6M-Y384>]; see also Jonathan Haidt & Marc J. Hetherington, *Look How Far We've Come Apart*, N.Y. TIMES: CAMPAIGN STOPS (Sept. 17, 2012, 9:48 PM), <http://campaignstops.blogs.nytimes.com/2012/09/17/look-how-far-weve-come-apart> [<http://perma.cc/HR4A-KMDL>].
54. Pew Report, *supra* note 49.
55. See, e.g., David E. Broockman, *An Artificial 'Disconnect'? Assuming Americans Are Reliably Ideological Masks Public Support for Policies More Extreme than Politicians Pursue* (Jan. 8, 2014) (unpublished manuscript) (on file with author).
56. Thomas Carsey & Geoffrey Layman, *Our Politics Is Polarized on More Issues than Ever Before*, WASH. POST: MONKEY CAGE (Jan. 17, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/01/17/our-politics-is-polarized-on-more-issues-than-ever-before> [<http://perma.cc/D937-65YD>].
57. See, e.g., Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, 546–47 (2011); Nolan McCarty et al., *Geography and Polarization 2* (Aug. 26, 2013) (unpublished paper), http://www.stanford.edu/~jrodden/wp/geo_polar_apsa2013_V4.pdf [<http://perma.cc/MS7T-P6RX>] (finding in part that many seemingly moderate districts are in fact internally polarized).

If political engagement correlates with increased polarization, as Abramowitz documents, then we should be skeptical about whether finding ways to increase popular participation will temper polarization. In addition, participation does not sprout up spontaneously, like mushrooms after a rain. Participation has to be energized, organized, mobilized, and channeled in effective directions – all of which requires the very organizations, and the partisans, that “citizen” participation is meant to bypass. Moreover, political engagement might not just involve individuals who self-select for partisanship, but might itself be an experience that generates polarization. Furthermore, despite all the cynicism about politics today, “Americans [now] are more interested in politics, better informed about public affairs, and more politically active than at any time during the past half century.”⁵⁸ More and more of us are engaged in the ways that idealized democratic citizens are thought to be. And we are partisans. Cause and effect are difficult to disentangle here. But do you know many politically engaged people who are not partisans, outside of groups like the League of Women Voters, whose membership has dropped nearly in half since 1969, according to Putnam?⁵⁹ Extremism in the name of moderation is no vice (that is certainly my own temperament), but it doesn’t raise a lot of money or draw a lot of volunteers. We should be wary of romanticizing a more engaged public as a vehicle that will save us from hyperpolarized partisan government.

Appealing to more “participation” as a cure for polarization thus reduces to a strange kind of hope that when the politically non-engaged become more engaged, they will not behave like those who are already politically engaged. They will pass untouched through the maw of the machinery of democracy but remain the same politically uninformed innocents as when they started. But their participation will have to be mobilized, organized, directed, and at least modestly informed. Will this not make them act in the same way as citizens who are already engaged?

Let me make this point concrete by turning to the specific, crucial issue of campaign financing. I show how certain proposals that focus on empowering more citizen participation are likely to have the unintended consequence of hindering effective governance.

I will state my preference at the outset: I favor a system of public financing, but not the kind of public financing centered on individual candidates that ex-

58. ABRAMOWITZ, *supra* note 44, at 19.

59. Robert D. Putnam, *Bowling Alone: America’s Declining Social Capital*, 6 J. DEMOCRACY 65, 69 (1995).

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ists in the United States (in the few places we have it).⁶⁰ Instead, I want to suggest a system of public financing in which more of the emphasis, and more of the flow of money, is oriented toward the political parties rather than individual candidates. I will return to this proposal shortly.

But to stay on the theme of empowering greater citizen participation, some proponents of public financing have suggested that campaign financing work not through the state, as in public financing around the world, but rather through individual vouchers provided to all of us.⁶¹ This is a distinctively American proposal, for it reflects, I believe, the peculiar and radically individualistic culture of American democracy, along with our characteristic distrust of more organized forms of political power.

Yet it turns out that individual donors are more ideologically extreme and more polarized than non-donors—as we’ve just discussed, the politically engaged are more polarized than the general public.⁶² Indeed, those who donate are more ideological even than “active partisans,” defined as those who identify with a political party and engage in more political activities than the mere act of voting.⁶³ Even more to the point, individual campaign donors are also *more*

60. See *Public Financing of Campaigns: An Overview*, NAT’L CONFERENCE OF STATE LEGISLATURES (Jan. 23, 2013), <http://www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx> [<http://perma.cc/MDY7-7LC9>].

61. The first proposal for a voucher scheme of campaign financing of which I am aware in the legal literature is Richard L. Hasen, *Clipping Coupons for Democracy? An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1, 5 (1996). Voucher schemes are also endorsed in BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 181-221 (2002); and Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. F. 61, 66 (2013).

62. This finding has been documented in numerous studies. See, e.g., P.L. FRANCIA ET AL., *THE FINANCIERS OF CONGRESSIONAL ELECTIONS: INVESTORS, IDEOLOGUES, AND INTIMATES* (2003); Barber & McCarty, *supra* note 34, at 15 (showing that donors are more extreme than non-donors in each survey year), 15-17 (showing that donors remain more ideological even after controls are added for non-monetary forms of participation); Joseph Bafumi & Michael C. Herron, *Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress*, 104 AM. POL. SCI. REV. 519-42 (2010); Michael Barber, *Ideological Donors, Contribution Limits, and the Polarization of State Legislatures* (Sept. 4, 2013) (unpublished paper), <http://static.squarespace.com/static/51841c73e4b04fc5ce6e8f15/t/5226bd17e4bod5d3dc239a94/1378270487878/Limits.pdf> [<http://perma.cc/M3CG-7DZU>]. Both small donors (under \$200) and large donors (over \$200) have much more bimodal policy preferences—they are either on the right or left, not the center—compared to non-donors. See Ray LaRaja & Brian Schaffner, *Want to Reduce Polarization? Give Parties More Money*, WASH. POST: MONKEY CAGE (July 21, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/07/21/want-to-reduce-polarization-give-parties-more-money> [<http://perma.cc/MF78-CMR2>].

63. Michael Barber, *Ideological Donors, Contribution Limits, and the Polarization of State Legislatures* 12-13 (Oct. 3, 2013) (unpublished manuscript), <https://politicalscience.byu.edu>

ideologically extreme than most other donors as well, such as PACs and the political parties.⁶⁴ PACs tend to focus on moderate candidates, as well as incumbents; individual donors focus on more ideologically polarized candidates. In general, groups that give for access-oriented reasons tend to finance moderates and incumbents, while ideological donors favor challengers and more extreme candidates.⁶⁵ Put another way, the most ideologically extreme money to campaigns comes from individual donors. Moreover, recent work concludes that the voting patterns of senators most closely track the policy preferences of their individual donors, rather than those of voters in the state or even co-partisans in the state—and that this pushes senators to the ideological poles.⁶⁶ Democratic senators are more liberal, Republicans more conservative, than their voters, but these politicians are reflective of the views of their individual donor bases.

Furthermore, candidate campaigns have become dramatically *more dependent* on individual donors in recent decades than on all other sources combined, such as political parties and PACs, even as our candidates and parties have become more and more polarized. In other words, as our campaign finance system has become more democratized, our politics has become more polarized. In 1990, individual contributions to campaigns provided about 25% of a campaign's money, and PACs provided about half; today, individuals are by far the largest source of direct money to campaigns (about 61% for Congress) and PAC contributions constitute less than 25%.⁶⁷

/Faculty/Thursday%20Group%20Papers/Limits.pdf. [<http://perma.cc/JFL7-2SFD>]. For a summary of the studies showing that individual donors come from the ideological poles of the distribution of general public policy preferences, see Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 100 VA. L. REV. at 38-42 (forthcoming 2015) (on file with author).

64. Stephanopoulos, *supra* note 63, at 21. For a dissenting view, see Michael J. Malbin, *Small Donors: Incentives, Economies of Scale, and Effects*, 11 FORUM 385, 397 (2013), which points out that, among incumbents, the top 5% in small donor contributions were randomly distributed in ideological terms within their parties.
65. Adam Bonica, *Ideology and Interests in the Political Marketplace*, 57 AM J. POL. SCI. 294 (2013). On the difference between interest-group strategies for campaign financing that are access-based versus those based on seeking to replace candidates with more preferred ones, see Samuel Issacharoff & Jeremy Peterman, *Special Interests After Citizens United: Access, Replacement, and Interest Group Response to Legal Change*, 9 ANN. REV. LAW. SOC. SCI. 185 (2013).
66. Michael Barber, *Representing the Preferences of Voters, Partisans, and Donors in the U.S. Senate* 18 (Mar. 25, 2014) (unpublished paper) <https://static.squarespace.com/static/51841c73e4b04fc5ce6e8f15/t/53330366e4b02fa38fc3859b/1395852134808/paper.pdf> [<http://perma.cc/HLR3-L4LL>]. This study examines incumbent Senators up for re-election in 2012, and "Senators" in text refers to this group.
67. *Id.* at 23. Similar numbers are provided at the Open Secrets website that tracks campaign contributions. See *Small Donors Make Good Press, Big Donors Get You Reelected*,

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Here is another fact to keep in mind in seeking to understand individuals, polarization, and money: a majority of individual contributions now come from out-of-state donors.⁶⁸ Also not surprising is that out-of-state donors *are the most* ideologically extreme of all contributors. Consider the kind of individuals likely to give out-of-state money to the campaigns of Elizabeth Warren and Ted Cruz, as opposed to the more moderate senators or challengers about whom most out-of-staters probably know little to nothing in the first place.⁶⁹ Are many individual voters around the country likely to send their money to Missouri for Claire McCaskill or to Tennessee for Lamar Alexander? *Democratizing* campaign contributions through vouchers might well, ironically, *fuel* the flames of political polarization, as compared to public financing systems funded in the more traditional way, through general revenues.

Voucher proponents might believe that the polarizing effects of individual donations will disappear once “all the people” are empowered to donate through vouchers. But this neglects the collective-action dynamics that influence all political activity. People have to become both motivated and engaged enough to choose to donate and to seek out information relevant to informed donations – just as they must to vote – and informing and motivating potential donors will take political organization and mobilization. Those who are most informed and motivated are likely to be partisans, and thus the groups most equipped to take advantage of these new political openings – as with other such openings – are also likely to be more partisan.

I say all this not to pick on voucher proposals in particular but to illustrate a larger point. Unless we attend to the ways in which political power is actually mobilized, organized, exercised, and marshaled, then policy proposals based on an individualistically driven vision of politics, or on non-grounded abstract democratic ideals such as “participation” or “equality,” can perversely contribute to undermining our institutional capacity to govern. If we want to adopt

OPENSECRETS.ORG, <https://www.opensecrets.org/resources/dollarocracy/04.php> [<http://perma.cc/N4XS-ZBRY>]. Barber and McCarty put the increase in the percent of campaign revenues from individual donors for House candidates over roughly this same period as moving from about 50% to about 75%. Barber & McCarty, *supra* note 34, at 31.

68. One study puts the percentage of out-of-state donations for incumbent Senators in the 2012 elections at roughly 60% and concludes that incumbents generally raise ten to fifteen percentage points more money from out-of-state donors as a proportion of their total donations than do challengers. Barber, *supra* note 66, at 12.

69. Small donor contributions of less than \$200, for example, accounted in one 2013 summary for 64% of the contributions to more polarizing Republicans, such as Michele Bachmann and Allen West, but only 5% of the contributions to party leaders, such as Eric Cantor. See Ezra Klein, *Small Donors May Make Politics Even Worse*, BLOOMBERG VIEW (May 8, 2013), <http://www.bloombergview.com/articles/2013-05-08/small-donors-may-make-politics-even-worse> [<http://perma.cc/9PZV-85N5>].

public financing in ways least likely to fuel partisan polarization, then more traditional forms of public financing through general revenues, rather than those based on individual donations, might be more appropriate.

Let me turn now to a different view: an institutionally and organizationally centered approach to the relationship between elections, governance, and effective political power.

IV. POLITICAL POWER, POLITICAL PARTIES

In thinking about how to enable effective democratic action through our political institutions, we should focus less on individual citizens and turn instead to the current or possible organizational entities that have the most powerful incentives to aggregate the broadest array of interests into democratic politics—and to force compromise, negotiation, and accommodation between those interests. Organizational power inevitably exists in democracies; it cannot be wished away, and it is in fact crucial in order for democracy to be able to work at all. Of the various organizational entities that exist or that I can envision, the political parties, driven by the need to appeal to the widest electorate, remain the broadest aggregators of diverse interests.

This proposition might sound ironic, in light of how polarized the parties have become. But the electoral incentive means that it remains true. The overpowering need to put together coalitions broad enough to control one, two, or three of our national political institutions remains the single strongest unifying force capable of bringing together broad arrays of interests into two large coalitions—and, in doing so, inevitably forcing compromise among those interests. When African-American voters in the South were permitted to vote for three decades or so after the Civil War, there were effective office-holding interracial political coalitions, despite the era's cultural attitudes about race.⁷⁰ Electoral incentives and the desire to wield the tools of political power provide powerful motivations to compromise between groups in the pursuit of winning coalitions. In first-past-the-post election systems, the two dominant political parties serve as the principal vehicle for these types of compromise.

I see no other candidate on the horizon. Recently, proposals have emerged to form multi-candidate PACs that would raise and donate to “moderate” can-

70. See GLENDA ELIZABETH GILMORE, *GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896-1920*, at 78 (1996); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910*, at 183 (1974); Pildes, *Democracy, Anti-Democracy, supra* note 39, at 313-14.

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didates.⁷¹ If such entities get off the ground, I am skeptical about how effective they will be. But of course, the multi-candidate organization *par excellence* that already exists is the political party. Indeed, the candidate contributions made by political party organizations tend to empower the forces in the center of the party; parties donate twice as much to candidates in the middle of the ideological spectrum as to those at the extremes.⁷² Party-based contributions to campaigns are a force for moderation compared to individual contributions.

However, this is where the problem of political fragmentation becomes acute. Parties, like all organizations, are complex entities composed of many, sometimes conflicting, components, including elected officials, organizational leaders, party voters, factions, and so on. Among these forces, it is the elected party leaders who have the strongest incentives to internalize national electoral

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71. See, e.g., Katie Glueck, *GOP Rep. Peter King Launches PAC*, POLITICO (Dec. 16, 2013), <http://www.politico.com/story/2013/12/peter-king-pac-2016-election-101204.html> [<http://perma.cc/8CGR-BN8C>] (describing King's PAC as a "vehicle that will enable [him] to go around the country to try to find like-minded Republicans who do not support a government shutdown . . ."); Raymond Hernandez, *Bloomberg Starts 'Super PAC,' Seeking National Influence*, N.Y. TIMES, Oct. 27, 2012, <http://www.nytimes.com/2012/10/18/nyregion/bloomberg-forming-super-pac-to-influence-2012-races.html> [<http://perma.cc/VFZ7-MN7U>] (describing the goal of Bloomberg's PAC as to "elect candidates from both parties who [Bloomberg] believes will focus on problem solving"); Daniel Strauss, *Super PAC To Defend Moderate Republicans Against Tea Partiers*, TALKING POINTS MEMO (Dec. 4, 2013), <http://talkingpointsmemo.com/dc/defending-main-street-republicans> [<http://perma.cc/4V43-6KAE>]. For the emergence of PACs at the state level, see, for example, Brad Cooper, *New PAC Supports Moderate Kansas Republicans*, WICHITA EAGLE, Aug. 2, 2012, <http://www.kansas.com/2012/08/01/2432145/new-pac-supports-moderate-kansas.html> [<http://perma.cc/E98E-LU3C>] (reporting that the Republican Senate president "joined in an unlikely pairing with organized labor"); Paresh Dave, *SEIU California Launches Republican PAC to Back Moderates*, SACRAMENTO BEE, June 9, 2011, <http://blogs.sacbee.com/capitolalert/latest/2011/06/seiu-california-republican-pac.html> [<http://perma.cc/7MMQ-YPKJ>] (describing California union workers' efforts to form a Republican PAC); Dennis Hoey, *Eliot Cutler To Launch PAC for Moderates*, PORTLAND PRESS HERALD, Mar. 30, 2011, http://www.pressherald.com/news/cutler-to-launch-pac-for-moderates_2011-03-30.html [<http://perma.cc/3LPQ-EUPD>] (describing Cutler's formation of a PAC for "candidates 'of any stripe' who are willing to work across party lines"); Errin Whack, *Bolling Launches PAC To Recruit Mainstream Republicans in Virginia*, WASH. POST, May 15, 2013, http://www.washingtonpost.com/local/va-politics/bolling-announces-launch-of-pac-to-recruit-mainstream-republicans-in-virginia/2013/05/15/81b1a2bc-bd6c-11e2-89c9-3be8095fe767_story.html [<http://perma.cc/YH9X-RXK7>].
72. Raymond J. La Raja & Brian F. Schaffner, *Do Party-Centered Campaign Finance Laws Increase Funding for Moderates and Challengers?* 8, 14 (Jan. 8-11, 2014) (unpublished paper), <https://polsci.umass.edu/uploads/profiles/sites/la-rajay/SPSA-LaRaja-Schaffner-Parties.pdf> [<http://perma.cc/ZS49-GZVS>]; see also Anthony Gierzynski & David A. Breaux, *The Financing Role of Parties*, in CAMPAIGN FINANCE IN STATE LEGISLATIVE ELECTIONS 185, 195-200 (Joel A. Thompson & Gary F. Moncrief eds., 1998) (finding that parties give most heavily to nonincumbent candidates in competitive races).

incentives toward broad coalitions. The success of party leaders depends to a significant extent on making the party brand as broadly appealing as possible.

There, I suggest, lies the problem. Political fragmentation has drained partisan elected leaders of much of the power to control, unify, and discipline members of their own party. By “fragmentation,” I mean both the diffusion of the power in elections away from the formal campaigns and the political parties—and even more importantly, the diffusion of power in government away from the leadership of the major political parties to their more extreme factions. While some have characterized the parties today as “networks,”⁷³ I believe “politically fragmented” better captures the structure.

Over recent election cycles, we have become well aware of the fragmentation reflected in the explosion of Super PACs, 527s, and 501(c) organizations that seek to influence elections and policy. Many of these organizations have much narrower ideological and policy interests than the parties as a whole. At the same time, party leaders also have less capacity to force party members to toe the party line. Members of the House and Senate are much better able to function as independent entrepreneurs and free agents. As Moisés Naím has documented across a wide array of public and private organizations, organizational “power” is breaking down in general.⁷⁴

A specific representation of this phenomenon is the unprecedented power that senators *in their first year in power* have in relation to their party leaders and consequently over our politics. Republican Party leaders may have understood that shutting down the government and threatening to default would be destructive to the party’s interests (they did not permit the same mistake to be made twice). But today, they find it difficult to stop one or a few individual senators, or a minority faction, from doing just that. It is impossible to imagine even as powerful a figure as Lyndon Johnson playing the kind of role in his first years in the Senate that Ted Cruz has been able to play.

73. See, e.g., Seth Masket, *Mitigating Extreme Partisanship in an Era of Networked Parties: An Examination of Various Reform Strategies*, BROOKINGS INST. (2014), http://www.brookings.edu/~media/research/files/papers/2014/03/20-masket/masket_mitigating-extreme-partisanship-in-an-era-of-networked-parties.pdf [<http://perma.cc/G29-NGJD>]. The idea of parties as networks of actors, however, implies far more coordination and unified action than is the case. As Masket acknowledges, “[t]he concept of hierarchy doesn’t map well onto the modern party.” *Id.* at 3. That is precisely my point, which is why I believe “political fragmentation” better describes the situation, particularly insofar as our purpose is to understand government dysfunction.

74. See generally MOISÉS NAÍM, *THE END OF POWER: FROM BOARDROOMS TO BATTLEFIELDS AND CHURCHES TO STATES, WHY BEING IN CHARGE ISN’T WHAT IT USED TO BE* (2013).

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To those who think that this kind of political fragmentation is a problem only on one side, I disagree.⁷⁵ The same structural forces are at work and the same kind of fragmentation lies latent in the Democratic Party; these divisions will become apparent under the right set of circumstances. The forces of economic populism—centered most directly for now on Elizabeth Warren, who already allegedly wielded an effective veto over her own President’s pick to chair the Federal Reserve⁷⁶—do battle with the more centrist, establishment forces within the Democratic Party. For now, the presence of a sitting Democratic president exerts a sufficient unifying force to suppress these conflicts, but once this presence is removed, we may well see more overt political fragmentation within the Democratic Party.

If you accept my conclusion that intense polarization of the parties in government is likely to be an enduring fact for the foreseeable future, the question must then shift to the following issue: from where are sources of compromise and negotiation, deal-making, pragmatism, and the like most likely to emerge

75. Fragmentation is a different issue than the much-discussed topic of asymmetric polarization; the latter is the claim that the Republican Party has moved much farther to the right than the Democratic Party has to the left during the period of intense partisan polarization. Measured by roll-call voting patterns, there is indeed evidence that the Republican Party has moved farther to the right since the 1980s than the Democratic Party has moved to the left. See, e.g., JACOB S. HACKER & PAUL PIERSON, *OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY* 5-7 (2005). Studies that measure ideology in other ways, though, conclude that congressional Democrats since 1980 have moved a bit more to the left than congressional Republicans have moved to the right. See, e.g., Michael A. Bailey, *Is Today’s Court the Most Conservative in Sixty Years? Challenges and Opportunities in Measuring Judicial Preferences*, 75 J. POL. 821 (2013); Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM J. POL. SCI. 367 (2014).

76. See Noam Scheiber, *Hillary’s Nightmare? A Democratic Party That Realizes Its Soul Lies with Elizabeth Warren*, NEW REPUBLIC, Nov. 10, 2013, <http://www.newrepublic.com/article/115509/elizabeth-warren-hillary-clintons-nightmare> [<http://perma.cc/KSA5-CLB9>]:

For its part, the Obama administration appears to regard Warren with its own special wariness. Take the successful campaign to block the would-be nomination of Larry Summers to be Federal Reserve chairman. Brown and Merkley played critical roles in halting Summers’s momentum and rounding up “no” votes among fellow Democrats. But Warren’s contribution is hard to overstate. “Elizabeth did something only she could do,” says a source close to the Fed chairman selection process, “which was engage with the administration on the subject and make clear that, if they insisted on moving ahead, the whole weight of her capacity could be brought to bear.” This “was a different order of magnitude,” says the source, alluding to Warren’s outsized fund-raising heft—\$42 million raised for her Senate race, half of it online—and her media magnetism. A Warren aide doesn’t dispute this, saying only that “she passed along her concerns to the White House.”

in such an overall polarized structure?⁷⁷ Polarization and divided government make capacities and attitudes related to compromise more necessary—and, of course, more difficult. In my view, elected party leaders are the most likely sources of the kind of political compromise and pragmatism necessary to reverse the decline of American government.

In part, this is a numbers problem: negotiations between three to five leadership figures are easier to conduct than hydra-headed negotiations in which new factions or individuals pop up. In part this is because the trust in negotiations that is essential to deal-making is established by repeat players in ongoing relationships of regular deal-making. Second, my focus on elected party leaders stems from an empirical belief, reflected in academic studies, that party leaders in Congress tend to be ideological “middlemen” of their parties.⁷⁸ They have stronger incentives to forge compromises both because their election requires appeal to broad constituencies within their parties and because they bear more personal responsibility and blame for the failure of “their” institution to function effectively.⁷⁹

77. These sources of compromise are all the more important if, as the recent, comprehensive analysis in MATT GROSSMANN, *ARTISTS OF THE POSSIBLE: GOVERNING NETWORKS AND AMERICAN POLICY CHANGE SINCE 1945* (2014) suggests, policymaking is primarily driven not by external factors, such as events, public opinion, or media coverage, but more by internal agenda-setting and deal-making within Congress and between Congress and the White House.

78. See GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* 125-34 (1993); RODERICK D. KIEWIT & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* (1991).

79. An intriguing article argues that in the mid-1990s, the House majority and minority leaders switched from being the ideological “middlemen” they had been for many decades and became more ideological, extreme figures than the average members of their caucuses. See Eric Heberlig et al., *The Price of Leadership: Campaign Money and the Polarization of Congressional Parties*, 68 J. POL. 992, 993 (2006). The cause of this change, the authors assert, was the increasing importance of campaign money starting in the mid-1990s (under the existing legal structures that determined the channels through which money could permissibly flow, I would add), which led members to put greater value on party leaders’ ability to raise money—and willingness to redistribute it to other members and the party—than on ideological representativeness. Because ideological extremists tend to do better with fundraising than moderates, this shift in priorities has empowered more ideologically extreme House majority and minority leaders. This result, congressional leaders who are extreme relative to their members, however, as reflected in Figure 1, *id.* at 993, is based on only two figures in the House over three Congresses, the 104th through the 107th, from 1994-2000 (when Newt Gingrich first became Speaker). My own casual impression is that after the initial years of adapting to the new world of campaign money, party leaders in subsequent years have returned, for the most part, to reflecting more the center of their caucuses than the extremes. The subsequent book on these issues, ERIC S. HEBERLIG & BRUCE A. LARSON, *CONGRESSIONAL PARTIES, INSTITUTIONAL AMBITION, AND THE FINANCING OF MAJORITY CONTROL* (2012), does not update the information on the relative polarization of the elected leader-

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But party leaders can play this role only if they have the tools and the leverage to bring along their caucuses in the direction that these leaders believe best positions the party as a whole. Finally, then, let me explain why they have lost that leverage.

The problem is not that individual leaders are now “weak.” Part of the American tendency to individualize politics is to focus on personalities as the cause of political action or inaction. Personalities matter, but so does structure. Both George W. Bush and Barack Obama campaigned, and tried to govern for an initial period, in ways that reached across the aisle; both discovered that the larger structure of hyperpolarized parties in Congress made this aim exceedingly difficult.⁸⁰ Furthermore, broader structural changes, including legal ones, have disarmed party leaders of the tools they previously had used to unify their members around deals that were thought to be in the best interest of the party as a whole. What institutional and structural changes might recapture some of the crucial capacities that enable effective partisan leadership and thereby also enable effective governance?

V. STRUCTURAL DECLINE IN THE POWER OF PARTY LEADERS

Party leaders once had their greatest leverage over their members through the power of committee assignments. These assignments were valuable because they were the means to work on substantive issues a member cared about, ways to raise the member’s profile and stature, and ways to raise money for subsequent elections.

But two major changes have made committee assignments less meaningful when it comes to the ability to raise funds and enhance one’s public status and visibility, at least for those politicians who see themselves as upwardly mobile (that is, most of them): the communications revolution and the current system of campaign financing. Politically ambitious senators more and more now view the Senate as a quick pass over to a presidential campaign, particularly in light of President Obama’s success. Indeed, staying in the Senate for more than a brief period may be considered a liability to pursuit of higher office, since longer tenure means more need to take positions on divisive issues that will inevitably alienate some potential constituencies.

ship, in either the House or Senate, relative to the average member of the relevant caucus. E-mail from Eric S. Heberlig, Professor of Political Science, UNC Charlotte & Bruce A. Larson, Associate Professor of Political Science, Gettysburg College, to author (Mar. 24, 2014) (on file with author).

80. See Pildes, *supra* note 33, at 282-87.

The first change is a cultural one we all recognize: the revolution in communications and information technology. According to Moisés Naím's account, this revolution is the major force spawning the general unraveling of organizational authority and effectiveness across public and private sectors.⁸¹ Individual officeholders now have the capacity to reach large, intensely motivated audiences of potential voters and donors in ways that were simply not possible before; they are able to build a personal brand apart from the party label. Does Senator Ted Cruz, for example, spend more time on Twitter and television, including cable television, as well as televised speeches on the floor in the post-CSPAN era, than he does meeting with Republican Party leaders? What could Lyndon Johnson have done that would have been comparable? Party leaders do not control and cannot shut down these new channels of access to direct communication with voters and donors. At the same time that these channels enable individual officeholders to reach out, they also enable more widespread populist influence to reach in and factional interests within parties can be more easily mobilized. Of course, there is no way to unwind this communications revolution.

The second force behind the reduced leverage party leaders have over their members involves legal changes. Here I will focus only on the way we have changed election financing starting in the 1970s. We adopted the most aggressive regulatory structure in American history for controlling money in national elections in the early 1970s in the aftermath of Watergate. The system we created was a candidate-centered system of financing, in contrast to the party-centered systems used in much of Europe.⁸² The 1974 Federal Election Campaign Act Amendments⁸³ imposed contribution caps and spending limits on campaigns in general, and they also treated political parties similarly to corporate and union PACs: party committees could give no more than \$5,000 to candidates. In addition, individual contributions to the parties were capped at

81. See NAÍM, *supra* note 74.

82. The 1907 Tillman Act had banned national banks and corporations from contributing to national campaigns, but was weakly enforced. The Hatch Act of 1940 began the conception of more candidate-based election financing rules by putting a \$5,000 contribution cap on donations to the parties and a \$3,000,000 cap on how much national party committees could raise and spend per year. The 1971 Federal Election Campaign Act limited the amount candidates (and their families) could give to their own campaigns; put caps on how much campaigns could spend for media time; endorsed the PAC structure for corporations and unions; imposed significant and broad disclosure requirements; and lifted (temporarily, as it turned out) the caps on party contributions and spending. For a brief summary of this history, see PETER J. WALLISON & JOEL M. GORA, *BETTER PARTIES, BETTER GOVERNMENT: A REALISTIC PROGRAM FOR CAMPAIGN FINANCE REFORM* 30-34 (2009).

83. Pub. L. No. 93-443 (1974).

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\$25,000 a year.⁸⁴ When the Supreme Court struck down the spending limits in this law in *Buckley v. Valeo*,⁸⁵ the Court gave virtually no independent consideration to the Act's regulation of political parties—either the restrictions on party donations to candidates or the caps on individual contributions to parties.

Then, in the early 2000s, we added on the second big change to our system of election financing: the McCain-Feingold campaign finance “reforms.” Before that moment, the political parties raised nearly half their money in what was called “soft money.”⁸⁶ Without delving deeply into details, soft money entailed contributions to the political parties that were not subject to the caps in federal campaign-finance law.⁸⁷ This soft money, which was used for party-building actions (including television ads, positive and negative, concerning specific candidates), was fully disclosed and transparent when Congress eliminated it. Some of these contributions were in huge amounts; around half of it came from individuals, the rest from corporations and unions.⁸⁸

From the perspective of reformers, soft money was corrupting. The “purist” solution in McCain-Feingold was to ban the parties from receiving *any* soft money at all. From that point on, all money given to the parties became subject to contribution caps. The fact that Congress was willing to cut off the flow of soft money to the parties was itself a signal of the candidate-centered nature of our financing system and the reduced dependence of candidates (especially incumbents) on the parties for their electoral success.⁸⁹ But the practical result now seems to have been to diminish the already-weakened political parties as a

84. The dollar figures of these constraints were raised in the 1976 amendments. Amendments to Federal Election Campaign Act of 1971, Pub. L. No. 94-283, 90 Stat. 475, 487 (1976).

85. 424 U.S. 1 (1976).

86. In the 1990s, when soft money burst onto the scene, it provided about as much as one-third of the national parties' receipts; by the 1999-2000 election cycle, that had risen to forty percent of total national party income. See Richard Briffault, *Soft Money, Issue Advocacy, and the U.S. Campaign Finance Law*, ELECTIONS CANADA (May 2002), http://www.elections.ca/res/eim/article_search/article.asp?id=75&lang=e [<http://perma.cc/34C-G6LA>].

87. For a fuller explanation of the technical details regarding soft money, see *id.*

88. See *id.* (“The size of soft money contributions also soared. In 1997–98, there were 390 individuals or organizations—including business corporations, labour unions, Native American tribes, and ideological groups—that gave \$100,000 or more to the soft money accounts of the national political parties. By 1999–2000, there were over one thousand \$100,000+ soft money donors, and 50 donors of \$1 million dollars or more in soft money.”). In total in the decade before McCain-Feingold, from 1991-2002, 51.5% of the money given to the national party committees came from individuals on the Democratic side and 48% on the Republican side. See *Soft Money Background*, OPENSECRETS.ORG, <https://www.opensecrets.org/parties/softsource.php> [<http://perma.cc/55GQ-9X7H>].

89. See Bob Bauer, *Of Fragmentation and Networks, and the State of Political Parties*, MORE SOFT MONEY HARD LAW (Feb. 19, 2014), <http://www.moresoftmoneyhardlaw.com/2014/02/fragmentation-networks-state-political-parties> [<http://perma.cc/4DQW-6NST>].

force in elections and to create incentives for this party “soft money” to flow to independent groups. Even “the ground game” in elections, the quintessential party electoral activity, is increasingly funded outside the parties.⁹⁰

At the same moment that legislators became able to brand themselves and raise money independently of the parties, the parties were dramatically disempowered relative to other groups. Even worse, the “reforms” to campaign financing actively encouraged money to flow outside the parties to organizations that supported narrower, more sectarian causes. That is why first-year senators can now wield as much power within and over their parties as much more senior senators, including the party leadership.

VI. A PARTY-BASED CAMPAIGN FINANCE SYSTEM

Since we cannot undo the communications revolution, I want to suggest three proposals for legal change aimed at giving the political parties—and just as importantly, their elected leadership—more influence in elections and hence over how their members govern. Legal changes might not be necessary to reempower party leadership; it is possible that organic processes, driven by national electoral incentives, will do so.⁹¹ But if legal changes turn out to be needed, I offer these three initial suggestions. The first two changes are modest, the third more dramatic. The specifics of any of these proposals are less important (and not developed here in any detail) than the general conceptual reorientation I have in mind: to empower the political parties and their leader-

90. See, e.g., Dan Eggen, *Outside Groups Plan To Focus on Air War, Ground Game in 2012 Election Fight*, WASH. POST, Apr. 20, 2012, http://www.washingtonpost.com/politics/outside-groups-plan-to-focus-on-air-war-ground-game-in-2012-election-fight/2012/04/20/gIQAw6beWT_story.html [<http://perma.cc/Q7MA-YVMC>].

91. See, e.g., Molly Ball, *How the GOP Establishment Tea-Partied the Tea Party*, THE ATLANTIC, Nov. 6, 2013, <http://www.theatlantic.com/politics/archive/2013/11/how-the-gop-establishment-tea-partied-the-tea-party/281208> [<http://perma.cc/ST5Y-JHAX>]; Neil King Jr., *GOP Pushes Back on Tea Party*, WALL ST. J., Oct. 9, 2013, <http://online.wsj.com/news/articles/SB10001424052702304500404579125831958935304> [<http://perma.cc/G9R-WCGA>]; Eric Lipton et al., *Business Groups See Loss of Sway over House G.O.P.*, N.Y. TIMES, Oct. 9, 2013, <http://www.nytimes.com/2013/10/10/us/business-groups-see-loss-of-sway-over-house-gop.html> [<http://perma.cc/S57Y-B9Y6>]; Campbell Robertson, *Byrne Wins Republican Runoff in Alabama House Race*, N.Y. TIMES, Nov. 5, 2013, <http://www.nytimes.com/2013/11/06/us/politics/tea-party-republican-loses-alabama-runoff.html> [<http://perma.cc/ABY4-RN64>] (reporting that strong business support helped the winner defeat the Tea Party-backed candidate in a Republican House primary); Jonathan Weisman, *In Mississippi, It's G.O.P. vs. Tea Party*, N.Y. TIMES, Mar. 26, 2014, <http://www.nytimes.com/2014/03/27/us/politics/mississippi-senate-race-boils-down-to-gop-vs-tea-party.html> [<http://perma.cc/5QYH-TR96>] (describing Republican establishment actors working to support Senator Thad Cochran against a Tea Party challenge).

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ship so that the aggregative forces in democracy have as powerful a role as possible, and as much leverage as possible, in the democratic process.

These proposals focus on shifting our campaign finance policies in ways that would give a greater role to the political parties. As Ray LaRaja and Brian Schaffner have recently demonstrated, states that have more “party-centered” campaign finance laws tend to have less polarized legislatures than those that impose significant constraints on the amounts and means through which the political parties can support candidates.⁹² The mechanism through which this occurs, they conclude, is that the parties tend to use their financial resources to support moderate candidates more than other sources of campaign money; consistent with the incentive structures I described above, the elected officials who control party organizations internalize winning elections over ideological purity. The empirical evidence shows that parties, more than issue groups and other political committees, tend to concentrate their money on moderates and not on ideologues. As a result, LaRaja and Schaffner argue, states that give more freedom to political parties in the campaign-finance system end up with less polarized legislatures.⁹³

The federal campaign finance system imposes caps on how much the political parties can directly contribute to the campaigns of their candidates.⁹⁴ But the campaign finance rules also treat an actor’s campaign spending that is coordinated with a candidate’s campaign as equivalent to a direct contribution to that campaign. Moreover, while the rules are more generous in dollar terms for the parties,⁹⁵ these rules similarly treat coordinated party spending beyond those amounts as prohibited contributions to the candidate’s campaign. Thus, parties can engage in only limited coordinated spending with their candi-

92. See Ray LaRaja & Brian Schaffner, *Want to Reduce Polarization? Give Parties More Money*, WASH. POST: MONKEY CAGE (July 21, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/07/21/want-to-reduce-polarization-give-parties-more-money> [<http://perma.cc/YU9D-W423>].

93. *Id.*

94. For general description and analysis of how campaign finance law regulates financing connected to the political parties, see Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620 (2000); and Nathaniel Persily, *Soft Parties and Strong Money*, 3 ELECTION L.J. 315 (2004).

95. In 2013, a party could make \$46,600 in coordinated expenditures with a House candidate in a state with more than one House member (\$93,100 in states with only one House member); for the Senate, the amount depends on the size of the state’s population and ranges from figures like \$9,000 for Maine to \$1,425,000 for New York. See the FEC’s website for these figures: *2013 Coordinated Party Expenditure Limits*, FED. ELECTION COMM’N, http://www.fec.gov/info/charts_441ad_2013.shtml [<http://perma.cc/ME7J-R4NY>].

dates.⁹⁶ The fear is that party spending in coordination with its candidate would be a conduit for individuals to circumvent the contribution caps that exist on direct donations to the campaign and that bans on earmarking party contributions for specific candidates are not sufficient to address this concern.

The effect (and intent) is to use campaign finance law to try to build more of a wall between the political parties and their candidates when it comes to spending money on elections. In fact, the Federal Election Commission wanted to go even further and treat *any* money a party spent to support a candidate as a direct contribution to the candidate, which would mean this money would be subject to contribution caps. The Supreme Court put a stop to this effort by holding that political party spending that is independent is just as protected under the First Amendment as independent spending by any other entity.⁹⁷ But we still live with the remaining constraints, which the Court endorsed, that impose limits on the ability of political parties to coordinate election spending with their candidates.⁹⁸ Indeed, the Court has rejected any view that it should apply stricter scrutiny to limits on coordinated party spending than to that of any other entity.⁹⁹

My first proposal, therefore—and it may sound startling—is to permit parties to work more directly together with their candidates and coordinate the party's spending with campaigns. Contributors should continue not to be able

96. See 2 U.S.C. § 441a(d)(3)(B)(4) (2012); 11 C.F.R. § 109.21(d)(1)–(3) (2012). See also Robert Bauer, *The Right to “Do Politics” and Not Just To Speak: Thinking About the Constitutional Protections for Political Action*, 9 DUKE J. CONST. L. & PUB. POL'Y 68 (2013) (arguing that coordination involves associational interests that are given too little concern in campaign-finance jurisprudence); Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War over Coordination*, 9 DUKE J. CONST. L. & PUB. POL'Y 1 (2014); Bradley A. Smith, *Super PACs and the Role of “Coordination” in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603 (2013) (observing that “there has still been remarkably little analysis of the theory of coordination and independent expenditures, by courts or commentators” in all the years since *Buckley v. Valeo*, 424 U.S. 1 (1976)); Bob Bauer, *Coordinating with a Super PAC, Raising Money for It, and the Difference Between the Two*, MORE SOFT MONEY HARD LAW (Jan. 27, 2014), <http://www.moresoftmoneyhardlaw.com/2014/01/coordinating-super-pac-raising-money-difference-two> [<http://perma.cc/CF8Q-W9X6>].

97. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615–16 (1996).

98. See *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (upholding limitations on coordinated party expenditures); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (in a plurality decision, striking down limitations on independent party expenditures). The FEC had initially taken the position that “all expenditures by [a party] committee that are attributable to an individual election must be considered coordinated.” Brief for Respondent at 30, *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (No. 95-489); see also *id.* at 28–30 (making the same argument).

99. *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 456.

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to earmark contributions for specific candidates,¹⁰⁰ and one can raise concerns about how effective those bans on earmarking might be, but the question of potential corruption should be seen in comparative terms: in a world in which individuals can contribute unlimited amounts to issue-advocacy Super PACs, including Super PACs dedicated to one specific candidate or issue,¹⁰¹ are we better off sharply limiting contributions to parties or their ability to engage in coordinated spending with candidates? Parties, after all, are constituted by numerous interests and many donors, including large donors; parties dilute the role of money by pooling so many interests and donors. This dilution is far from complete, of course, but again, it is probably better than the alternatives. Instead of treating cooperation between parties and candidates as potential vehicles through which individuals can corrupt candidates, we should recognize that, on balance, party coordinated spending at least has the virtue of linking parties and candidates more effectively. This link would help revive a more central role for the parties' national campaign committees in their candidates' success, and in turn give those in control of the parties more leverage over candidates.

My second modest proposal is to raise significantly the amounts of money that can be donated to political parties for election purposes. It is important to recognize, but complex to unravel, how the McCain-Feingold law's ban on soft-money contributions affected the overall money available to parties and hence the role of the parties, in relation to other entities, in the democratic process. Let me offer just two quick facts to illustrate how this law's ban on soft money immediately has affected election financing. McCain-Feingold, at least as much or more than *Citizens United*, accounts for the role of non-party entities in the way our elections are run today.

In the first election after the law was enacted, in 2004, the political parties appeared to be able effectively to replace the soft money they had lost through increased, successful efforts to raise more money from more individuals, in part because McCain-Feingold also raised the amount of money individuals could donate to the parties.¹⁰² But the law soon also encouraged a dramatic rise in spending by groups outside the party structure. From 2002, when the Act was adopted, until 2008—well before *Citizens United* was decided in January 2010— independent spending by non-party entities exploded, growing around 1122% in those 6 years (or 555% from 2000, the presidential election before the

^{100.} 2 U.S.C. § 441a(a)(8) (2012) provides that contributions by an individual or a PAC which “are in any way earmarked or otherwise directed through an intermediary or conduit” to a candidate “shall be treated as contributions from such person to such a candidate.”

^{101.} See Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644 (2012).

^{102.} See Pildes, *supra* note 1, at 144-45.

Act).¹⁰³ In the 2012 elections, non-party spending grew only 207% from the 2008 election, even though the 2012 election was highly competitive to the very end.¹⁰⁴ The money that had been going to the parties, and no longer could, simply flowed now to direct, independent spending by those who had formerly given to the parties. At the same time, spending by the political parties now does appear to have taken a significant hit.¹⁰⁵

Keep this in mind the next time you hear *Citizens United* castigated as “the root of all evil” concerning money in politics. This view is wrong, for too many reasons to go into here, and *Citizens United* has become a too-convenient whipping post for those concerned about an excessive role for money in American elections.¹⁰⁶ In fact, *Citizens United* has played a minor role in the recent explosion of non-party money, partly because the logic of *Buckley* itself made it inevitable that the First Amendment would prohibit caps on contributions to non-

103. See *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/cycle_tots.php [http://perma.cc/V4DH-4DUE].

104. These figures are calculated from data provided by OpenSecrets.org and include non-party spending for independent expenditures, electioneering communications, and communication costs in total over these years. *Id.*

105. See, e.g., Robert Kelner & Raymond La Raja, Op-Ed, *McCain-Feingold’s Devastating Legacy*, Apr. 11, 2014, WASH. POST, http://www.washingtonpost.com/opinions/mccain-feingolds-devastating-legacy/2014/04/11/14a528e2-c18f-11e3-bcec-b71ee10e9bc3_story.html [http://perma.cc/N4VF-W8KT].

106. Francis Barry provides one brief explanation of some of the reasons:

This broader right to engage in express advocacy has given wealthy donors another option for where to send large checks. Those checks, however, are increasingly being sent to groups that were unaffected by the *Citizens United* and *Speechnow* decisions: 501(c) organizations that, like the old stealth PACs, do not have to disclose their donors. Governed by the Internal Revenue Service rather than the Federal Election Commission, the election activity of these groups is more restricted than that of political committees, but oversight has always been lax. From 2004 to 2012, spending by 501(c) organizations grew by almost 500 percent, to \$334 million from less than \$60 million.

Over the same period, total spending by 527 groups dropped by 65 percent, to \$151 million from \$431 million. Some of the missing money undoubtedly went to 501(c) organizations, and some of it went to super PACs, which raised \$609 million in 2014. But let’s put these numbers in context.

Total spending by political committees accepting unlimited contributions (Super PACs and 527s) grew by 76 percent from 2004 to 2012. Meanwhile, total contributions raised by the two major parties’ presidential candidates grew by 72 percent, from \$696 million in 2004 to \$1.2 billion in 2012.

Francis Barry, *Forget the Dictionary, Super PACs Aren’t New*, BLOOMBERG VIEW (Mar. 21, 2014), <http://www.bloombergvew.com/articles/2014-03-21/forget-the-dictionary-super-pacs-aren-t-new> [http://perma.cc/5ZV6-CQYM].

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party entities that engaged only in independent election spending.¹⁰⁷ Reforms like the McCain-Feingold soft-money ban created at least as strong an incentive for the rise of the centripetal and fragmenting forces in democracy as has *Citizens United*. In a world in which the potential pool of money to influence election outcomes becomes effectively unlimited, because *Buckley v. Valeo* makes any kind of spending limitations unconstitutional, restrictions on the flow of money to candidates and campaigns will inevitably lead that money to flow through other channels, as it did in floods well before *Citizens United*.¹⁰⁸ For those who remain concerned about the flow of money into the political parties, we can debate appropriate limits on amounts and sources. But if we have limits on the amounts that can be donated to parties from appropriate sources, then those limits should be set at high levels to encourage a more effective role for parties in elections and hence in governance.

Both raising the caps on donations to parties and on party spending coordinated with its candidates do raise concerns that donors would be able to use the parties to corrupt those in office by making elected officials dependent upon large contributions to the parties—contributions that are then passed through to specific candidates who are aware of the ultimate source of the party's spending or contributions. My final, more extreme proposal therefore takes to its natural conclusion the underlying idea of structuring the campaign finance system to support a larger role for the political parties, in a way that addresses this corruption concern. We could consider a shift to publicly financed elections, but with the important twist that they be financed significantly through the political parties, rather than having the individual candidates be the exclusive or overwhelming recipient of the funds. In the limited experiences of public financing in the states, the money overwhelmingly flows through the candidates, not the parties—reflecting the typical individualist-based American conception of democracy.¹⁰⁹

107. One recent major study of independent spending at the state level both before and after *Citizens United* concluded that the decision “did not have much of a direct effect on business spending, despite public expectations.” Keith Hamm et al., *Independent Spending in State Elections: Vertically Networked Political Parties Have Been the Real Story 1* (working paper) (Mar. 2014), http://www.cfinst.org/pdf/state/hamm-kettler-malbin-glavin_state-indep-spdg_2006-2010_webversion.pdf [<http://perma.cc/3QVV-Y3RQ>].

108. See generally Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999).

109. Fourteen states provide public financing to candidates, who agree in return to limits on their campaign spending. In most states, public funds make up a portion of a candidate's funding, but candidates are permitted to continue to raise regulated money from private sources; in “clean election” states, candidates who accept public financing cannot raise any further private funds. Ten states provide small amounts of money to the political parties, usually to help finance party conventions; these grants “are generally not large.” See generally *Public*

Public financing through the parties would most directly accomplish the aim of putting greater leverage into the hands of party leaders. It would also, perhaps not coincidentally, bring our system of financing elections closest to the most common system used in other well-established democracies.¹¹⁰ Of course, if we were to encourage or require money to flow primarily through the major political party organizations, it would become all the more important to focus on how the leadership of party organizations gets constituted—and, given the much greater significance that party organizations would have, the ways in which these party leaders are chosen would inevitably change (particularly for the party that does not control the presidency). Based on the views I have outlined here, perhaps the ongoing party organizations, the Democratic National Convention and Republican National Convention, would need to be put under the control of the elected party leadership in government, at least for determinations of how to use campaign funds. Elected national leaders of the party (a multi-member small group of such leaders might be appropriate) remain the actors most likely to internalize the incentives to make the party appealing to the widest constituency. But fixing the details is less important than generating discussion about this general direction for public financing schemes.

It is possible, of course, that organic developments might move political dynamics in this direction without formal policy change. The 2014 midterm election cycle, for example, has seen the emergence for Senate races of an exceptionally well-funded Super PAC on the Democratic side, The Senate Majority PAC, which is funded by individual billionaires making large contributions (the largest to date being \$5.0 million) and labor unions.¹¹¹ Much like the

Financing of Campaigns: An Overview (Jan. 23, 2013), NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx> [<http://perma.cc/ET9K-NUFV>] (providing an overview of state public financing and campaigns).

110. Most countries in Western Europe provide annual subsidies to political parties, typically based on either the number of votes received, the number of legislative seats held by the party, or some combination of the two. For a description of public funding arrangements in five such countries, see Karl-Heinz Nassmacher, *Party Funding in Continental Western Europe*, in INTERNATIONAL IDEA, *FUNDING OF POLITICAL PARTIES AND ELECTION CAMPAIGNS* 117, 122–26 (Reginald Austin & Maja Tjernström eds., 2003). Information as to which countries use public funding as part of their political finance system is available at Magnus Ohman, *Political Finance Regulations Around the World: An Overview of the International IDEA Database*, IDEA (2012), <http://www.idea.int/political-finance/index.cfm> [<http://perma.cc/F9ZJ-GFFE>].

111. See Matea Gold, *Top Harry Reid Advisers Build Big-Money Firewall To Protect Senate Democrats*, WASH. POST, Sept. 16, 2014, http://www.washingtonpost.com/politics/top-harry-reid-advisers-build-big-money-firewall-to-protect-senate-democrats/2014/09/16/991381b6-3cdf-11e4-9587-5dafd96295fo_story.html [<http://perma.cc/EX9N-48NW>].

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broad electoral aims of a political party, the purpose of this Super PAC is to preserve the Democratic majority in the Senate.¹¹² The party has therefore spent large sums to attempt to preserve the seats of vulnerable but competitive incumbent Senators, which in turn means the most centrist Senators in the Democratic Party, who hail from purple or red states, such as Senator Pryor of Arkansas, Senator Hagan of North Carolina, and Senator Begich of Alaska.¹¹³

This PAC behaves much like a political party in the sense that its aim is not to support ideological purists, but in more pragmatic, electorally oriented terms, to support the party's vulnerable candidates, regardless of specific ideology. Given the theoretical and empirical account that I provided earlier, it should come as no surprise that the organizers and leaders of this PAC have strong professional connections to Senate Majority Leader Harry M. Reid,¹¹⁴ or that President Obama has spoken at two of the PAC's major fundraisers.¹¹⁵ Although Senator Reid does not formally control this PAC, one might comfortably speculate that if this PAC (as the biggest outside spender on the Democratic side) succeeds in enabling the election of Democratic Senators, Senator Reid might well end up with greater capacity to "persuade" those Senators to follow the leadership's positions. If similar PACs closely tied to the leadership emerge on both sides of the aisle in both houses of Congress, party leaders might well end up with greater leverage over rank-and-file members dependent on this source of funding.

These large contributions to independent-spending "non-party" entities are flowing into this surrogate for the Democratic Party, rather than into organs of the party organization itself (such as the Democratic Senate Campaign Committee), because current law does not permit political parties to accept unlimited contributions that will be used only to engage in independent spending. But current litigation is challenging this restriction on First Amendment grounds, based on the argument that political parties, like other entities, should be able to accept unlimited contributions if they will be used only for the party's constitutionally protected right to engage in independent spend-

112. *Id.* ("The Senate Majority PAC team came together in early 2011, haunted by narrow Democratic Senate losses the year before in states such as Illinois and Pennsylvania.")

113. *Id.* ("When Sen. Mark Pryor was pounded with ads last spring . . . the [Senate Majority PAC] punched back at Pryor's Republican challenger . . . [T]he Senate Majority PAC and Patriot Majority have spent millions defending Sen. Kay Hagan . . . In Alaska, the Senate Majority PAC has provided most of the funding for . . . a super PAC backing Sen. Mark Begich.")

114. *Id.* (describing the PAC as "[l]ed by a quartet of longtime political strategists with close ties to [Senator] Reid").

115. *Id.* (noting that Obama "headlined two fundraisers for the super PAC this summer").

ing.¹¹⁶ There is little doubt that if Democratic Party organizations could accept these unlimited, independent-expenditure contributions, then an entity like the Senate Majority PAC would disappear overnight, and all or nearly all of that money would flow to the appropriate party organization instead (more ideologically oriented Super PACs would continue to exist). Moreover, if this litigation succeeds, it would significantly reduce the importance of the issues I have raised about limits on party coordinated expenditures or caps on donations to the parties for money that will be used for contributions to campaigns, not independent spending. If the political parties were constitutionally entitled to receive unlimited contributions dedicated for use only for independent party spending on behalf of candidates, then we would likely see a significant reversal of the flow of money from Super PACs to the parties.

The Supreme Court's recent decision in the *McCutcheon* case might already provide a gentle nudge in this direction.¹¹⁷ That decision left intact contribution caps on the amount an individual could donate to any particular candidate or to a political party, but invalidated caps on the total amount of money an individual (staying within these limits) could give to a group of candidates or party organizations. Before the decision, an individual could give no more than \$123,200 in total to candidates and party organizations.¹¹⁸ The decision has triggered the formation of more joint fundraising committees; these enable a group of candidates to raise money collectively and accept a single check, which is then divided up legally among the candidates, and enable political party organizations, such as a national party organization and a number of state party organizations, to do the same thing.¹¹⁹ Despite claims about the additional torrent of money that *McCutcheon* would release through these vehicles, it remains unclear at this stage how much money these joint fundraising committees will be able to raise.¹²⁰ But if party-based joint fundraising committees do turn out to be of considerable practical significance, then the effect of *McCutcheon* would likely be to cause more money to flow to the political parties, rather than to non-party organizations that had never been subject to similar aggregate con-

116. See Complaint, Republican Nat'l Comm. v. FEC, No. 1:14-cv-00853 (D.D.C. filed May 23, 2014), http://www.fec.gov/law/litigation/rnc_rnc_complaint.pdf [<http://perma.cc/WB7J-CBNM>].

117. *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

118. *Id.* at 1443.

119. Andrew Mayersohn, *Gather Ye Contributions, In Bulk*, OPENSECRETS.ORG (Aug. 21, 2014), <https://www.opensecrets.org/news/2014/08/gather-ye-contributions-in-bulk> [<http://perma.cc/6E8P-GQUT>].

120. *Id.*; Bob Biersack, *McCutcheon Decision: Add Some More Zeroes to That Check*, OPENSECRETS.ORG (Apr. 2, 2014), <http://www.opensecrets.org/news/2014/04/mccutcheon-decision-add-some-more-z> [<http://perma.cc/J276-NFT9>].

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tribution caps. If this occurs, *McCutcheon* would turn out to be the first Supreme Court decision in this entire field with the practical effect of creating incentives for money to flow to the parties rather than to non-party groups. Whatever else might be said about the decision, it would therefore encourage, to some modest extent, the forces inducing centralization of financing through the parties – emphasized in this Feature.¹²¹

To be sure, there is still reason to be concerned about the role in American elections of extremely large contributions or spending from single individuals or entities. But we only began in the 1970s to attempt to regulate the role of money in national elections in a comprehensive way.¹²² Moreover, as almost half a century of effort using that approach has shown, it is extremely difficult to limit the amount of money that flows into elections, as long as we continue to have a privately financed system and an understanding of the First Amendment that precludes limitations on election spending – a First Amendment constraint attributable to *Buckley v. Valeo*,¹²³ not to any more recent decision. In light of this reality, the best policy we can achieve is probably to create incentives to encourage this money to be channeled in one direction rather than another. We should use these incentives to channel that money to flow through the political parties to a much greater degree than is currently the case.

VII. MAKING DEAL-MAKING POSSIBLE

I have focused on campaign finance laws merely as one point of entry into my larger theme: the need to reinvigorate party leaders' capacity to play a unifying leadership role. If we turn reform efforts in this direction, instead of the paths more often advocated, then other suggestions might start springing to mind.

For example, effective governance inevitably requires negotiation, particularly in our separated-powers system. But little in academic work on democracy, or even popular accounts of democracy, even addresses issues related to negotiation, such as the institutional environments or structural conditions that enable effective negotiations among political leaders. How could law and policy facilitate these structures and conditions?

121. For a similar view, see Nathaniel Persily, Op-Ed, *Bringing Big Money Out of the Shadows*, N.Y. TIMES (Apr. 2, 2014), <http://www.nytimes.com/2014/04/03/opinion/bringing-big-money-out-of-the-shadows.html> [<http://perma.cc/LK4X-D6GX>].

122. For a brief history of campaign finance regulation, see ISSACHAROFF, KARLAN & PILDES, *supra* note 22, at 332-34.

123. 424 U.S. 1 (1976).

Part of our romanticization of democracy has been reflected in an extreme emphasis on greater transparency as a solution to our democratic anxieties. In our culture, it is difficult to defend the need for secrecy in negotiations. But compare the environment in which successful international negotiations still work today (at least before WikiLeaks) to the ways in which our laws and culture of transparency have transformed the environment in which domestic negotiations over policy take place.

After the 1976 Government in the Sunshine Act required that congressional committee meetings to be public, surveys of senators soon concluded that these open meeting requirements were the largest single cause of a decline in the ability to negotiate and to make politically difficult tradeoffs.¹²⁴ Today, we have the unfortunate Federal Advisory Committee Act,¹²⁵ which extends these open-meeting requirements even to bodies that only provide advice to the federal government and ties these advisory groups in knots for little meaningful public benefit. If negotiations among leaders are a key to effective governance, particularly in polarized times, then we need a less moralistic, more realistic sense of the conditions under which negotiations effectively take place.

One structural condition for productive negotiation in theory and practice is likely to be the presence of long-term players who will interact over multiple negotiations. One-shot bargaining games are notoriously more prone to strategic withholding and manipulation of information, since there is no threat of future sanction in subsequent negotiations. In the political realm, this suggests that whatever the downsides to long-term incumbencies, one advantage that longer-serving members of Congress are likely to have is greater informational knowledge about what the other side values most and what it can afford to trade; which threats are realistic and which are bluffs; and the ability to trade off issues across time and policy spaces—an ability that can enable productive compromise.¹²⁶ Once again, the presence of long-term players is a structural condition that tends to favor the role of party leaders, since they tend to have served for long tenures, along with other more senior members.

124. Alan Ehrenhalt, *Special Report: The Individualist Senate*, 40 CONG. Q. WKLY. 2177-78 (1982) (“Most senators seem to agree that [recent open meeting requirements] have made negotiation and political self-sacrifice infinitely more difficult.”). See also Sarah A. Binder & Frances E. Lee, *Making Deals in Congress*, in AM. POL’Y SCI. ASS’N, *supra* note 34, at 58, 63-64 (explaining how transparency increases lawmakers’ incentives to posture and makes consideration of broad solutions more difficult).

125. Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. §§ 1-16 (2013)).

126. See Mark Warren & Jane Mansbridge, *Deliberative Negotiation*, in AM. POL’Y SCI. ASS’N, *supra* note 34, at 104-06.

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This is yet another reason why changes that empower recent arrivals to Congress might also make it more difficult to forge deals across partisan lines. To be sure, safe homogenous seats can yield long series of terms of office for candidates who can afford to appeal to more extreme poles of the spectrum without an electoral cost; once again, we face tradeoffs between democratic values. But the importance of repeat players to effective democratic negotiation in legislative bodies brings out a downside to another romantic but counter-productive populist “reform” of the democratic process: the movement for term-limits (especially short ones) for state legislators, in an effort to elect more “citizen legislators.”¹²⁷ Yet term limits seem not to have any effect on the composition of those elected to office.¹²⁸ The term limit effort was also designed to make legislators more accountable to the public. However, the effect of term limits is to “weaken the legislative branch relative to the executive;”¹²⁹ to empower legislative staff, who can invest in long-term development of policymaking expertise; to boost interest groups, upon whom less experienced legislators become more dependent for information; and to force legislators to adopt shorter time horizons that are in tension with the longer-term, repeat interactions that make for effective political negotiation and problem solving.¹³⁰

A second structural condition for effective negotiation across political divisions is, as suggested above, the ability for certain stages of the discussion and negotiation process to take place outside the public eye. Indeed, contrary to the popular emphasis on the pervasive importance of full transparency, studies of this issue now cause leading social science reports to issue such strong statements as that “the empirical evidence on the deliberative benefits of closed-door interactions seems incontrovertible.”¹³¹ Perhaps the reasons this is so are obvious, but they are nonetheless worth stating briefly, given the far greater emphasis the “democratic” benefits of transparency have received in recent decades. When the audience for a negotiation is public, the parties are encouraged to posture for their own constituents and, sometimes, to stand for principle by refusing to compromise. When negotiations take place in less public arenas, parties typically feel free to take greater risks in revealing their posi-

127. For the role of the “citizen legislator” rhetoric in advocacy for term limits, see John M. Carey et al., *The Effects of Term Limits on State Legislatures: A New Survey of the 50 States*, 31 LEGIS. STUD. Q. 105, 116 (2006). The Supreme Court held that statutory term limits for federal offices are unconstitutional in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

128. *Id.* at 113-17.

129. *Id.* at 129-30.

130. For the most comprehensive study of the effects of term limits, see generally THAD KOUSSER, *TERM LIMITS AND THE DISMANTLING OF STATE LEGISLATIVE PROFESSIONALISM* (2005).

131. Warren & Mansbridge, in AM. POL’Y SCI. ASS’N, *supra* note 34, at 108.

tions, the issues on which they have the most intense preferences, the issues on which they can give, and the benefits they must attain in return for any compromises they make. Similarly, negotiations work as part of packages of tradeoffs, but disclosing any one potential compromise in isolation, before the entire package of countervailing compromises has been agreed upon, can easily scuttle any potential deal. That is why, of course, one effective tactic for undermining negotiations is to leak the details of one potential dimension of compromise before the full range of provisions has been settled. Open negotiations can themselves foster polarization, which is why peace negotiations are frequently carried out in secret.¹³²

The demand for greater transparency has been driven, of course, by genuine democratic concerns, including concerns regarding corrupt deals—ones that do not adequately take into account the full range of appropriate interests—or concerns that important affected interests will not be heard. One way to reframe the costs and benefits of transparency to democracy might therefore be to focus less on demanding *full transparency of processes* and more on asking for *transparency of the reasons and purposes* that explain and justify outcomes.¹³³ The adoption of the Constitution provides one example: while the negotiations at the Constitutional Convention were held in secret, there was a robust, public ratification debate in which the justifications for various provisions, and the arguments against, were extensively tested in a prolonged open process.¹³⁴ Of course, any decision to permit greater space for private democratic negotiation would itself be a decision that in most contexts would have to be made publicly and be publicly justified—though there are some contexts in which even the fact that negotiation is taking place might have to remain secret initially to have any chance of success.

Additionally, insulating the processes of negotiation from constant public monitoring to a greater degree would require policymakers to generate trust in the negotiating process itself. This might in turn necessitate public disclosure of the participants in the process, in order to ensure all relevant interests are represented, but without necessarily disclosing the detailed, step-by-step substantive proposals within the negotiation process itself. There are many controversial issues at stake, to be sure, in advocating greater space for less public

132. For a recent account of the role of secrecy in the Camp David negotiations during the Carter administration that produced the peace treaty between Israel and Egypt, see LAWRENCE WRIGHT, THIRTEEN DAYS IN SEPTEMBER: CARTER, BEGIN, AND SADAT AT CAMP DAVID (2014).

133. This is a recommendation the American Political Science Association Task Force Report on negotiation makes. Warren & Mansbridge, in AM. POL'Y SCI. ASS'N, *supra* note 34, at 108-112.

134. See generally PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 (2010) (recounting the extensive role played by “We The People” in the states’ ratification debates).

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policymaking negotiating spaces. However, we need to begin to take seriously the reality that full transparency can be in considerable tension with the prospects for productive negotiations and hence effective democratic governance in polarized times.

A third implication of moving away from the romanticized model of democratic governance is as follows. In a few short years we have learned that ending earmarks has eliminated one of the most direct benefits that party leadership could bestow upon recalcitrant members to generate their support on major legislation.¹³⁵ A de-romanticized and less purist view of democracy might also have to accept that certain kinds of public side-payments – logrolling is itself an example, of course – are necessary to enable the compromise and negotiation required for government to function more rather than less effectively. Successful negotiation takes advantage of differential intensities of preferences; members of Congress who are moderately opposed or indifferent to legislation can have strong preferences for the concentrated benefits that public projects in their state or districts offer. Bans on bringing certain dimensions of policy into the negotiation dynamic can make tradeoffs and productive compromises more difficult.

VIII. LESS ROMANTICIZED VISIONS OF DEMOCRACY

Let me return to where I began. For many years now, private law scholarship has focused on the consequences of its rules for the dynamics of private

135. See, e.g., Rosalind S. Helderman, *Boehner Faces a Political Cliff over Budget Fracas in Washington*, WASH. POST, Dec. 22, 2012, http://www.washingtonpost.com/politics/boehner-faces-a-political-cliff-over-budget-fracas-in-washington/2012/12/22/8301c280-4acd-11e2-9a42-d1ce6doed278_story.html [http://perma.cc/4HPQ-JTAC] (describing how it was difficult for Boehner to bring “fiscal cliff” legislation to the floor in part because of the elimination of earmarks); Damian Paletta, *Breakdown Is New Norm in Spending Showdowns*, WALL ST. J., Oct. 1, 2013, <http://online.wsj.com/news/articles/SB10001424052702303643304579107683112139054> [http://perma.cc/X7QM-VPY4] (explaining how “public revolt” against earmarks means passage of spending bills can no longer be greased); Jennifer Steinhauer, *Last Shutdown a Lesson Lost on Capitol Hill*, N.Y. TIMES, Sept. 28, 2013, <http://www.nytimes.com/2013/09/29/us/politics/last-shutdown-a-lesson-lost-on-capitol-hill.html> [http://perma.cc/C4FB-K4AJ] (attributing the failure of Congress to pass any appropriations bills prior to the shutdown in part to earmark ban); Sean Sullivan & Aaron Blake, *House GOP To Look at Immigration Against Backdrop of Deep Divisions*, WASH. POST, July 9, 2013, http://www.washingtonpost.com/politics/house-gop-to-look-at-immigration-against-backdrop-of-deep-divisions/2013/07/09/9f1fd7e6-e8a6-11e2-8f22-de4bd2a2bd39_story.html [http://perma.cc/PGK3-6Q9U] (party leaders citing loss of earmarks as contributing to decreased party unity). The classic study of the role of “pork barrel projects” in building effective majority coalitions in Congress is DIANA EVANS, *GREASING THE WHEELS: USING PORK BARREL PROJECTS TO BUILD MAJORITY COALITIONS IN CONGRESS* (2004).

power in contexts like market settings. My aim, and what I view as the aim for “the law of democracy,” is to do the same for public law, in the context of democratic elections and governance.

This approach recommends that we think in terms of measures that would encourage the forces of centralized authority within the political parties and discourage the forces of political fragmentation. Stronger parties are likely to remain the most effective vehicle for enabling the compromises and deals that are necessary in the face of what will be the ongoing polarization of the parties in government. Put another way, the problem is not that we have parliamentary-like parties; it is, I suggest, that our political parties are not parliamentary-like *enough*.

The obstacles to any changes along these lines will not merely be entrenched interests. In overcoming these obstacles, it will be just as necessary and important to confront head-on two powerful cultural trends that will generate resistance to publicly financed elections through the parties and other measures that aim at re-empowering political leaders.

The first is America’s exceptional and distinct ideology of “popular participation.” Any change in the democratic system that aims to empower political leaders will be cast in terms of Manichean conflict between “the people” and “the elites.” America’s cultural self-understanding of democracy has always invoked a rhetoric of “popular sovereignty” that is far more populist in meaning than in other Western democracies. But it is increasingly becoming clear, in our era at least, that the much greater participation enabled by the communication revolution breeds polarization as well as fragmentation. Instead of viewing a relentless expansion of participatory reforms as the cure for what ails democracy, we should start recognizing a perhaps-tragic tradeoff between the desire to make government more accountable, through measures like enhanced popular participation, and the capacity for government to function effectively. In the past, for example, I have supported matching private-public election financing systems, such as the system used in New York City and now being adopted elsewhere. But for the reasons I discussed earlier, I have become wary that these systems will only exacerbate polarization and fragmentation. Indeed, one recent study has found that in “clean-money” public financing systems, such as systems that match public dollars to private contributions, candidates’ positions move farther away from the ideological center of public policy preferences once the clean money system has been adopted.¹³⁶ The mechanism involved, this study suggests, is candidates’ need to appeal to ideologically extreme indi-

136. See Andrew B. Hall, How the Public Funding of Elections Increases Candidate Polarization 20-21 (Aug. 13, 2014) (unpublished paper), https://dl.dropboxusercontent.com/u/11481940/Hall_publicfunding.pdf [<http://perma.cc/UA3K-3H3N>].

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vidual donors to qualify for public funds. Other studies do not reach such conclusions,¹³⁷ and it is too early with these systems to draw conclusions about whether individual donor-based public financing systems will contribute to polarization. But we should be alert to the possibility that they will, and we ought not take for granted that individual donor-based public financing systems will inevitably and automatically reflect the actual distribution of policy preferences among the general electorate.

Second, efforts to empower party leadership will run into America's characteristic and unique distrust of political parties. Part of the culturally distinctive understanding of "popular sovereignty" in America has been a romantically individualist vision of democracy: a vision that sees organizational intermediaries between citizens and government, such as political parties, as a corruption of true democracy. Furthermore, if parties must be tolerated, then they must be put under the control of "the people" as much as possible; hence the Progressive Era anti-party creation of the mandatory primary election. Therefore, a robust ideological defense of political parties, as well as of party and political leadership, will have to be willingly and forthrightly undertaken in order to mobilize support for any set of practical measures that seek to re-empower party leadership.

If I am right that the problem is effective governance; that political fragmentation might be a more productive focal point for effective reform efforts than polarization per se; and that the right direction for fresh thought is how to re-empower political and party leaders, then it is also necessary to understand the deep sources of resistance that must be engaged as a prelude to any practical movement along this path. These sources lie in the distinctly American attachment to a romantic vision of democracy centered on the individual citizen, rather than on effective governance and the central role of organized political power, particularly the political parties, in determining how well a democratic system actually functions in delivering the appropriate level and forms of public goods.

CONCLUSION

American democracy has always rested on a balance between a mythology of "popular sovereignty" and the reality of what is needed to organize political and governing power effectively. The key to effective democracy might be cast

137. See Seth E. Masket & Michael G. Miller, Does Public Election Funding Create More Extreme Legislators? Evidence from Arizona and Maine (July 14, 2014) (unpublished paper), <https://430327fo-a-62cb3a1a-s-sites.googlegroups.com/site/millerpolsci/docs/extremismweb.pdf> [<http://perma.cc/4Y8U-Y2AN>].

in the following way: we need to sustain the appropriate elements of popular participation while maintaining a coherent and decisive enough structure of political leadership to enable effective governance.

We have to be careful not be seduced by an overly romantic and individualized conception of democracy that has a deeper resonance in American political culture and history than in any other nation. We should also be careful about invoking democratic values, such as political equality, freedom of association and speech, and participation, in overly idealized and abstract terms that fail to attend to the actual consequences of institutionalizing these values in particular ways on effective political power and governance. This is a particular risk for legal scholarship and advocacy, both of which tend to be based more on analysis and argument concerning values and principles than on empirical facts about the actual organization of effective political power.

I realize there will be no rousing ovation for any of this. Who cheers for centralizing more power in the political parties at a time when the parties are at their least appealing? Who cheers, worse yet, for a particularly elitist vision of the political parties, centered on empowering party leaders? People will not “go to the streets” in favor of political parties and party elites. All this runs counter to the DNA of America’s democratic sensibilities.

But that is part of my purpose: to challenge those sensibilities. In the midst of the declining governing capacity of the American democratic order, we ought to focus less on “participation” as the magical solution and more on the real dynamics of how to facilitate the organization of effective political power. I have tried, today, to give you a glimpse into this alternative, institutionalist approach to democracy and legal thought.

Making American Democracy Representative

A bold three-part proposal to introduce ranked-choice voting and proportional representation—and to abolish primaries

BY BENJAMIN I. PAGE AND MARTIN GILENS

Americans are starting to catch on to the fact that our system of “first past the post” plurality voting in single-member districts can lead to perverse results. The citizens of Maine, for example, got stuck with an unpopular reactionary governor, Paul LePage, after he was elected in 2010 with just 38 percent of the vote in a three-way race.

Out of frustration, Mainers have since instituted an alternative system called ranked-choice voting (RCV). With RCV, voters do not just pick one candidate; they rank all the candidates in order of preference, from most favored to least favored. The candidate with the most first-choice votes wins outright only if he or she gets a majority of those votes. Otherwise, voters’ second choices come into play. (See sidebar below.) In a moderately conservative state like Maine, RCV would usually mean a more centrist or middle-of-the-road official would win, rather than the far-right LePage. In a more progressive state or district, it would also elect more representative officials—in that case, more progressive ones.

Despite repeated efforts by Maine’s Republican establishment to block RCV, citizens of the state have twice passed referenda in favor of it. They recently decided to continue to use RCV in federal congressional elections and state primary elections. Ironically, as a result of a decision by the Maine Supreme Court, the system does not apply to the general election that motivated the reform in the first place—the election of the governor.

We believe that ranked-choice voting, which a number of cities have also adopted for local elections, could help elect members of Congress who better reflect the preferences of their constituents. (RCV could also help us elect presi-

dents more democratically, but that is a topic for another time.) For the House of Representatives, RCV would help reduce the influence of Tea Party-type extremists, thereby reducing party polarization and gridlock, and it would produce government policy better aligned with the wants and needs of all Americans.

The problems of unrepresentativeness and polarization call for further reforms as well, which should include more open ballot access for candidates and participation of all citizens at each stage of the electoral process—goals that we believe would be best achieved by abolishing primaries. In addition, Americans should consider adopting a variant of the method used by most democracies in the world for electing their national legislatures: a system of proportional representation through multi-member districts, which would help ensure that the House of Representatives actually represents every political view embraced by a substantial number of Americans in proportion to the voters who support it.

This is a big agenda, not likely to be enacted overnight. But in the interest of overcoming widespread dissatisfaction with government, Americans may be ready to consider changes

in elections that have long been off the table. Maine is not the only state to adopt a major reform; both California and Washington state have adopted an alternative election format known as “top two.” To sort out the different approaches and see how several reforms might work together in elections for Congress, it makes sense to consider how American congressional elections have been going awry.

IN A TYPICAL PRIMARY election, a small portion (usually just 15 percent to 20 percent) of each major party’s eligible voters choose two nominees for the general election. Candidates who might draw some support from both parties’ voters as well as from independents have little chance of winning either party’s primary. In states or districts that are dominated by one party, the officeholders who emerge tend to reflect the preferences of their party’s primary voters, donors, and activist organizations. As Michael Barber has shown, U.S. senators’ voting in Washington most closely reflects the preferences of their campaign donors, less closely the preferences of their same-party voters, and barely at all the preferences of their state’s voters taken as a whole. The Senate as well as the House could benefit from RCV and the abolition of primaries.

Even in states or districts with relatively even partisan divisions in the electorate, the Republican and Democratic candidates who make it through their party primaries tend not to represent the average voter in their state or district. What results instead is what Joseph Bafumi and Michael Herron call “leapfrog representation,” in which moderate districts are not represented by moderate officeholders but vacillate between Democrats and Republi-

How Ranked-Choice Voting Works

In Maine, voters assign preference rankings to as many of the candidates on the ballot as they like, as their first choice, second choice, and so on. If there are multiple candidates for a single office, the candidate with the most first-choice votes

wins only if she or he has a majority of all the first-place votes. If not, the candidate with the fewest first-choice votes is eliminated. Voters who had preferred the eliminated candidate then have their votes transferred to their second-choice candi-

date. If no candidate still has a majority of the votes, the process is repeated as many times as necessary, with the votes cast by people who had backed each eliminated candidate transferred to the still-viable candidate that they rank highest.

cans who stand to the left and the right (sometimes the far right), respectively, of the majority of voters.

In short, major party primaries, besides stifling third parties, tend to prevent the election of centrist candidates—who might appeal to the largest number of voters in their state or district—and give disproportionate power to small groups of party activists, donors, and interest groups.

California and Washington made some progress in addressing this problem when they adopted the “top two” nonpartisan nominating system. In those two states, primary elections are now open to candidates and voters of any party (or no party)—an excellent idea. The two candidates with the most votes win places on the November ballot. The hope is that in heavily one-party districts, if the top-two system produces two nominees from the dominant party, at least one of them will have broader voter appeal than the extremists and interest group-funded candidates that the old system tended to come up with. Then, in the general election, voters from the minority party will presumably join in a majority to elect the candidate who is more representative of the district as a whole.

But “top two” has not always realized this hope. For one thing, it has some of the same defects as straight plurality voting for a single winner. Each voter must pick just one candidate. So if several similar candidates split the votes of their supporters, less-popular candidates may prevail, just as LePage did in Maine.

That problem could be addressed by using ranked-choice voting in nonpartisan primary elections. If voters rank a number of candidates, both candidate A (with more first-choice votes than any other candidate) and candidate B (with the next-highest number of first choices) might well win places on the November ballot, just as in the top-two system. At least one of those two might be reasonably representative of the average voter in the district. But it is also possible that candidate C could win fewer first-choice votes than either A or B only because many voters’ first-choice votes were split between C and highly similar candidates



Supporters of ranked-choice voting delivered petitions to the State House in Augusta, Maine, last February.

D, E, and F. If C was the second choice of many of those voters, majorities might prefer C over both A and B. In that case, C should go to the November runoff. Top-two would eliminate C, but RCV would forward C to the general election. Consequently, the use of RCV in primaries as well as general elections would lead to more representative results than either plurality voting or even top-two.

BUT IF WE MERELY USE RCV in primaries and general elections for single-member districts, we will not have dealt with the small, heavily partisan, and unrepresentative nature of primary electorates, or with the lack of representation of minority viewpoints that is inherent in single-member districts.

In order to deal with unrepresentative primaries, it would be helpful to take a second step and eliminate primary elections altogether, nominating and electing members of Congress in one unified process through “instant runoffs” in November. Ranked-choice voting would allow citizens to evaluate candidates from any party—or no party—who qualified for the ballot by gathering petition signatures (as is currently the case in California and many

other states) rather than by party endorsements. Candidates could choose to list a party affiliation on the ballot as an aid to voters, but that affiliation would not reflect any formal endorsement by the party. The winner should be the candidate who was ranked above all other candidates by majorities of voters in head-to-head comparisons.

Eliminating primary elections would advantage candidates who appeal to as broad a swath of their districts as possible. It would have other advantages as well. Americans are called upon to vote far more frequently than citizens of any other democracy, one of the sources of lower voter turnout in the United States. Eliminating primaries would reduce the burden on voters. November general elections typically see considerably higher turnout and a more representative electorate than do primaries, which badly under-represent lower-income citizens and ethnic minorities. Focusing voters’ attention on one high-stakes general election should help maximize turnout.

Further, eliminating primaries would reduce the power of small but intense cadres of extreme ideological activists. In low-visibility, low-turnout primaries, such groups can flood

social media and turn out their supporters to nominate an extremist candidate. That is how Tea Party favorite Dave Brat ousted Eric Cantor—a conservative himself, but less extreme than Brat—in a Virginia Republican primary, despite Cantor’s big win in the previous general election and his closer fit with the district.

This November-only system, with open, petition-based nominations, would give voters more choices. With RCV, there would be no problem of “wasted” or counterproductive votes for third- or fourth-party candidates. A voter could rank her or his genuine first choice first, and if that candidate did poorly, the voter’s second preference would count. Third or fourth parties would no longer be blatantly discriminated against by the electoral system.

The openness of the system would put pressure on both major parties to pay more attention to all the voters in their states or districts, and less attention to their party donors and activists. Republicans would face more centrist pressures, while Democrats would have to pay more heed to progressive economic views. Large majorities of Americans hold progressive opinions on jobs, health care, the minimum wage, progressive taxation, bank regulation, and many other issues, yet those views are currently slighted by many Democratic officeholders, just as they are by nearly all Republicans.

If the major parties did not respond to the citizenry, new parties or independent candidates could challenge them. That threat would pressure the major parties toward democratic responsiveness.

Yet the two major parties would by no means be excluded from elections. We expect that they would continue to do most of the work of vetting, endorsing, and campaigning for candidates they favor, just as they do in nonpartisan primaries in California. Such candidates would generally choose to list a party affiliation on the ballot and would tend to win high rankings from most of their fellow partisans.

STILL, EVEN WITH THESE reforms, certain problems will persist as long as we stick with single-member congressional districts. For one thing, electing just one candidate from each district—even electing the one who is most

representative of the district’s median voter—would tend to leave Congress with many centrists but too few members with distinctly minority views or minority demographic characteristics. In order to get full representation of the whole range of diverse views and diverse groups in America and to enrich legislative deliberations in the House of Representatives, a third step would be necessary: moving to a system of proportional representation. In the United States, that can most feasibly be achieved by setting up multi-member congressional districts within each state.

Multi-member districts could also help with the nagging problem of “naturally” one-party districts that result from voters of similar political views being clustered together geographically, as they are, for example, in heavily minority urban areas. These lopsided districts waste votes for the Democrats: A district that is 90 percent Democratic can elect only one Democratic member of Congress, when con-

elect a member of Congress from the state’s majority party. The 40 percent minority party might be completely shut out of the state’s congressional delegation.

Proportional representation American-style, as we envision it, could solve this and other related problems. The system would start with all the reforms discussed above: involvement throughout the process by all citizens (no one-party primaries); open ballot access through petitions; ranked-choice voting; and instant runoff elections that combine nominations and election in one November-only contest. It would add (in large states) mega-districts electing four or five representatives at once, and (in smaller states) a single statewide district electing all of the state’s representatives at once. It would use voters’ rankings more comprehensively, not just to pick a single, most-preferred winner, but to select a set of the most preferred candidates for all the available seats in Congress, through a “single transferable vote” (STV)

Ranked-choice voting in a November-only election would provide more choices, draw higher turnout than primaries do, and force parties to pay attention to all voters.

siderably fewer Democrats in a less lopsided district could do that job (the rest could vote elsewhere and affect those elections). “Naturally” lopsided districts contribute to the perennial Republican edge in the number of House seats the GOP wins relative to the proportion of votes the party gets nationally. Such districts are bad for democracy regardless of their particular partisan effects.

Although independent redistricting commissions can and should help get rid of partisan gerrymanders, they cannot solve the problem of naturally lopsided districts even if they try to maximize two-party competition. In a heavily (say, 60 percent) one-party state, maximizing two-party closeness would be impossible except in a few districts (which ones?) and would leave the others extremely lopsided. Or, if the maximum amount of competitiveness were sought uniformly throughout the state, there would be a 60-40 balance in every district, every one of which would likely

counting system. (See sidebar on page 44.)

In a four-seat mega-district that was evenly divided between Republican and Democratic voters, the result might be to elect to Congress one very progressive Democrat, one moderate Democrat, one moderately conservative Republican, and one libertarian, with roughly the same mix of races, ethnicities, and genders as in the mega-district as a whole. A more progressive district would elect more progressives, perhaps including minor-party progressives.

If this reform were implemented throughout the country, it should result in a House of Representatives that actually looks and thinks like America. It would be a House that represents all views and all demographic characteristics in close proportion to their shares in the whole adult population of the United States.

To be sure, reformers would need to address a variety of specific problems. It is essential to limit the number of seats to be filled and the number of candidates running for those

seats in each mega-district, so that voters are not burdened with a hopelessly confusing number of choices, and so that promising second- or third-choice candidates do not get lost when the candidates with the fewest first-place preferences are eliminated by STV. This would also help each citizen keep in touch with his or her “own” representative (not based on geographical closeness, which has lost much of its relevance, but perhaps on ideological-, gender-, or ethnicity-based closeness) to deal with personal problems or requests.

The number of seats up for election can easily be specified by law. The number of candidates will be a function of the number of

use in Australia, Ireland, Malta, and many U.S. communities and private groups. But besides avoiding excessive numbers of offices to fill or too many candidates seeking to fill them, the precise design of ballots needs to be addressed.

For example, while party labels can be helpful to voters, making it too easy to vote for an entire one-party slate might damage proportional representation. If too many voters made rigid, party-line preference rankings there would be less chance of candidate merit overcoming party loyalty. True, ranked-choice voting would solve a big problem that bedeviled early-19th-century multi-member districts. (Back then, each citizen cast as many votes

positions in their preference rankings simply by making a single check-mark or a single click. Better to encourage voters to think about, and distinguish among, the merits of the individual candidates affiliated with their party (and, if they choose, candidates not so affiliated).

Advocates of federalism and states’ rights should not worry that a federal law mandating proportional representation would mean too much intrusion into the business of individual states. Mega-district boundaries could be left up to the states, requiring only that each small state elect all its representatives (by RCV) in a single statewide district, and that all large states carve out a mega-district to choose at least, say, three or four and no more than (perhaps) five or six members of Congress. Under proportional representation, the precise sizes and boundaries of districts would not matter much. Oddities would mostly cancel out across districts. Opportunities for gerrymandering would be minimal.

No constitutional amendment would be required. This system of proportional representation could be adopted by a federal law (as the current system of single-member districts was in the mid-1800s).

No doubt this proposal would arouse substantial political opposition, based on incumbent protection and partisan or ideological worries, even if most of those worries are exaggerated. Achieving proportional representation American-style might require persistent pressure over a number of years from a broad, sustained social movement, just as was needed in the 20th century to win direct election of senators, voting rights for women, and enfranchisement of African Americans. But we are optimistic that major reforms will be once again possible as more people come to recognize how our electoral institutions have contributed to the problems of polarization, gridlock, and unresponsiveness that beset American democracy today. ■

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How the Single Transferable Vote Works

Ranked-choice voting can be extended to fill multiple seats, as in a multi-member congressional district.

Here, too, each voter ranks as many candidates as she or he likes, assigning first choice, second choice, third choice, and so on down to the voter’s last-choice candidate. But the rankings are used to pick a set of winners, as many winners as there are seats to be filled. The best way to do this using the rankings is by the single transferable vote system.

First, a threshold is established for the number of votes needed to win a seat,

which depends on the number of voters and the number of seats to be filled. (When picking two winners, the threshold is one-third of the number of voters; with three seats, it is one-quarter, and so on.) In the first round of counting, any candidate or candidates with more first-choice votes than the threshold wins a seat. If those candidates have excess votes above the threshold, their extra votes are transferred proportionally to the second-choice candidates of their supporters, and any candidates whose new totals exceed the threshold are elected. (This prevents vot-

ers from being “punished” for wasting their top preferences on a popular candidate who would have won even without their support, and helps eliminate any incentive for strategic voting.)

If all the seats are not filled in this manner, the candidate with the fewest first-choice votes is eliminated, and that candidate’s votes are transferred to their supporters’ second choices. After this transfer, any candidate who is pushed over the threshold wins a seat, those candidates’ excess votes are redistributed, and the process repeats itself until all the seats are filled.

signatures required to qualify for the ballot—a number that must be high enough to prevent an unwieldy number of candidates but low enough to allow access to a wide range of office-seekers. California seems to have hit a plausible balance: The median number of primary candidates in each of California’s 53 U.S. congressional districts in 2018 was four.

The STV system for counting ranked-choice votes has had a generally successful history of

as there were seats in their state, and each party listed its candidates on a single slate. The dominant party in the state generally won every seat—a very undemocratic outcome.) Even with totally party-line voting, RCV would at least produce a congressional delegation whose partisan makeup reflected the partisan proportions among voters in the district. Still, we think it would be a mistake to let voters put a fixed list of candidates from one party in high

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Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America

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Politics as partisan warfare: that is our world. Over the last generation, American democracy 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 nineteenth century. Within Congress, the parties have become purer and purer distillations of themselves. The parties are now more internally unified, and more sharply differentiated from each other, than anytime over the last 100 years. Moreover, this polarization is not limited to those in office. Over the last generation, there has been a

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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, Pamela Karlan and Samuel Issacharoff, for all they have contributed to my thinking about these issues, even when, or especially when, we disagree. For the wonderful hospitality they provided in hosting these lectures, I would like to thank the University of California, Berkeley, School of Law, particularly Dean Christopher Edley, and Princeton University, particularly Provost Christopher Eisgruber. Boalt hosted this lecture in the fall of 2009; Princeton, in the spring of 2010. I am immensely grateful to the distinguished group of commentators, who were willing to take time away from their own work, not only to comment on this Article, but to take the time to commit their thoughts to writing. Early versions of this Article were presented at the University of Chicago Law School and Loyola Law School in Los Angeles, and I would like to thank participants at those institutions for their comments as well. I would also like to thank Alex Mindlin for research assistance. Finally, I thank the Guggenheim Foundation for support.

dramatic ideological and partisan sorting of voters as well. A center in America's governance institutions has all but disappeared.

This Article explores the causes of this polarization. Are the causes relatively contingent and short-term ones, so that it is possible to envision this structure of extreme partisan polarization changing, perhaps if certain institutional changes were made in the way American democracy and elections are designed? Or are the causes deep-rooted and structural ones, so that the appropriate conclusion is that this extreme partisan polarization is likely to be the ongoing structure of American politics and democracy for the coming years, regardless of any efforts that might be made to diminish this polarization? In particular, the article explores three potential causes of this polarization, which I label Persons, History, and Institutions.

"Persons" refers to the view that polarization is a reflection of particularizing polarizing personalities of various recent political figures, including presidents. This view is reflected in the longing for the "statesmen" of past decades, who forged political breakthroughs across party and ideological lines to enact major policy initiatives. "History" describes the view that large-scale historical and transformative forces in American politics account for the modern structure, coherence, and polarization of the Democratic and Republican parties of today. The specific historical processes involve the end of the 20th Century one-party monopoly on the American South, which began with the 1965 enactment of the Voting Rights Act; the destruction of that world eventually led, by the 1990s, to the South having a system of genuine two-party competition for the first time since the Civil War. How much does the dramatic reorganization of American democracy entailed by that transformation account for the structure of partisan conflict today? "Institutions" refers to more discrete structures that organize democracy: the structure of primary elections, gerrymandering, campaign finance, and the internal rules that allocate power to political leaders in the House and Senate today. How much do these specific institutional features contribute to polarization, and in what ways, if any might they be changed to diminish it?

To foreshadow, the article concludes that the major cause of the extreme polarization of our era is the historical transformation of American democracy and America's political parties set into motion by the 1965 Voting Rights Act. Thus, perhaps the extreme polarization over the last generation should not be seen as aberrational. This polarization, for better or worse, might be the "mature" structure of American democracy. As such, it is likely to be enduring, despite the best efforts of presidents and reformers to transcend the extreme polarization of recent years.

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INTRODUCTION

American democracy over the last generation has had one defining attribute: the rise of extreme partisan polarization. The aim of this Article is to explore the causes of this momentous transformation that has characterized our democracy over the last generation. Do the causes of this extreme polarization make it likely to endure for years to come? Or are the causes more short-term, contingent ones? Can we do anything to diminish this extreme polarization, should we choose to, such as by changing some of the institutional structures through which elections and democracy in America are currently organized and given form?

If the causes of hyperpolarized democracy 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, 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. For example, if polarization is primarily caused by particularly divisive political leaders, rather than deep structural transformations of American politics or specific

institutional features of the way democracy is currently organized, we could escape polarized partisan divisions by finding and choosing leaders who seek to forge broad-based consensus around a revitalized center.

This Article examines three principal types of causes that have been offered for the eruption of American politics into radically divided warring partisan armies.¹ I refer to these potential causes as persons, history, and institutions. This Article pursues these three potential explanations to decide whether hyperpolarized democracy in America is likely to be enduring, and what, if anything, can be done to recreate the kind of center that existed in American politics in the decades before the past generation. My conclusion is a sober one: our era's hyperpolarized politics primarily reflect deep historical and structural transformations in American democracy. Paradoxically, this polarization reflects a maturation of American democracy, rather than a state that should be considered temporary or aberrational. Thus, hyperpolarized democracy in America is likely to be enduring.

I.

THE EMERGENCE OF HYPERPOLARIZED DEMOCRACY

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 nineteenth century.² Moreover, this dramatic polarization, though

1. 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, 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.

2. A host of studies reach similar conclusions about this fact, even as they use a variety of different measures to assess party polarization. See, e.g., ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER* 139–58 (2010); NOLAN MCCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 15–71 (2006); DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* (1991); BARBARA SINCLAIR, *PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING* 3–36 (2006); JEFFREY M. STONECASH ET AL., *DIVERGING PARTIES: SOCIAL CHANGE, REALIGNMENT, AND PARTY POLARIZATION* 18 (2003); John J. Coleman, *The Decline and Resurgence of Congressional Party Conflict*, 59 J. POL. 165, 165–84 (1997); Melissa P. Collie & John Lyman Mason, *The Electoral Connection Between Party and Constituency Reconsidered: Evidence from the U.S. House of Representatives, 1972–1994*, in *CONTINUITY AND CHANGE IN HOUSE ELECTIONS* (David W. Brady et al. eds., 2000); Richard Fleisher & Jon R. Bond, *The Shrinking Middle in the US Congress*, 34 BRIT. J. POL. SCI. 429, 429–51 (2004) [hereinafter Fleisher & Bond, *The Shrinking Middle*]; Richard Fleisher & Jon R. Bond, *Partisanship and the President's Quest for Votes on the Floor of Congress*, in *POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A POLARIZED ERA* (Jon R. Bond & Richard Fleisher eds. 2000); Gary C. Jacobson, *Party Polarization in National Politics: The Electoral Connection*, in *POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A POLARIZED ERA* (Jon R. Bond & Richard Fleisher eds., 2000); Jason M. Roberts & Steven S. Smith, *Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971–2000*, 47 AM. J. POL. SCI. 305, 305–17 (2003); Sean M. Theriault, *The Case of the Vanishing Moderates: Party Polarization in the Modern Congress*, Presented at the American Political Science Association Annual Meeting (May 26, 2009), available at http://www.allacademic.com/meta/p60280_index.html.

seemingly the norm of American politics, is a relatively recent phenomenon that has emerged over the past generation. Before then, most of twentieth 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 journalistic accounts on the subject puts it, on major issues, nearly all Republicans and Democrats now “line up against each other with regimented precision, like nineteenth-century armies that marched shoulder to shoulder onto the battlefield.”³ 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 one hundred years. In 1976, moderates constituted 30% of the House; by 2002, this proportion had shrunk to 8%.⁴ Similarly, in 1970, moderates constituted 41% of the Senate; today, that proportion is 5%.⁵ A center in America’s governing institutions has all but disappeared.⁶

Nor is this extreme polarization limited to the halls of Congress. Politics is partisan warfare: that is our world. Assessing citizen views about politics is trickier than gauging voting records in Congress, but by almost all measures, Americans as a whole have recently become dramatically more partisan, too.⁷

3. RONALD BROWNSTEIN, *THE SECOND CIVIL WAR: HOW EXTREME PARTISANSHIP HAS PARALYZED WASHINGTON AND POLARIZED AMERICA* 14 (2007).

4. These figures are based on standard measures of votes in Congress (DW-Nominate scores). See ABRAMOWITZ, *supra* note 2, at 141. In addition, over this same period “strong conservatives” grew from 17% of House Republicans to 67%, while “strong liberals” went from 35% of House Democrats to more than 50%. *Id.* at 142.

5. See Alan I. Abramowitz, *U.S. Senate Elections in a Polarized Era* (Oct. 24, 2009) (unpublished manuscript) (on file with author).

6. As one study puts it, in 1968, 60% of members of Congress voted in the middle third of the ideological spectrum; by 2004, that percentage had become 25%. See Sean M. Theriault, *Party Polarization in the U.S. Congress: Member Replacement and Member Adaptation*, 12 *PARTY POL.* 483, 484 (2006).

7. 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* 138 (William G. Mayer ed., 2008). Here is 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%, respectively. 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) [hereinafter Jacobson, *The 2008 President and Congressional Elections*]; see also Marc J. Hetherington, *Resurgent Mass Partisanship: The Role of Elite Polarization*, 95 *AM. POL. SCI. REV.* 619, 629 (2001) (explaining that 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% plus) in 2008: 34 plus D.C. That’s up from around 25 in 2000 and 2004. Percentage of electoral votes in

Over the last generation, there has been a dramatic ideological and partisan realignment of voters. Voters have sorted themselves out so that their party affiliation and their ideology are far more aligned now than thirty years ago: thus, most self-identified conservatives are now Republicans, while liberals are Democrats.⁸ Similarly, split-ticket voting has declined sharply: more voters express consistent, partisan political preferences by voting for candidates from the same party across all races, whether for the House, the Senate, or the presidency.⁹ Voters who have aligned in this way are more strongly attached to their party affiliation; these party loyalties are manifested in various ways that shape policy and elections.¹⁰

Take, for example, whether citizens approve of the president's performance. From the Eisenhower years through the Reagan administration—the 1950s through the 1980s—citizens who identified themselves with one party or the other predictably gave presidents of their own party higher approval ratings than citizens who supported the other party. But the gap was modest, ranging from twenty-two to thirty-nine points between how much supporters of the party in power approved of the president and how much his opponents did. In the 1980s, though, that gap shot up to sixty points, where it has more or less remained ever since.¹¹ Or consider these recent survey results on the question: “Which comes closer to your view: A) government should do more to solve problems, or B) government is doing too many things better left to businesses and individuals?” Democrats choose A, 72% to 22%; Republicans choose B, 83% to 15%.¹² It is no wonder that perception of presidential performance in this era, then, is so partisanly skewed.

Americans have become more consistent and polarized in their policy and

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 [sic] four years ago, only deeper.

Michael Crowley, *Polarized America*, THE NEW REPUBLIC (Nov. 6, 2008, 12:10 PM), <http://www.tnr.com/blog/the-stump/polarized-america> (summarizing the findings of political science professor Alan Abramowitz).

8. MATTHEW LEVENDUSKY, *THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS* 38–77 (2009).

9. Larry M. Bartels, *Partisanship and Voting Behavior, 1952–1996*, 44 AM. J. POL. SCI. 35 (2000); Hetherington, *supra* note 7, at 629.

10. LEVENDUSKY, *supra* note 8, at 8.

11. In this case, 80% of the party-in-power's voters approved of the President's performance, but only 20% of other parties' voters did. The most extreme partisan gap ever reported in these polls occurred during the Bush II 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, *supra* note 3, at 16.

12. See William A. Galston, *Can a Polarized American Party System Be “Healthy?”*, 34 ISSUES IN GOVERNANCE STUD. 1, 14–15 (2010).

political preferences over the past several decades. In addition, the *more* people care about and engage in politics the *more* extreme this polarization becomes: with increased participation comes increased polarization. As Alan Abramowitz has recently documented, one way to test whether citizens are as polarized along partisan and ideological lines as officeholders is to explore whether there are linkages across preferences on diverse issues—cultural and economic, foreign and domestic.¹³ Across these issues, *voters* line up in ideologically consistent ways. They are grouped at either one end of a liberal-conservative spectrum: if they are “liberal” on abortion, they are also liberal on environmental protection, minimum wage laws, capital gains taxes, and the like. *Non-voters*, in contrast, tend to clump toward the middle of the liberal-conservative spectrum—liberal on some issues, conservative on others.¹⁴ More generally, it is the least informed, least politically active, and least engaged citizens who are the most centrist. Voters are more polarized than non-voters; those who engage in one additional political activity beyond voting, such as trying to persuade someone else to vote for their preferred candidate, are more polarized still; those who engage in two political activities beyond voting are even further polarized.¹⁵

In a well-known book entitled *Culture War? The Myth of a Polarized America*, Morris Fiorina and others argued that Americans were generally more centrist, less ideological, and less partisan than members of Congress.¹⁶ Thus, we were reassured that polarization is an artifact of Congress, not American public opinion. But Abramowitz concludes that this “myth” fails to distinguish “the engaged public” from others.¹⁷ The engaged public, those who contribute to and work on campaigns, and those to whom officeholders are most likely to respond, constitutes a substantial portion of the electorate.¹⁸ Thus, the hyperpolarization within Congress is not a free-floating phenomenon. Members of both parties are mirroring the polarization among the engaged public. It would be difficult to untangle whether polarization is ultimately driven from the top down, with the engaged public taking its cues from members of Congress, or from the bottom up, with members of Congress responding to the polarization of the engaged public. Either way, however, the extreme

13. ABRAMOWITZ, *supra* note 2, at 49–57.

14. *Id.* at 55.

15. *Id.* at 41–43. Similarly, those who describe themselves as “independents” who lean either to the Democratic or Republican side actually vote much like loyal partisans; in other words, they do not move back and forth between parties over election cycles but actually vote in consistently partisan patterns. See BRUCE E. KEITH, ET AL., *THE MYTH OF THE INDEPENDENT VOTER* 60–75 (1992).

16. MORRIS P. FIORINA, ET AL., *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* 19 (2006).

17. ABRAMOWITZ, *supra* note 2, at 15–34.

18. *Id.* at 49–57. Two-thirds of those who vote, for example, now report engaging in at least one other campaign-related action. *Id.* at 17. Political engagement levels today are much higher than in, for example, 1980. *Id.* at 22.

polarization in Congress is reflected in similar polarization today among voters and those most engaged in policy and politics.

Now we have entered the Obama era, a partisan transition in the presidency. Being nearly two years into the Obama presidency provides an apt opportunity to reassess how temporary or enduring dramatically polarized democracy in America is. 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.¹⁹

Consider recent action within Congress on two of the major legislative issues of the Obama presidency, economic stimulus and health care. In February 2010, 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.²⁰ Health care legislation was enacted in the face of even more extreme partisan division: not a single Republican in either the House or the Senate voted for the most far reaching piece of domestic legislation in forty-five years. Or consider the public more generally: those affiliated with opposing parties continue to have vastly divergent views of President Obama's performance. The partisan gap in approval ratings for President Obama is larger than it has ever 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.²¹ From the Eisenhower through the Carter years, this gap in one-year approval ratings never exceeded thirty-four points; since then, it has averaged forty-eight points.²² Consider another perspective on these measures: before Reagan, no president had averaged more than a forty point gap in approval rating during his term; starting then, only the elder George Bush has averaged *less* than a fifty-point gap.²³ As difficult for Obama supporters as it may be to believe, those opposed to him are as vehemently

19. 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’L J., Oct. 31, 2009 at 13 (positing 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).

20. READ THE STIMULUS, <http://www.readthestimulus.org> (last visited Feb. 17, 2011).

21. Jeffrey M. Jones, *Obama’s Approval Most Polarized for First-Year President*, GALLUP (Jan. 25, 2010), available at <http://www.gallup.com/poll/125345/obama-approval-polarized-first-year-president.aspx>.

22. The point gap one year in was 45 for Reagan; 32 for G.H.W. Bush; 52 for Clinton; and 45 for G.W. Bush. *Id.*

23. *Id.*

opposed as Democrats were to George W. Bush.²⁴ For a generation now, Americans of different parties have lived in different worlds. They continue to do so today, when they look at the President. 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 identified themselves more strongly and consistently in partisan terms.²⁵

The emergence of hyperpolarized politics, in Congress and among the most actively engaged citizens, has profound ramifications for how America's governing institutions function—or fail to function. What accounts for this momentous transformation over the last generation? I now turn to three principal, potential explanations: persons, history, and institutions.

II.

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, and the political system might move beyond the poisonous, unproductive divisions that have characterized American politics over the last generation. One might envision these leaders as committed to finding common ground, open to sound compromises, and adept at consensus building: uniters, not dividers, one might say. The cause of polarization, according to this view, 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 being 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

24. President Obama's approval ratings one year in are comparable to those of President George W. Bush before Sept. 11, 2001 (when the latter shot up dramatically). *Id.*

25. 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. *See* LEVENDUSKY, *supra* note 8.

president any success, or even to deny the legitimacy of his holding office. The two political parties move further and further apart. No matter what he does, the president cannot 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, 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 more so.

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, most factual elements—that is, the elements least subject to interpretive dispute—are taken from the Bush presidency, not the Obama one.²⁶ Before the Obama presidency, it might have been difficult to persuade those hostile to President Bush that it was anything other than Bush's agenda, style, and advisors—Karl Rove, most of all—that explained poisonous party polarization. Surely, the election of a different kind of figure, with a different agenda, would change that. Yet as President Obama's tenure 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 his presidency and compare them 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.²⁷ 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."²⁸ He embraced uncharacteristic issues for a Republican, such as his

26. 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 Behind Act, received bipartisan support and was actively negotiated with two major liberal Democratic figures in Congress, Rep. George Miller and Sen. Edward Kennedy, both of whom Bush praised highly and visibly. BROWNSTEIN, *supra* note 3, at 228–29. On Sept. 10, 2001, Bush's approval rating was 51%, with 90% of Republicans approving but only 27% of Democrats doing so. *Id.* at 249. Shortly after Bush's inauguration, his pollster and strategist, Matthew Dowd, concluded that polarization was so intense that "you can lose the swing voters and still win the election, if you make sure your base is bigger than theirs." Thomas B. Edsall, *Why Other Sources of Polarization Matter More*, in 1 RED AND BLUE NATION? CHARACTERISTICS AND CAUSES OF AMERICA'S POLARIZED POLITICS 292, 292 (Pietro S. Nivola & David W. Brady eds., 2006).

27. BROWNSTEIN, *supra* note 3, at 222–25.

28. *Id.* at 226.

commitment to educational reform; he would transcend party divisions; he chose the mantle of “compassionate conservatism.” Media analyses often confirmed this view.²⁹ 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.”³⁰ And as he promised to heal the wounds of bitter partisan divisions, he pledged to be open to the best new ideas, no matter their source: “I will listen to the best ideas from my fellow conservatives and moderates and new Democrats. I will bring America together.”³¹ The similarities to the Obama campaign are jolting.

Of course, some believe none of Bush’s pledges were 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, and highly partisan administration.³² 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 his advisors viewed Bush as having reached out in a bipartisan way, with some major pieces of legislation behind him, Bush’s poll numbers had not changed at all. His advisors 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 reelection was by appealing to his base. Put simply, there were too few persuadable voters out there. Bush’s first year also convinced his advisors 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. 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 any from reaching across the aisle—a more general theme to which I will return in Part III.C. In terms that could describe the Republican party under Obama, some

29. A *USA Today* story from August 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.” Editorial, Clinton’s Challenges of ’92 Confront Bush Today, *USA TODAY*, Aug. 4, 2000, 18A. 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.” PEW RESEARCH CENTER’S PROJECT FOR EXCELLENCE IN JOURNALISM, A QUESTION OF CHARACTER: HOW THE MEDIA HAVE HANDLED THE ISSUE AND HOW THE PUBLIC HAS REACTED 1 (2000).

30. BROWNSTEIN, *supra* note 3, at 226.

31. *Id.* at 226.

32. See, e.g., JONATHAN CHAIT, THE BIG CON: THE TRUE STORY OF HOW WASHINGTON GOT HOODWINKED AND HIJACKED BY CRACKPOT ECONOMICS 149 (2007) (“From the beginning, ‘compassionate conservatism’ was an artifice designed to mask Bush’s conservatism from an electorate that did not want a sharp rightward turn.”).

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.”³³ 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 George W. Bush presidency as the cause of an increasingly partisan and polarized world, among parties and voters, or as itself having been caused by these forces.³⁴ 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 in his presidency and receives virtually no support from the opposing party, the script begins to look eerily similar. Obama, like Bush, seems incapable of transcending the divisions against which he campaigned. That ought to suggest that forces larger than individual personalities are at work.

The temptation to cast individual personalities as responsible for the current state of our politics also takes the form of nostalgia for “statesmen” of the past.³⁵ “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 these kind of centrist political leaders. Rather, larger forces marginalize these figures or drive them out altogether. That such figures do not exist today is not primarily a failure of personality. One of the principal mechanisms prohibiting the emergence of centrists is the party primary. Arlen Specter on the Republican side and Joe Lieberman on the Democratic side provide perfect bookends to this fact.

In 1980, Senator Specter himself describes being part of a regular lunch group of moderate Republican senators that had fifteen members.³⁶ 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

33. BROWNSTEIN, *supra* note 3, at 338.

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

35. For one surprising example of this nostalgia, from a sophisticated source that should know better, see KEITH T. POOLE & HOWARD ROSENTHAL, *IDEOLOGY AND CONGRESS* 319 (2d ed. 2007) (“Our politics 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.”).

36. Peter Boyer, *Getting to No*, *NEW YORKER*, Sept. 28, 2009, at 32.

lines; his vote against President Reagan's nomination of Robert Bork to the Supreme Court, for example, was instrumental in Bork's defeat. By the time of President Obama's stimulus bill, he was one of only three Republican senators to vote for the bill. In today's more hyperpartisan age, that was enough to be considered a final 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 Senator Specter in the primary, the specter of a primary defeat pushed the five-term Senator 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, it was 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 desirable as centrists or moderates.

More generally, both parties continue to marginalize their more moderate factions. During the 1980s and 1990s, 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, Republican primary voters continue to push moderates out of the party in favor of more partisanly "pure" Republicans—even at the cost of

endorsing third-party candidates.³⁷ In the 2010 primaries, more ideologically extreme candidates for the Senate defeated those closer to the center in Utah, Kentucky, California, Nevada, and Florida, where the incumbent governor was forced to run as an independent in the fall elections.

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 1986, in which the Democratically dominated House chose to seat the Democratic candidate Frank McCloskey of Indiana's Eighth District despite state officials having declared the Republican candidate the winner.³⁸ 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 their power. Out of this moment was born House Republican acceptance of Newt Gingrich's philosophy: Republicans would never be treated fairly or get anywhere by trying to work with Democrats, and instead they should unite in opposition and pursue the single objective of House control. For many Democrats, the origins of modern partisanship began with Ronald Reagan's presidency, which they saw as a revolutionary attack on a longstanding political consensus, and 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?"³⁹ Or was 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 "fifty percent plus one" basis? Or is Barack Obama trying to run the most "progressive" government in modern history, to which a polarized opposition is a justified response? Which Speaker of the House "caused" polarization: Newt Gingrich or Nancy Pelosi?

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.⁴⁰ And Republicans in the House vote with somewhat greater unity than do Democrats.⁴¹ But the larger truth is that the polarized political system that has been a generation in the

37. As has recently occurred in the special election to fill a vacant seat in a reliably Republican district, New York's 23rd. See Adam Nagourney & Jeremy W. Peters, *G.O.P. Moderate, Pressed by Right, Abandons Race*, N.Y. TIMES, Oct. 31, 2009, at A36.

38. See JULIET EILPERIN, *FIGHT CLUB POLITICS: HOW PARTISANSHIP IS POISONING THE HOUSE OF REPRESENTATIVES* 10 (2006).

39. BROWNSTEIN, *supra* note 3, at 226.

40. For documentation on the Republican movement, see SINCLAIR, *supra* note 2, at 36–67; on the Democratic movement, see *id.* at 14–22.

41. BROWNSTEIN, *supra* note 3, at 15.

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 at work. 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.

III.

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.⁴² As I explain below, the changes set into motion in 1965 catalyzed the political parties to realign themselves, appealing to different constituencies than in the past, and to define themselves along different, more ideologically coherent, and polarized lines.⁴³ In addition, voters sorted themselves out so that their ideological or policy preferences and their preferences for candidates and political parties fell into line with each other.⁴⁴ Through this mutually interactive process, voters now have come to have relatively consistent, fixed ideological preferences and they now choose between political parties—and their candidates—with relatively clear, distinct, and sharply differentiated policy orientations.

The VRA is undoubtedly the most important and most effective civil rights statute ever enacted. It reflected and 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 partisan politics we now have. If this

42. See, e.g., Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002) [hereinafter Pildes, *At War with Itself?*]; Richard H. Pildes, *Symposium: Group Conflict and the Constitution: Race, Sexuality, and Religion: Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505 (1997); Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359 (1995) [hereinafter Pildes, *The Politics of Race*]; Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993).

43. See, e.g., BYRON E. SHAFER & RICHARD JOHNSTON, *THE END OF SOUTHERN EXCEPTIONALISM: CLASS, RACE, AND PARTISAN CHANGE IN THE POSTWAR SOUTH* (2006).

44. See LEVENDUSKY, *supra* note 8, at 109–19.

view is sound—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 twentieth 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, or the manifestation of a more mature American democracy, and hence likely to be enduring.

A. Disfranchisement and Its Consequences

If this sounds topsy-turvy, it is because many people fail to appreciate that from roughly 1890 to 1965, the South was a one-party political regime, much like one-party authoritarian states around the world. Further, the Democratic Party’s complete monopoly on the South throughout those years was not 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. This eventually culminated in lasting legal changes in statutory law and state constitutions that redefined and massively contracted the Southern electorate.⁴⁵

These legal changes effectively eliminated or drastically reduced African American electoral participation, and, though this consequence is less well appreciated, 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. It is not just as if Microsoft were to get laws passed that made it impossible for Apple to compete effectively; it is 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 was national political parties that were internally divided and not particularly coherent ideologically. Partisan loyalties did not neatly track ideological ones, as they do today. The Democratic Party was a coalition of

45. See generally J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910* (1974).

Southern Democrats, extremely conservative on race or any issue that 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 after 1937.⁴⁶ During this era, the largest bloc was almost always composed of conservative Republicans, even though Democrats formally controlled the House.⁴⁷ The liberal Democrats followed, then conservative Democrats, and finally moderate Republicans. The same was true for the Senate.

None of these groups were large enough to pass legislation on their own; doing so required strong support from at least two of the groups. As a result, any significant legislation required compromise and bargaining across party lines. This is the era being looked back upon nostalgically by those who exalt the prior generation’s political leaders as those who were able to forge “compromises” 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.

As an example, even when the Democratic Party controlled all three of the House, Senate, and presidency during the Kennedy 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 by Southern Democrats and Republicans.⁴⁸ Even Alaskan and Hawaiian statehood—1958 and 1959, respectively—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.⁴⁹ As this era was coming to a close, the political scientist James MacGregor Burns, in his 1963 book, *The Deadlock of Democracy*, wrote that “[t]he consequence of the four-party

46. See generally JAMES MACGREGOR BURNS, *THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA* (1963).

47. *Id.* at 257–64.

48. Such acts include 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).

49. BURNS, *supra* note 46, at 127–28. The first civil rights legislation of the modern era, the 1957 Civil Rights Act, was also enacted during the Eisenhower years, and 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, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 507–11, 600–24 (2002).

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.”⁵⁰

B. Completing American Democracy

The 1965 VRA, and related changes in the era in constitutional doctrine and law, began the process of unraveling this system. The VRA began what might be considered the “purification” or “maturation” of the American political system. Put another way, the VRA initiated the rise of a genuine political system in the South, which meant the destruction of the one-party monopoly and the emergence, eventually, of a more normal system of competitive two-party politics. Just as the peculiar structure of the one-party South had projected itself onto the shape of national political parties, so too this dramatic transformation of Southern politics in turn reshaped the essential structure of the national political parties. As the VRA and related measures broke down the barriers to electoral participation in the South—literacy tests, poll taxes, manipulative registration practices, and durational residency requirements—a massive infusion of new voters, mostly black but white as well, entered and reconfigured Southern politics.⁵¹

These voters were, on average, much more liberal than the median voting white 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-reinforcing feedback dynamic to this whole process as well; as the Democratic Party became more liberal in the South, more conservatives fled; as more conservatives fled, the Democratic Party became even more liberal. At the national level, the progressive strands on racial issues that had existed in the Republican Party diminished, to be replaced by a more conservative stance on racial issues, while the Democratic Party at the national level became the party of racial liberalism.

There is an ongoing debate between two views regarding what the most significant causal force was in bringing about the realignment of the two political parties: the eventual rise of two-party competition in the South and the purification of the two parties into highly polarized opponents. The more

50. BURNS, *supra* note 46, at 260.

51. In Mississippi, for example, the black registration rate jumped from 6.7% to 59.4% within three years of the Act’s passage. See Pildes, *The Politics of Race*, *supra* note 42, at 1360–61 (reviewing QUIET REVOLUTION IN THE SOUTH: IMPACT OF THE VOTING RIGHTS ACT 1965–1980, CHANDLER DAVIDSON & BERNARD GROFMAN, EDS. (1994)).

familiar story is that the emergence of civil rights and the issue of race into national politics in the 1960s was the dominant catalyst that, starting with the presidential election of 1964, gradually led to the profound transformation of the party system. The most influential academic statement of this view is in the work of Carmines and Stimson;⁵² Edsall and Edsall popularized this view.⁵³ Despite the popularity of this view, the concrete evidence supporting it is not overwhelming.⁵⁴

The alternative, less well-known view is that economic development in the South—and with it, class difference—was the fundamental force driving middle-class whites to a resurgent Republican Party in the South. This view emerges from the work of Shafer and Johnston, who note that the one-party system in the South had been designed explicitly to suppress class conflicts among whites, as well as to eliminate black political participation.⁵⁵ In a pattern that began in the 1950s, as post–World War II economic development began to surge and the South emerged from a purely agricultural economy, the highest-earning white Southerners began voting Republican, as in the North, while low-income whites continued to vote Democratic.⁵⁶ Put more precisely, Shafer and Johnston argue that economic conditions—not race—drove *white* voting patterns. They agree that, as Carmine and Stimpson argue, race *was* the dominant partisan mobilizer for Southern blacks, in response to the civil rights movement. From that point on, black Southerners voted overwhelmingly and consistently for the Democratic Party for all national offices. But Southern whites, from the 1950s through the 1990s, voted according to their economic interest in House and Senate elections. Low-income whites, for example, were no more Republican in the South in the 1990s than they were in the 1950s.⁵⁷

52. See, e.g., EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* xiii (1989) (“The struggle over race, at its peak the dominant issue of American political life for only some three years in the mid-1960s, permanently rearranged the American party system.”); *id.* at 58 (“The American party system, in sum, was fundamentally transformed during the mid-1960s. The progressive racial tradition of the Republican party gave way to racial conservatism, and the Democratic party firmly embraced racial liberalism.”); see also PAUL R. ABRAMSON ET AL., *CHANGE AND CONTINUITY IN THE 1988 ELECTIONS* 121–51 (1990) (adopting the Carmines and Stimson view).

53. See THOMAS B. EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* (1991).

54. See, e.g., Alan I. Abramowitz, *Issue Evolution Reconsidered: Racial Attitudes and Partisanship in the U.S. Electorate*, 38 AM. J. POL. SCI. 1, 2 (1994). The evidence presented in this paper shows that racial attitudes had very little influence on party identification among either younger or older whites. Other issues, especially those involving the scope of the welfare state and national security, played a much larger role in driving many whites away from the Democratic Party during the 1980s. *Id.*

55. SHAFER & JOHNSTON, *supra* note 43. This view is supported by the earlier work in Abramowitz, *supra* note 54, at 14.

56. SHAFER & JOHNSTON, *supra* note 43, at 24–29. Shafer and Johnston appear to argue that for presidential elections, views on racial issues did drive partisan voting patterns of Southern whites, but for the House and Senate, it was economic self-interest. *Id.* at 179.

57. *Id.* at 27.

Regardless of the precise contribution of class and race to this pattern, Southern party politics began a fundamental transformation in the 1960s that has produced the two-party system of today.

Starting in the 1990s, a new feature of the recently amended VRA, the required creation of safe minority districts, added new fuel to this process.⁵⁸ Safe minority districts concentrated Southern black voters into the majority in certain districts and reduced their presence dramatically in most others. The effect was the elimination of districts in which white-black coalitions controlled outcomes—districts in the 20-40% African American range, which had often been electing moderate white Democrats. In the 1980s, for example, 35% of white Southerners and 72% of black Southerners lived in these districts; by 1992, after the 1990s redistricting that required the creation of these safe minority election districts, only 16% of white Southerners and 31% of black Southerners lived in such biracial districts.⁵⁹ As one major study puts it, “[c]onscious reapportionment in the 1990s then pushed both black and white Southerners out to the extremes.”⁶⁰ 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.⁶¹ These effects then fed back into the dynamic of party composition and competition, increasing the separation of conservatives and liberals into two parties with increasingly coherent, and distinct, ideologies. Safe districting was not a leading 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.⁶²

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 in the political parties and voter partisan identities 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,

58. See, e.g., DAVID LUBLIN, *THE REPUBLICAN SOUTH: DEMOCRATIZATION AND PARTISAN CHANGE* 22–23 (2004).

59. SHAFER & JOHNSTON, *supra* note 43, at 115.

60. *Id.* at 116.

61. In 1991, the last year before redistricting, the South’s congressional delegation consisted of 72 white Democrats, 5 black Democrats, and 39 white Republicans; a decade later, under the districts created in 1992, there were 37 white Democrats, 16 black Democrats, and 71 white Republicans (and one independent). EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* 13 (2002). See generally Pildes, *The Politics of Race*, *supra* note 42.

62. Shafer and Johnson argue that in the 1980s, the biracial composition of many congressional districts created incentives for biracial campaigns, but that when the incentives for such campaigns were “sharply reduced” after the 1990s redistricting, those kind of campaigns became much rarer. SHAFER & JOHNSON, *supra* note 43, at 108–16.

become a genuine two-party system with robust, regular partisan competition.⁶³ From 1874 to 1994, for sixty consecutive elections, the Republicans were a minority of the Southern delegation in the Senate and House; in 1994, that flipped in both chambers.⁶⁴ 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.⁶⁵

With the political parties coming to stand for more pure ideological platforms of liberalism or conservatism, voters then sorted themselves over time into party identifications and voting affiliations in ways that more closely mirrored their ideological and policy preferences than in the past. Thus, between 1972 and the early 2000s, the strength of the relationship between the party identification of voters and their ideological preferences—put in simple terms, whether voters express liberal or conservative preferences on policy—quadrupled, with the rate of increase going up after 1992.⁶⁶ This sorting appears to have been driven from the top down: as the political figures who are the most visible determinants of the meaning of a party's label—presidential candidates primarily, then other major figures in the party—endorse particular issues, and as those figures across parties polarize, voters take their cues from these party elites and sort themselves into parties in response.⁶⁷ Moreover, once voters have a strong party identification, they tend to bring their ideological beliefs into alignment with their partisanship—rather than the other way around.⁶⁸ Only massive shocks to the party system, such as occurred in the mid-1960s when millions of new voters were brought into the system and the parties redefined their identities and supporters, cause voters to switch party identities in order to bring party into alignment with ideology. Otherwise, stability in party identification is typical.⁶⁹ And as voters have become more sorted, with party and ideology tracking each other, they have become more loyal. They are more consistently supportive of their party's candidates in elections—in other words, there is less split-ticket voting; more likely to express the same position as their party on issues; and more likely to evaluate their party and candidates highly, which is reflected in the dramatic partisan differences today in presidential performance.⁷⁰

The full, cumulative effect that the VRA has had upon the political parties took about thirty years to come to fruition. This process only just began in

63. See, e.g., BLACK & BLACK, *supra* note 61, at 369–404.

64. *Id.* at 400, 402.

65. *Id.* at 404.

66. ABRAMOWITZ, *supra* note 2, at 44–45.

67. LEVENDUSKY, *supra* note 8, at 106–08, 131–32.

68. *Id.* at 119.

69. Thomas M. Carsey & Geoffrey C. Layman, *Changing Sides or Changing Minds? Party Identification and Policy Preferences in the American Electorate*, 50 AM. J. POL. SCI. 464 (2006).

70. LEVENDUSKY, *supra* note 8, at 126–28.

1965. The citizens that 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. The Democratic Party of the South had to feel and respond to pressure; as that party moved left, the Republican Party had to be reborn. Candidates had to be willing to run under these new banners. Voters had to become 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 is crossed. Conservatives who had long thought of themselves as Democrats decide that they are Republicans, and there is a cascade among others who perceive themselves in the same way. 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 electoral victories occurred in the South—a surge that enabled Republicans nationally to take control of the House.⁷¹ It took about a generation, from 1965 to 1995, for the massive political restructuring wrought by the VRA to work its way through American democracy.

Rather than entering a post-partisan stage, we are probably still in the midst of the process of party purification. We have not yet reached equilibrium, and party polarization might well increase further in coming years. Some of the Southern Democrats still in the House were elected nearly twenty years ago in districts that are strongly Republican in national elections; they remain in office due to personal popularity and incumbency. When they retire, their seats will likely be filled by Republicans.⁷² 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 the reality and threat of primary contests 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.⁷³ Indeed, while this Article was all but completed before the 2010 elections, we now know that the 2010 elections will further increase polarization in Congress. As one recent study concludes:

The replacement effect of the 2010 Midterm Elections is unlike anything in recent memory. The shift in the House median is two and a half times what was observed after the 1994 Election, wiping out the

71. LUBLIN, *supra* note 58, at 1.

72. See Jeff Zeleny, *Democrats' Grip on the South Continues to Slip*, N.Y. TIMES, Oct. 18, 2010, at A18.

73. See Holly Ramer & Andrew Miga, *GOP Eyes Comeback for New England House Seats*, REAL CLEAR POLITICS, Apr. 28, 2010, http://www.realclearpolitics.com/news/ap/politics/2010/Apr/28/gop_eyes_comeback_for_new_england_house_seats.html (noting that there were no Republican House members from New England after 2008 elections).

effect of Democratic gains in the previous two elections and then some. The 111th was the most liberal Congress in the past three decades; the 112th will be the most conservative. The 2010 Elections [also] had a profound effect on congressional polarization. Not only will the 112th House be the most polarized on record; 2010 will surpass 1994 as the most polarizing election cycle.⁷⁴

Similarly, 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, political participation has gone up over the last five years, both in terms of voter turnout and other means of electoral engagement, such as contributing money, working on a campaign, or attending a campaign meeting or rally.⁷⁵ Indeed, polarization among the public might have increased *more* in the last generation than polarization 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.”⁷⁶

An important complement to post-VRA partisan realignment in explaining the dramatic increase in polarization between the 1970s and today has been offered by Nolan McCarty, Keith T. Poole, and Howard Rosenthal.⁷⁷ Focusing on the dramatic changes in relative economic inequality that have emerged during this same period,⁷⁸ they argue that income differences have become much more important since the 1970s in explaining the party with which voters identify, how they vote in national elections, and how liberal or conservative a representative is from a given district.⁷⁹ McCarty, Poole, and Rosenthal find that in 1973, the income level of a congressional district had no effect on how liberal or conservative its representative was in the House,⁸⁰ and that in presidential elections during the Eisenhower and Kennedy years, voters in the top quintile of income were no more likely to vote Republican or Democratic than those in the bottom quintile.⁸¹ But in the ensuing years, during the era of polarization, these patterns sharply changed. For example, in the 1992, 1996, and

74. See Adam Bonica, *Introducing the 112th Congress*, IDEOLOGICAL CARTOGRAPHY, Nov. 5, 2010, <http://ideologicalcartography.com/2010/11/05/introducing-the-112th-congress>.

75. ABRAMOWITZ, *supra* note 2, at 19.

76. *Id.* at 80. Abramowitz goes on to note that the bases of both parties are decidedly polarized. *Id.*

77. MCCARTY ET AL., *supra* note 2.

78. In addition to the data in their work, an extensive summary of the changing patterns of economic inequality over the twentieth century can be found in LARRY M. BARTELS, *UNEQUAL DEMOCRACY* 1–29 (2008).

79. MCCARTY ET AL., *supra* note 2, at 115. Others take issue with this view and find no clear relationship between income inequality and class-based voting over time. See, e.g., Andrew Gelman et al., *Income Inequality and Partisan Voting in the United States* (Feb. 9, 2010) (unpublished manuscript) (on file with author).

80. MCCARTY ET AL., *supra* note 2, at 44.

81. *Id.* at 73.

2000 presidential elections, voters in the top income quintile had become more than twice as likely to identify as Republicans as those in the bottom quintile.⁸²

Based on extensive data analysis, McCarty, Poole, and Rosenthal conclude that a dramatic transformation in the economic basis of the political parties has occurred over the second half of the twentieth century: as economic inequality has increased, a powerful divergence has emerged between the partisan identification and voting patterns of high-income versus low-income Americans.⁸³ Moreover, they note that, while the realignment of the political parties triggered by the VRA is the most important change in the party system over the last sixty years, and although the direct issue of policies concerning race might have played an initial role in triggering that realignment, income is now an even more important determinant than race of Southern party identification and voter behavior than in the rest of the country.⁸⁴

But it is unclear whether, in light of the 2008 presidential election, income remains as strong a factor in voting patterns. While increased income did generally continue to correlate with increased Republican support, the pattern is more blurred. Obama actually did better than McCain among the highest-income voters, or those earning more than \$200,000 per year.⁸⁵ Moreover, while Obama did win overwhelmingly among voters earning below \$50,000 per year, McCain prevailed among voters earning between \$50,000 and \$75,000. Obama prevailed among voters earning in the \$75,000–\$100,000 range, but McCain dominated voters in the \$100,000–\$200,000 terrain.⁸⁶ Thus, the correlation between income and partisan voting preferences is choppy than it had been in the elections on which McCarty et al. based their argument. Yet partisan polarization remains just as strong or stronger after 2008 as in prior years. If the link between income and partisanship becomes diminished, while polarization remains high, the view that income inequality has driven partisan polarization might have to be reconsidered. But in any event, McCarty et al. present their important theory about the link between income inequality and polarization as an elaboration on, and complement to, the ideological realignment and redefinition of the parties that began in the civil rights era of the 1960s. The parties began to redefine their positions and identities in the 1960s, largely in response to civil rights issues, while by the 1970s and since,

82. *Id.* at 74.

83. *Id.* at 107.

84. *Id.* at 108 (“[T]he political attachments of the contemporary South are driven by income and economic status to an extent even greater than in the rest of the country.”).

85. HISTORYCENTRAL.COM, *2008 Election Results by Income*, <http://www.historycentral.com/elections/12008/exit/Income.html> (last visited Feb. 17, 2011); *see also Election 2008: What Really Happened*, RED STATE, BLUE STATE, RICH STATE, POOR STATE (Nov. 5, 2008), <http://redbluerichpoor.com/blog/2008/11/election-2008-what-really-happened> [hereinafter RED STATE, BLUE STATE].

86. *See* RED STATE, BLUE STATE, *supra* note 85.

in McCarty et al.'s view, voters' electoral preferences and party identifications reflect their economic status.

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 thirty to forty 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. In turn, voters have more consistent ideological preferences and sort themselves into political parties based strongly on these ideological preferences, as opposed to other reasons—such as longstanding group ties to particular parties. Voters are more consistently loyal to their parties.

Instead of thinking of this world as aberrational, or as the creation of a few polarizing figures, I suggest we see it as likely to be the normal, ongoing state of American party politics. The period before the VRA—a period shaped by massive disenfranchisement in the South that sustained an artificial Democratic Party monopoly—was the aberrational period. That is why the 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.

IV. 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 belief that political leaders, or particular figures, are responsible for this polarization is naïve. Instead, individual political personalities are 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 predetermined 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 interested in the possibility that 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 uncorked cannot be put back inside, nor would we want them to be. But perhaps they can be channeled in certain directions, rather than in others, through the specific ways we design the laws and institutions of democracy. I identify here the three specific institutional features that, it has been argued, have either contributed to the rise of polarized politics or could be adjusted to help reconstruct a center in American politics: primary elections, gerrymandered election districts, and

centralization of House and Senate power in the hands of party leaders. I also note the processes by which these specific changes could be made and I assess the likelihood of these changes actually occurring.

A. Primary Elections

The single institutional change most likely to lead to *some* moderation of candidates and officeholders, across all elections, would be to change the design of primary elections. The change would involve replacing closed primaries, in which only registered party members can vote, with various alternative forms of primary elections. As a matter of political economy, this is also a change that is foreseeable; indeed, it is already happening in some states, particularly those with voter initiatives.

Although primary elections were created to democratize the electoral process and take candidate selection out of the hands of party bosses, the problem that has emerged over time is that primary elections tend to have much lower turnout than general elections.⁸⁷ For the House, for example, primary turnout averages about one-third that of general elections.⁸⁸ As low turnout events, primaries tend to be dominated by the most committed and active party members, who tend to be more ideologically extreme than the average party member.⁸⁹ As a result, primaries tend to be controlled by the extremes of each party, which can affect which kinds of candidates prevail in the primaries—and therefore, which potential candidates choose to run.

1. The Structure of Primary Elections

This effect can be exacerbated by the particular legal structure a primary takes. Primary elections can be either closed or fully open, or take some variation in between. In the purest form of closed primaries, only voters who have registered under a specific party affiliation some time in advance of the

87. On the history of primary elections, see generally LEON EPSTEIN, *POLITICAL PARTIES IN THE AMERICAN MOLD* 167–74 (1986).

88. David W. Brady et al., *Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate?*, 32 *LEGIS. STUD. Q.* 79, 91 (2007) (aggregating turnout data from 1956–1998).

89. For presidential primary elections, this finding has been documented in JOHN H. ALDRICH, *WHY PARTIES? THE ORIGINS AND TRANSFORMATIONS OF POLITICAL PARTIES IN AMERICA 189–92* (1995); NELSON W. POLSBY & AARON WILDAVSKY, *PRESIDENTIAL ELECTIONS: STRATEGIES AND STRUCTURES OF AMERICAN POLITICS* (12th ed. 2008); JOSEPH A. SCHLESINGER, *POLITICAL PARTIES AND THE WINNING OF OFFICE* (1991). *But see* John G. Geer, *Assessing the Representativeness of Electorates in Presidential Primaries*, 32 *AM. J. POL. SCI.* 929 (1988); Barbara Norrander, *Ideological Representativeness of Presidential Primary Voters*, 33 *AM. J. POL. SCI.* 570 (1989). For Senate elections, this finding is documented in David Brady & Edward P. Schwartz, *Ideology and Interests in Congressional Voting: The Politics of Abortion in the U.S. Senate*, 84 *PUB. CHOICE* 25, 29, 33, 40, 43 (1995); Wayne L. Francis et al., *Retrospective Voting and Political Mobility*, 38 *AM. J. POL. SCI.* 999 (1994); Amy B. Schmidt et al., *Evidence on Electoral Accountability in the U.S. Senate: Are Unfaithful Agents Really Punished?*, 34 *ECON. INQUIRY* 545–67 (1996); for House elections see Brady et al., *supra* note 88.

primary are permitted to vote; semi-closed systems further permit new or unaffiliated voters to vote without declaring an affiliation in advance. About half the states use closed or semi-closed primaries.⁹⁰ The most ideologically committed and hardcore party activists tend to dominate closed primaries even more than they already dominate primaries in general. As a result, closed primary winners are thought more likely to reflect the ideological extremes around which the median party activist centers.⁹¹ Closed primaries thus, arguably, contribute to more polarized partisan officeholders. Semi-open and pure-open primaries permit all voters to choose a party primary preference at the primary election itself. In the former, voters must choose a party primary in public, by requesting the ballot of a particular party or otherwise declaring membership in the party, at least for Election Day. In pure-open primaries, voters make the decision privately about the party primary in which they plan to vote.

Voters and candidates certainly act on the belief that the more closed the form of a primary election, the more likely the primaries are to favor more ideologically extreme candidates. California voters, for example, expressed disaffection for years with the state's closed primaries, which had been in effect since 1909, when the mandatory primary election had first been created.⁹² In surveys, California voters had overwhelmingly favored open primaries since the early 1980s, based on the belief that open primaries would encourage more moderate candidates to run and thus increase their prospects of election, which in turn would empower more centrists in the legislature.⁹³ Not surprisingly, however, politicians elected under the existing system had no interest in changing it, despite the apparent popular support for open primaries.

Eventually, voters bypassed the legislature through the initiative process, and when the shift to a "blanket primary"—an extreme form of open primary⁹⁴—was put to the voters, it was approved with nearly 60% support, with roughly comparable support among members of both major parties and even more support among independents.⁹⁵ The central justification for doing so

90. These definitions are taken from Kristin Kanthak & Rebecca Morton, *The Effects of Electoral Rules on Congressional Primaries*, in CONGRESSIONAL PRIMARIES AND THE POLITICS OF REPRESENTATION 116, 121 tbl.8.1 (Peter F. Galderisi et al. eds., 2001). The number of states using closed primaries is taken from the website of the organization, FairVote. *Primaries: Open and Closed*, FAIRVOTE.ORG, <http://archive.fairvote.org/?page=1801> (last visited Feb. 17, 2011).

91. One important empirical study that documents this finding is Elisabeth R. Gerber & Rebecca S. Morton, *Primary Election Systems and Representation*, 14 J.L. ECON. & ORG. 304 (1998).

92. *Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1290 n.2 (E.D. Cal. 1997), *aff'd*, 169 F.3d 646 (9th Cir. 1999), *rev'd*, 530 U.S. 567 (2000); *see also* Gerber & Morton, *supra* note 91.

93. *Cal. Democratic Party*, 984 F. Supp. at 1291.

94. In a blanket primary, voters are permitted to choose, office by office, which party's primary they prefer to vote in; thus, a voter might vote in the Democratic Party's primary for Governor, but the Republican Party's primary for Secretary of State.

95. *Cal. Democratic Party*, 530 U.S. at 567.

was that a blanket primary, as a form of open primary, would generate more moderate nominees and give voters more centrist choices on general election day.⁹⁶ The blanket primary was in effect for two elections before the U.S. Supreme Court held it unconstitutional. Yet in the wake of that ruling, California voters still did not want to return to the closed primary. Instead, just recently, they have voted to respond to the Court's decision by adopting yet another form of open primary, the "top-two primary," described in more detail below. Again, California voters are motivated by the belief that this more open form of primary election will favor moderates and centrists, rather than the polarized extremes of each party that closed primaries are thought to favor.

Like voters, more centrist candidates also act on the belief 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.⁹⁷ That is surely part of why he seized the opportunity that a recall election offered: to bypass the activist-controlled, closed Republican primary and appeal directly to the general electorate in a single election.⁹⁸ Though the overwhelming preference in that general election, Schwarzenegger would surely have found it more difficult to emerge from a Republican primary election, as more moderate or centrist candidates have found for years.

Similarly, during the Democratic presidential primaries in 2008, Barack Obama performed somewhat better in open-primary states than closed ones, in which Hillary Clinton did better.⁹⁹ Thus, to the extent Obama was seen as the more centrist candidate, and that this view accounts for this pattern, he had greater success in primary electorates that expanded the electorate beyond only voters who had previously registered as Democrats. Advocates of greater use of open primaries believe they will tend to select candidates whose appeal is more centrist and pull candidates, and therefore officeholders, more to the center.¹⁰⁰

Though voters and candidates believe open primaries, in various forms, are more likely to favor moderate, centrist candidates than closed primaries, the empirical data is actually more mixed and equivocal. Specific studies of

96. VOTING AT THE POLITICAL FAULT LINE: CALIFORNIA'S EXPERIMENT WITH THE BLANKET PRIMARY 351–53 (Bruce E. Cain & Elisabeth R. Gerber eds., 2002).

97. Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239, 255 (2004).

98. Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 437 (2004).

99. Of the 16 closed primaries, Obama won 7, and Clinton won 9; of the 24 open or semi-open primaries, Obama won 13, and Clinton won 11. The data on types of primaries is taken from FAIRVOTE.ORG, *supra* note 90, and Richard E. Berg-Andersson, *Primary, Caucus, and Convention Results*, THE GREEN PAPERS (Dec. 26, 2000), <http://www.thegreenpapers.com/PCC/Tabul.html>; the data on the 2008 results is based on *Election Center 2008: Delegate Score Card*, CNN (Aug. 20, 2008, 2:25 PM), <http://edition.cnn.com/ELECTION/2008/primaries/results/scorecard/#D>.

100. VOTING AT THE POLITICAL FAULT LINE, *supra* note 96.

California's brief experience with the blanket primary indicate that it did have modest effects in favoring election of more moderate candidates.¹⁰¹ Voting in the California Assembly, but not the state Senate, was more bipartisan; there is also some evidence, but not strong evidence, that California's U.S. House delegation was more moderate during the period of the blanket primary.¹⁰² For Congress, some studies conclude that closed primaries do produce significantly more liberal House Democrats but have little effect on the ideological positioning of House Republicans; the aggregate effect on House polarization is small.¹⁰³ Furthermore, at the state level, systematic studies that examine polarization across state legislatures find no correlation between polarization and the form of a state's primary election.¹⁰⁴ Thus, the data about the effect of primary structure on polarization remain equivocal, even as many participants in the system believe that open primaries do favor more centrist candidates.

In addition to open primaries, more novel primary structures that proponents also hope will generate more moderate candidates and officeholders are in use. In an initiative in June 2010, California voters approved a "top-two" structure for state and national primary elections, other than the presidential election, to take effect in 2012.¹⁰⁵ In the top-two primary, candidates from all political parties will compete together in a single, open primary, with candidates for each office from all the parties appearing on the same ballot. In the general election, only the top two candidates from the open primary will run—in a kind of run-off election—even if one candidate received more than 50% of the vote in the open primary. The candidates will not necessarily run under a party label; they can voluntarily identify themselves with a party label or choose not to do so. Most importantly, the two candidates in the general election can be from the same party—if they choose to identify with a party. Thus, in a congressional district that is 65% Democratic, for example, it is easy

101. See Elisabeth R. Gerber, *Strategic Voting and Candidate Policy Positions*, in VOTING AT THE POLITICAL FAULT LINE, *supra* note 96, at 192, 210 (concluding that "the evidence strongly suggests that the overall net effect of the blanket primary was to produce more moderate candidates"). In particular, Gerber concluded that this moderating effect was minimal for top-of-the-ticket races but substantial in state legislative races. *Id.*; see also Gerber & Morton, *supra* note 91, at 318–21 (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); Eric McGhee, *Open Primaries*, 2010 PUB. POL'Y INST. OF CAL. 8 (concluding that the blanket primary led to election of more moderates). Interestingly, in the brief period of time in which the blanket primary was in effect, including the 1998 election, voter participation reached higher levels than it had since 1982; after the Court ruled the blanket primary unconstitutional, rates of participation went back down. Molly Milligan, *Open Primaries and Top Two Elections: Proposition 14 on California's June 2010 Ballot*, 2010 CTR. FOR GOVERNMENTAL STUDIES 45 n.28 [hereinafter CGS REPORT].

102. McGhee, *supra* note 101, at 8.

103. MCCARTY ET AL., *supra* note 2, at 68.

104. Seth Masket, *Primaries and Partisanship*, ENIK RISING (March 26, 2010, 6:59 AM), <http://enikrising.blogspot.com/2010/03/primaries-and-partisanship.html>.

105. See Jesse McKinley, *California Voting Change Could Signal Big Political Shift*, N.Y. TIMES, June 9, 2010, at A1.

to imagine that two Democratic candidates will be left to compete in the general election. Washington has been using this system since 2008, after the Supreme Court rejected a facial constitutional challenge to it.¹⁰⁶

That California is seeking to change its politics through institutional redesign is not surprising. California has the most polarized state legislature in the country.¹⁰⁷ In addition, an increasingly large proportion of Californians is disaffected from either of the major parties; among registered voters, 20% now decline to state a party affiliation.¹⁰⁸ And of course, policy making, particularly over budgetary matters, has come to seem completely dysfunctional, as California annually runs tens of billions of dollars in budget deficits and cannot find political agreement to address this crisis.¹⁰⁹

The arguments and hopes for the top-two primary are similar to those for open primaries, but with a somewhat different focus that, potentially, has broader ramifications. The top-two primary is not likely to have much effect on statewide races; the two candidates who emerge from the primary are likely to represent the two major parties.¹¹⁰ The top-two primary is designed to increase the chances of election for moderates running for Congress or the state legislature, *particularly* in election districts that are overwhelmingly dominated by voters affiliated with one party.¹¹¹ In a district dominated by Democrats, for example, the top two candidates who emerge from the primary are likely to be Democrats. The general electorate will then choose between those two candidates on Election Day. Thus, if Republicans or independents prefer a more moderate representative, they will be able to affect the choice as between these two Democratic candidates.

The top-two primary also potentially entails a significant cost: because candidates choose whether to self-identify with a party, and if so, with which one—without “the party” in any form being able to control who uses the party label—it is possible the party’s brand name will come to lose any coherent meaning. Indeed, that is precisely the claim the parties made in challenging Washington’s top-two primary, a challenge the Supreme Court deferred until more empirical information becomes available concerning the effects of the

106. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008). The Supreme Court left open the possibility that a later constitutional challenge could succeed once more empirical information becomes available concerning how ballots are designed and how this system actually works in practice, particularly whether it causes certain kinds of voter confusion. *See id.*

107. *See* Boris Schor, *Abel Maldonado is a Liberal Republican (But Only in California)*, BORIS SCHOR BLOG (Feb. 11, 2010, 1:25 PM), <http://bshor.wordpress.com/2010/02/11/abel-maldonado-is-a-liberal-republican-but-only-in-california>.

108. CGS REPORT, *supra* note 101, at 3.

109. *See, e.g.*, Daniel B. Wood, *As California Budget Deadlock Drags, State Set To Pay Steep Price*, *Christian Science Monitor*, Aug. 19, 2010, *available at* <http://www.csmonitor.com/USA/Politics/2010/0819/As-California-budget-deadlock-drags-state-set-to-pay-steep-price>.

110. *Id.* at 1–3.

111. *Id.*

actual implementation of the top-two primary.¹¹² If that dilution of the party label happens, voters might end up casting less well-informed votes because voters rely on the party label as the most significant cue or heuristic in understanding what a candidate stands for.

Currently, a debate roils over whether the top-two primary will, in fact, lead to election of more moderate candidates. The most comprehensive analysis concerning California concludes that about one-third of all state legislative and congressional races could produce general election run-offs between two candidates of the same party—nearly all of which would involve Democrats—and that some of the resulting general-election contests will be determined on general election day by how independents and opposite-party members vote.¹¹³ Thus, moderates might win some races they otherwise would not.¹¹⁴ Some scholars are skeptical that any major change in legislative polarization will result from the shift to the top-two primary structure. They point out, for example, that Washington has one of the most polarized legislatures in the country, even though Washington has used various alternatives to closed primaries for years.¹¹⁵

If the general problem is that primary elections tend to involve much smaller electorates not representative of the general electorate, another option is more dramatic change in voting rules that circumvent that problem altogether. The prime example is instant run-off voting (IRV), in which voters get one ballot and rank all the candidates in the order they prefer—or as many candidates as they prefer.¹¹⁶ IRV essentially collapses the primary and general election together. Put another way, it eliminates the primary election because voters turn out only once for the day of the general election. After voters rank the candidates, the first-place choices are counted; if any candidate receives a majority, he or she is elected. Otherwise, a series of run-offs is, in effect, carried out, using each voter's preferences. The candidate who receives the fewest first-place choices is eliminated. All ballots are then recounted, with each ballot counting as one vote for each voter's highest-ranked candidate who has not been eliminated. Specifically, voters who chose the now-eliminated candidate will have their ballots counted for their second ranked candidate—just as if they were voting in a traditional two-round run-off election—but all

112. *Wash. State Grange*, 552 U.S. at 442.

113. In Washington, which began using a top-two primary in 2008, 6% of state House primaries and 2% of Senate primaries have produced same-party run-off elections, but none of its United States House races have done so. McGhee, *supra* note 101, at 4.

114. One important empirical study concludes that open primaries do tend to produce more moderate winners. See Gerber & Morton, *supra* note 91, at 310–11.

115. Washington used a blanket primary from 1934 through 2002; an open primary until 2006; and now the top-two primary. See also Eric McGhee, *Electoral Reforms Won't Fix California Gridlock*, S.F. CHRON., Mar. 14, 2010, at E4.

116. See generally Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418 (1995) (describing advantages of IRV).

other voters get to continue supporting their top candidate. The weakest candidates are successively eliminated and their voters' ballots are redistributed to those voters' next choices until a candidate earns a majority of votes.¹¹⁷

In addition to the fact that IRV involves just one election day and thus avoids any skewing caused by the typically shrunken and more ideologically extreme primary electorate, IRV is also thought to favor more moderate candidates. The reason is that even voters whose first choice is an ideologically extreme candidate are likely to list moderates as their second and third choices, rather than ideologically extreme candidates of the other party.¹¹⁸ IRV could also be designed so that the parties continue to have significant influence—for example, by requiring that a candidate receive some threshold level of support from party leaders, a party caucus, convention, or other selection system—or to permit candidates to choose their own party identification, as in the top-two system.¹¹⁹

It is also possible to use non-partisan primaries altogether. California, for example, from 1914 to 1959, permitted candidates to “cross-file,” which meant they would seek nomination in more than one party's primary, without having to reveal their party affiliation. This is the system under which Earl Warren won all the party primaries in 1946 and was elected Governor of California with 90% of the vote. During this period, party influence in California's politics was extremely weak.¹²⁰ Nebraska, which uses non-partisan elections for its unicameral legislature, has one of the least polarized state legislatures, as does Louisiana, which uses a version of the top-two primary.¹²¹ Non-partisan elections do seem to lead to significant drops in party loyalty within the legislature, so that party identification does not play an active role in legislative politics, but at some point, this comes at significant cost. Parties bring structure

117. This description is taken from the website of FairVote, an organization that promotes IRV. *How Instant Runoff Voting Works*, FAIRVOTE.ORG, <http://www.fairvote.org/How-Instant-Runoff-Voting-Works> (last visited Feb. 17, 2011).

118. Some have suggested IRV would be particularly effective on general election day in presidential elections, where moderate Democrats or Republicans might be more willing to challenge party leaders, because under IRV they would not split the party as Theodore Roosevelt did to the incumbent Republican President, William Howard Taft, in 1912. But voters would also be more willing to vote for independents, because they would not feel they were wasting their votes, as under the current system. See Larry Diamond, Comment, *in* 2 RED AND BLUE NATION? CONSEQUENCES AND CORRECTION OF AMERICA'S POLARIZED POLITICS 295, 299 (Pietro S. Nivola & David W. Brady eds., 2008).

119. For more on IRV, see generally Briffault, *supra* note 116. Support for IRV appears to be rising; cities that now use it include San Francisco, Minneapolis, Oakland, Memphis, and Springfield, Illinois, among others. IRV does, however, require voters to vote without knowing how well a candidate does in a primary election; it has been criticized, therefore, for depriving voters of important information they might need to make informed choices. See Nelson W. Polsby, Comment, *in* 2 RED AND BLUE NATION?, *supra* note 118, at 286.

120. SETH E. MASKET, NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES 54–87 (2009).

121. Masket, *supra* note 104.

and patterning to political conflict, and without that coherence, it becomes all the more difficult for voters to hold elected officials accountable.¹²²

The empirical debate seems to come down to this question: if changes in the form of primary elections lead even a small number of moderates to replace more ideologically extreme officeholders, how much difference to legislative policymaking would the presence of even a small number of additional moderates make, either on average or on particularly important or salient issues. If we focus on the United States House or Senate, for example, how much difference on issues like health care, financial regulation, and others would the presence of a small number of additional moderates make? Or, to put the point another way, in an era of generally polarized parties, bipartisanship is likely to mean, at best, a fairly small number of legislators who cross party lines. How much difference would the presence of a few additional centrists make to the kind of bipartisanship we can realistically expect today? It would be a mistake to think that alternatives to closed primaries, in whatever form, would dramatically change the make-up and polarization of political bodies; the real question is whether even modest changes would be significant enough to undermine the kind of hyperpolarization that exists in many of today's political bodies.

2. *Legal Questions*

A shift away from closed primaries, finally, presents two legal questions. First, through what structures and institutional mechanisms can changes in primary elections be made? 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, Article I, Section 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

122. To put this in technical terms, parties organize politics for voters along a one-dimensional space, such as a liberal-to-conservative continuum. In a study that compares the Kansas legislature to the Nebraska legislature, one study found that Nebraska legislative politics lacked this feature, while Kansas legislative politics had it. Gerald C. Wright & Brian F. Schaffner, *The Influence of Party: Evidence from the State Legislatures*, 96 AM. POL. SCI. REV. 367 (2002). This study also noted that “it is difficult to imagine how voters could achieve even general policy direction when conflict patterns in the legislature are unstable and unstructured. . . . [N]onpartisan elections effectively break the policy linkage between citizens and their representatives in the statehouse.” *Id.* at 377.

elections for Senators and Representatives.” But Article I, Section 4 also expressly gives Congress the right to take over these functions from the states.¹²³ Under this power, Congress has passed national laws that require states to use single-member districts for electing members of the House, regulate the voter-registration process for national elections, and mandate and regulate the process of casting and counting provisional ballots in national elections.¹²⁴ Similarly, the Supreme Court has never held an act of Congress unconstitutional under this provision for going beyond the bounds of what Article I, Section 4 permits Congress to do.¹²⁵ Thus, Congress might well have the power to regulate primary elections for national offices. As a practical matter, however, the idea of Congress taking 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. As the California experience illustrates, voters tend to be more supportive of open primaries than existing officeholders or party leaders.

The second legal issue that would confront the effort to replace closed primaries with open ones 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 also as noted above, the Supreme Court held California’s blanket primary unconstitutional in a 2000 decision; the Court reasoned that political parties have First Amendment associational rights that make certain forms of state-mandated primaries unconstitutional.¹²⁶ The Court held that California’s blanket primary—an unusual, crazy-quilt version of the open primary—unconstitutionally violated the associational rights of party members.¹²⁷ I have criticized the analysis and the outcome in the Court’s decision elsewhere.¹²⁸ Even accepting the decision, though, only three states used

123. “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.” U.S. CONST. art. I, § 4.

124. For a summary of these laws, see Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741 (2006).

125. Indeed, the Supreme Court has read this power expansively. *See, e.g.*, *Smiley v. Holm*, 285 U.S. 355 (1932) (holding that Congress generally has regulatory power under the United States Constitution over the entire field of election process); *Newberry v. United States*, 256 U.S. 232, 255 (1921); *United States v. Mosley*, 238 U.S. 383, 386 (1915); *Ex parte Yarbrough*, 110 U.S. 651, 661 (1884); *Ex parte Siebold*, 100 U.S. 371, 387 (1880); *Ex parte Clarke*, 100 U.S. 399 (1879).

126. *See Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000). For a full description and analysis of *Cal. Democratic Party*, see Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001).

127. *Cal. Democratic Party*, 530 U.S. at 567.

128. Richard H. Pildes, Foreword, *The Constitutionalization of Democratic Politics*, 118

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.¹²⁹ 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 come to hold open primaries unconstitutional. But some commentators, including those who support open primaries, misunderstand or overstate this risk.¹³⁰ I would guess that the Court will not hold open primaries, a long-standing 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 from pursuing legislative efforts, state or national, to adopt open primaries out of fears that the Court will hold such primaries unconstitutional.

The move away from closed primaries is the single most discrete institutional change I can think of that might—and I stress *might*—have some effect in rebuilding the center in American political institutions. Small changes in institutional design for elections often do have surprisingly powerful ramifications for the kinds of candidates who run, are elected, and then govern in office. 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 the nature of polarized politics, a move toward open primaries would be one way in which we could conceivably change the institutional framework within which elections take place that might help keep more centrist figures in office and lead more of them to choose to run—and to win.

B. Gerrymandering

A second institutional structure blamed a great deal in recent years for contributing to the rise of polarized politics is the modern system of gerrymandered congressional election districts. I have speculated about this connection myself in earlier writings.¹³¹ But as more empirical work has emerged, there is less evidence than one might think to suggest that

HARV. L. REV. 29, 101–30 (2004) [hereinafter Pildes, *Constitutionalization*] (suggesting that Washington's blanket primary system was facially constitutional and did not severely burden respondent Republican Party's associational rights).

129. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008).

130. 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 primaries be adopted. BROWNSTEIN, *supra* note 3, at 378–89. The Supreme Court has certainly not yet held open primaries unconstitutional and, to the extent Brownstein is repeating predictions, I think those predictions are much too pessimistic about the likely constitutionality of open primaries.

131. Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253 (2006) [hereinafter Pildes, *The Constitution and Political Competition*].

gerrymandered election districts, which might still be pernicious for any number of other reasons, play a significant role in causing the rise of political polarization, even in the U.S. House of Representatives. Moreover, even if gerrymandering did contribute to polarization, it would be much harder to eliminate or diminish this effect than most analysts realize. Thus, though gerrymandering has received a great deal of attention over the last decade, I am no longer convinced it is a significant cause of increased polarization, nor do I believe we could do much about it, even if it were.

1. Do Gerrymandered Election Districts Lead to the Election of More Ideologically Extreme Officeholders?

The theory as to how gerrymandering can increase polarization rests upon two propositions. The first is that modern gerrymandering practices have sharply increased the number of congressional seats that are overwhelmingly safe for one party or the other, and have thus diminished the number of competitive or marginal election districts. The second is that officials elected from seats overwhelmingly safe for one party or the other are more polarized than members elected from more competitive districts. Consequently, on this view, if we could create more competitive election districts, we would elect more centrist Democrats or Republicans and have less polarized political bodies.

A direct link runs from issues concerning the structure of primary elections and the gerrymandering issue. If general elections were competitive, winning candidates would, in theory, have to be responsive to the median voter in the general election. The particular structure of the primary—closed or open—might matter little, then, because regardless of what type of candidate tended to emerge from the primaries, any candidate would still have to be able to attract the centrist, median general-election voter. Competitive general elections might, therefore, mitigate the effects closed primaries have in favoring candidates from the extremes. Indeed, 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.¹³² Moreover, during the 1950s and 1960s, “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”¹³³—just as the Downsian models predicted.

If election districts are overwhelmingly safe for one party or the other, the need to follow that script disappears. If any Democrat, no matter how liberal, moderate, or conservative, who wins the primary is going to win the general

132. See, e.g., ALDRICH, *supra* note 89, at 12–14.

133. LEVENDUSKY, *supra* note 8, at 131–32. For the data that supports this point, see MCCARTY ET AL., *supra* note 2, at 31, and Brady et al., *supra* note 88, at 79.

election because 80% of a district's population is composed of voters who vote Democratic in nearly all elections, the primary winner has no need or incentive to tack back toward the center—or any other particular place—for the general election. In particular, ideologically extreme winners of closed primaries face no pressure to move back toward the center in order to win general elections when the district is overwhelmingly safe for their party whether they do so or not. The particular reason a district is overwhelmingly safe would not matter; whether intentionally designed to be safe, or safe simply because voters with shared political preferences happen to be geographically concentrated, the effect—no meaningful electoral pressure from general elections to move back to the center—would be the same. But if gerrymandering in recent decades has produced more and more election districts overwhelmingly safe for one party or the other, gerrymandering could be a significant contributor to the rise of polarized politics.

Part of the attraction of the story that gerrymandering causes polarization lies in the fact that one initial element in that story is undoubtedly true. Incumbent reelection rates have been going up steadily over the last fifty years, with the rate reaching the extraordinary level of 97.9% on average for incumbents who ran in the four elections leading up to 2004.¹³⁴ Over the last generation or so, we have also experienced a dramatic increase in the rise of overwhelmingly safe election districts at the national level, districts dominated overwhelmingly by voters who loyally support the candidate of one party or the other in election after election. 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. Thus, the competitiveness of congressional elections has declined.

This decline is a familiar story. The data has been collected elsewhere.¹³⁵ Here is one way of illustrating the point: from 1976 to 2002, the proportion of House Democrats elected from safe districts rose from 24% to 49%; for House Republicans, the rise was from 27% to 40%. Correspondingly, the proportion of Democrats from marginal or high-risk districts dropped from 60% to 32%, while for Republicans the drop was from 46% to 34%.¹³⁶ For another striking point that conveys the general picture, consider the following: normally, the first election after a census and redistricting is the most competitive, as everyone scrambles to win in newly configured districts. But in the wake of the

134. See John N. Friedman & Richard T. Holden, *The Rising Incumbent Reelection Rate: What's Gerrymandering Got To Do with It?*, 71 J. POL. 593, 593 (2009).

135. For a summary of that data, see Gary C. Jacobson, Comment, in 1 RED AND BLUE NATION?, *supra* note 26, at 284–90 [hereinafter Jacobson, Comment]; Pildes, *The Constitution and Political Competition*, *supra* note 131, at 256–60. For a recent general overview of these issues, see generally PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING (Thomas E. Mann & Bruce E. Cain eds., 2006).

136. This data is from ABRAMOWITZ, *supra* note 2, at 145. The definitions used for “safe,” “marginal,” and “high-risk” seats are provided there. *Id.*

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.¹³⁷ The 2002 and 2004 elections were the least competitive in post-war history.¹³⁸ To show how recent these changes are, from 1970 through 2004, the average number of House seats that changed parties was 14.5; but from 1996 through 2004, that number was just 4 seats.¹³⁹ 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 enabled Democrats to pick up 31 and 21 seats in 2006 and 2008, respectively.¹⁴⁰ 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 of a buffer for existing congressmen.¹⁴¹ Of course, in an age of hyperpolarized partisan politics, these large swings in voter preferences across all House districts might be predicted to occur with greater frequency than in

137. *Id.* at 257. McCarty et al. agree that redistricting accounts for much of this decline in competition; they conclude that the redistrictings in 1980, 1990, and 2000 account in the aggregate for 83% of the decline in competitive seats since 1980. See Nolan M. McCarty, Keith T. Poole, & Howard Rosenthal, *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666–80 (2009). This lack of competitive elections for Congress contrasts notably with the greater competitiveness seen in Senatorial and Gubernatorial elections. While only one of 11 House elections was decided by less than 10 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.

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

139. Eric Uslander, *The 2006 Midterm Elections in the United States and the Consequences for Policy-Making in the 110th Congress*, http://www.bsos.umd.edu/gvpt/uslander/uslander2006_elections.ppt. Uslander also notes, as have others, that electoral margins of victory have been increasingly dramatically. Thus, from 1992 to 1994, 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 10 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. *Id.*

140. See Jacobson, *The 2008 President and Congressional Elections*, *supra* note 7, at 1; Gary C. Jacobson, *Referendum: The 2006 Midterm Congressional Elections*, 122 POL. SCI. Q. 1 (2007).

141. See Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 OHIO ST. L.J. 1121, 1129 (2007). Issacharoff and Nagler laid out 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.

Id.

the past. Hyperpolarization means that the fate of candidates across districts is more likely to be linked through the party label, so that House elections might more routinely become, in effect, national referenda on the parties.

There has undoubtedly been a dramatic decline in competitive House elections. But the key question is: what accounts for this decline? To blame gerrymandering is tempting, in part because it is so ugly. 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.¹⁴² This practice enables incumbents to gerrymander, both for their own benefit and that of their party. 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 sometimes 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 the bipartisan incumbency-protection gerrymander in the number of safe seats.¹⁴³

To appreciate how tawdry this process is, one need look no further than this unembarrassed admission regarding California redistricting by Representative Loretta Sanchez, in which she describes the role of redistricting czar Michael Berman, the leading consultant to the controlling Democratic Party in drawing the new district lines:

So Rep. Loretta Sanchez of Santa Ana said she and the rest of the Democratic congressional delegation went to Berman and made their own deal. Thirty of the thirty-two 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.”¹⁴⁴

Moreover, differences between the competitiveness of congressional districts that courts or commissions draw and those that partisan state legislatures design, albeit modest, seem to suggest politically self-interested

142. For a description and survey of these alternative institutions in other democracies, and analysis of the consequences, see Pildes, *Constitutionalization*, *supra* note 128, at 78–81.

143. See Thomas Brunell & Bernard Grofman, *Evaluating the Impact of Redistricts On District Homogeneity, Political Competition, and Political Extremism in the U.S. House of Representatives, 1962 to 2006*, in *DESIGNING DEMOCRATIC GOVERNMENT: MAKING INSTITUTIONS WORK* 117, 125 (Margret Levi et al. eds., 2008). One important study concludes, though, that no meaningful difference in incumbent reelection rates exists between partisan versus bipartisan gerrymandering plans. See Friedman & Holden, *supra* note 134, at 603–07.

144. Hanh Kim Quach & Dena Bunis, *All Bow to Redistrict Architect: Politics Secretive, Single-Minded Michael Berman Holds All the Crucial Cards*, *ORANGE CNTY. REGISTER*, Aug. 26, 2001, at A1, available at <http://fairvote.org/redistricting/reports/remanual/usnews6.htm#arch>.

districting has contributed to the decline in competition.¹⁴⁵ In 2002, in 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 legislature-drawn districts were competitive enough to be won by less than a landslide.¹⁴⁶ 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 legislature-drawn districts were the least competitive.¹⁴⁷ The major difference between 1992 and 2002 was a decline of almost 50% in the number of congressional districts not won by a landslide when legislatures controlled districting.

Even so, the evidence that gerrymandering is a major cause of the decline in competitive elections is not powerful. Most of the increase in safe seats over the last thirty years, and the decline in marginal seats, for example, has occurred in the years *between* redistricting cycles, rather than after redistricting—there was a particularly large increase in safe seats between 1992 and 2000, then a far more marginal further increase after the 2002 redistricting.¹⁴⁸ Similarly, the changes that affect incumbent reelection rates vary smoothly over time, rather than showing sharp changes associated with a redistricting year.¹⁴⁹ Thus, the major causes for the decline in competitive elections appear to lie elsewhere than the districting process. One major source, instead, is the increasing geographic concentration of like-minded voters; states and counties, not just congressional districts, are becoming more “purified” in terms of the partisan affiliations of the voters who live in them.¹⁵⁰ In the 2004 presidential election, for example, 60% of the nation’s counties gave supermajority support (60% or more) to either Bush or Kerry; that percentage of landslide support had been reached only once in the past half-century—1972.¹⁵¹ The counties, of course, are not reconfigured or gerrymandered on a regular basis, unlike election districts, yet the counties are also becoming more and more “safe” for one party or the other. Given that demographic fact, even “neutral” districting approaches are not likely to generate many additional competitive districts.

145. 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).

146. *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.”).

147. Pildes, *The Constitution and Political Competition*, *supra* note 131, at 259.

148. ABRAMOWITZ, *supra* note 2, at 147. *See also* Jacobson, Comment, *supra* note 135, at 284–85 (noting that most of the loss of closely balanced House districts occurred between 1994 and 2000).

149. *See* Friedman & Holden, *supra* note 134, at 593.

150. *See generally* BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2008).

151. Galston, *supra* note 12, at 11.

In addition, Senate seats have become safer over time. Between 1976 and 1978, for example, 27% of Senate seats were solidly “safe” for one party or the other; 60% of seats were marginal.¹⁵² By 2008, 60% of Senate seats were safe and only 30% were marginal.¹⁵³ As documented above, voters in general, in both parties, have become far more ideologically consistent and polarized—just as they have become far more polarized in their perception of the president’s performance. That is why national elections have shifted more toward turning out a party’s supporters than trying to win over swing voters. The growing financial advantage of incumbents might also play a role in the decline of competitive elections.¹⁵⁴ Overall, polarization among elected officials and politically active citizens appears to be a reflection of the political parties today, not of the nature of election districts.¹⁵⁵

But even if gerrymandering does contribute significantly to the decline in competitive election districts, the second step in the gerrymandering-as-cause-of-polarization story would also have to be true: more competitive districts would have to produce more moderate or centrist officeholders. Put the other way, safe seats would have to tend to send more ideologically extreme legislators to Congress. Some experts suggest this to be the case;¹⁵⁶ and it is true that some of the safest districts in the country, those required by the VRA, do tend to elect the most liberal Democratic representatives.¹⁵⁷ Yet viewed in

152. Abramowitz, *supra* note 5, 31 tbl.3.

153. *Id.* Similarly, 39% of Senate races were decided by fewer than 10 percentage points in the 1970s, but since 2002, only 22% of Senate races have been this competitive. *Id.* at 33 tbl.5.

154. The cost of beating an incumbent, the amount challengers spent on average to defeat House incumbents, rose 15 times from 1974 to 2004. Uslander, *supra* note 139.

155. See Keiko Ono, *Electoral Origins of Partisan Polarization in Congress: Debunking the Myth*, 2005 EXTENSIONS 1–5. 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 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 Gary C. Jacobson, Competition in U.S. Congressional Elections 8 (March 6, 2006) (unpublished draft presented at conference, “The Marketplace of Democracy”). 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).

156. See, e.g., Bruce Cain, *From Equality to Fairness: The Path of Political Reform*, in PARTY LINES, *supra* note 135, 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, 899 (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.”).

157. See Brunell & Grofman, *supra* note 143, 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

the aggregate, there does not appear to be strong evidence to support a linkage between polarization and safe election districts.¹⁵⁸

Members of Congress, Republican or Democratic, from competitive districts, for example, vote in only slightly less polarized patterns than members from safe seats.¹⁵⁹ Over the last generation, all members of Congress, however grouped, have become dramatically more polarized. This includes Democrats as well as Republicans, whether from the North or South, whether from safe or competitive districts.¹⁶⁰ The increase in the polarization of members from all these kinds of districts has been quite similar. The only members substantially more moderate than their colleagues are those increasingly few who represent districts that actually lean toward the other party in national elections.¹⁶¹ Both Democrats who represent Republican-leaning districts and Republicans who represent Democratic-leaning ones are more moderate than their colleagues. But many fewer such representatives exist today compared to the 1970s.¹⁶² The reason for this decline itself has nothing to do with gerrymandering, but with the ideological purification of the parties: voters now are much more partisanly loyal across all elections, including presidential, Senate, and House elections, and they vote much less often than a generation ago for candidates from different parties for the House and the Presidency. Moreover, the lack of relationship between safe or competitive

homogeneity among the Democrats.”); *see also* MCCARTY ET AL., *supra* note 2, at 3 (“Some legal requirements such as majority-minority districts may exacerbate polarization.”).

158. *See, e.g.*, Girish J. Gulati, *Revisiting the Link Between Electoral Competition and Policy Extremism in the U.S. Congress*, 32 AM. POL. RES. 495 (2004); Thomas E. Mann, *Polarizing the House of Representatives: How Much Does Gerrymandering Matter*, in 1 RED AND BLUE NATION?, *supra* note 26, at 276 (concluding, after data analysis, that “[p]artisan polarization in the House clearly operates to a substantial extent independent of the competitiveness of congressional districts”); *see also* Brunell & Grofman, *supra* note 143, at 125; McCarty, Poole, & Rosenthal, *supra* note 137, at 666–80. In an extraordinary study of California state legislative politics, Seth Masket shows that legislators tend to reflect the ideological preferences of their particular district in eras of a weak-party system, while they tend to follow the party line regardless of district composition in eras of a strong-party system. MASKET, *supra* note 120, at 84. In California, the former era—the Progressive Era—ran from 1910 to 1952, when candidates could cross-file in several parties’ primaries without identifying their own party affiliation. *Id.* The latter era began after 1952 when the cross-filing option went into decline because of a state law that required candidates to identify under a party label. *Id.*

159. ABRAMOWITZ, *supra* note 2, at 150. Based on regression analysis, Abramowitz concludes that district partisanship (how safe or competitive a district is) accounts for about 20% of the overall level of ideological polarization in Congress today. *Id.* at 151. *See also* MASKET, *supra* note 120, at 4 (noting that congressional districts nearly evenly divided between Democrats and Republicans nonetheless elect members who are either extremely liberal or conservative).

160. ABRAMOWITZ, *supra* note 2, at 149.

161. *Id.* at 151–52.

162. In 1976, 39% of Democrats and 18% of Republicans represented such districts; by 2002, 18% of Democrats and 12% of Republicans did. *Id.* at 152. Another study concludes that from the 1960s to 1980s, nearly 40% of House Democrats won their seats in Republican-leaning districts, based on the presidential vote; by the early 2000s, that had been reduced to 15% (Republican members of the House elected from Democratic leaning districts never exceeded about 15%). Galston, *supra* note 12, at 14.

seats and how ideologically extreme or centrist officeholders appear to reflect the preferences of voters. The ideologies of Democratic and Republican voters themselves appear to be quite similar to the ideologies of same-party voters regardless of whether those voters live in districts that strongly favor one party or the other or that are heterogeneous.¹⁶³

Thus, the best evidence to date suggests that the gerrymandering-as-cause-of-polarization story fails at both steps. Elections have become much less competitive at the individual district level, but gerrymandering does not appear to be a major cause. But even suspending judgment on that step, it also does not appear that members elected from more competitive districts are less extreme or polarized than members elected from safe districts. There is no doubt polarization has increased dramatically since the 1970s, and that districted elections are less competitive. But gerrymandering does not seem to be a major cause.

2. How Difficult Would Creating More Competitive Elections Through the Design of Election Districts Be?

The problem is deeper still for those hoping that the elimination of gerrymandering, by increasing electoral competition, would reduce polarization. There is an important, but less appreciated element, in the decline of competitive election districts: the role of the Voting Rights Act (VRA) in parts of the country with significant minority populations in necessarily 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.¹⁶⁴ The law’s definition of racially polarized voting is a simple one, with the consequence that these districts are generally required in most places where significant minority populations exist.¹⁶⁵ Racially polarized elections are defined as elections in which minority voters overwhelmingly prefer a particular

163. ABRAMOWITZ, *supra* note 2, at 154–55. One study explores whether states that used relatively more independent districting processes for the first time in 2002, in the wake of the 2000 census, ended up with less polarized congressional delegations. Using a very broad definition of “relatively more independent districting processes,” the study found five states that had made this change: Alabama, Arizona, Connecticut, Idaho, and Maine. The study found no meaningful change in partisanship for the first three, but did find that partisanship in Idaho and Maine declined. But whether this decline, in even two of the five states, can be attributed to the change in districting practice is difficult to infer because of how broadly the study defines “relatively more independent” districting. Idaho, for example, shifted to a binding, bipartisan redistricting commission with no nonpolitical tiebreaking member. Maine, which has only two seats in Congress, did not use an independent districting commission at all, but empowered its courts to redistrict if a redistricting deadline for the legislature had passed, but the courts were not needed for the 2002 redistricting. I would not hazard any generalizations from this study. See David G. Oedel, et al., *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?*, 54 VILL. L. REV. 57 (2009).

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

165. See Pildes, *At War With Itself?*, *supra* note 42, 1151–61.

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.¹⁶⁶ For example, if 90% of African American voters in Texas preferred Obama to McCain in the 2008 election, while 75% of white Texan voters preferred McCain, that election would be considered racially polarized—even if no Democratic candidate for President, black or white, does any better among white Texan voters.¹⁶⁷

The VRA's resulting requirement that safe minority districts be drawn has first- and second-order effects on the increase in safe districts and the decline in competitive ones. 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. The average margin of victory in 2008 in these majority-minority districts, for example, was around 73%—as compared to 36.5% for the rest of the country's districts.¹⁶⁸

Additionally, the second-order effects of safe minority districts must be taken into account. 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. In states with significant minority populations, the process of doing so typically concentrates a portion of the state's Democratic voters into these safe minority districts. The result, by definition, is fewer Democratic voters to spread around in other districts. Hence, depending on the overall partisan makeup of a state, it can become 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.¹⁶⁹

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 might be able to 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, which themselves are not likely to be competitive in general elections, the partisan distribution of the remaining voters means that fewer Democratic voters are left

166. *Id.* at 1524.

167. For the history of the role of racial polarization analysis in VRA implementation, see Samuel Issacharoff, *Polarized Voting and the Political Process*, 90 MICH. L. REV. 1833 (1992).

168. The raw data is available in *Dubious Democracy 2008*, FAIRVOTE.ORG, <http://www.fairvote.org/dubious-democracy-2008>. Calculations have been made based on this data.

169. Thomas Mann also notes this point. See Thomas E. Mann, *Redistricting Reform: What is Desirable? Possible?*, in PARTY LINES, *supra* note 135, 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 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. This means that 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, which now affords unusually transparent access to the redistricting process. In 2000, voters passed an initiative that removed the power to design congressional and state legislative districts from the Arizona Legislature and gave it to an entity called the Independent Redistricting Commission.¹⁷⁰ 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 by legislature, there is a public record of the process, unlike for most redistrictings. 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 parts that remained to be redistricted shot up to 16%. That, of course, made it much harder to draw competitive districts, with roughly even numbers of Democrats and Republicans, in these parts of the state. Indeed, the difference is dramatic, in terms of competitive elections: 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 can have in the modern practice of safe districting. A similar dynamic was at work in Georgia, in which the ability to design competitive districts in the rest of the state was diminished once the legal obligation to create VRA-required districts was fulfilled.¹⁷¹

Thus, VRA districts themselves are not competitive in general elections and, as a secondary effect, their creation can also make it more difficult in important states to create other districts that are competitive. This secondary effect will arise in states that begin with a Republican majority statewide, as in Arizona. In those states, the byproduct of creating safe minority districts will tend to be an increase in the size of the Republican majority in the rest of the state. This result will then make it more difficult to draw competitive districts in the rest of the state. In a state with a Democratic majority statewide, the

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

171. On Arizona, the data in this paragraph come from a court case. *See id.* 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 1990s.

effect would be the opposite. Thus, how big a role this secondary effect plays overall in the decline of competitive districts depends on how many VRA districts are drawn in Democratic- or Republican-leaning states. As a rough estimate of that, of the nine states that have an African American population of close to 20% or higher, six states—all Southern—have Republican governors, one indicator of a Republican statewide majority.¹⁷² 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 that we should modify the VRA obligation to create safe minority election districts. Every matter of electoral-institutional design involves tradeoffs. The need for safe minority districts in contexts of racially polarized voting, and the benefits of creating them, is powerful. But to understand our present situation, and to consider realistically whether institutional and legal changes might increase the number of competitive elections, we need a full account of the causes for the decline in competition. To recognize that the decline in competitive elections has many causes, and that the VRA might contribute in some fashion to that decline, is merely to show how deeply rooted the causes of that decline are and how much might be at stake in pursuing legal changes that might counteract that decline.

In addition, even leaving the VRA aside, the mechanisms for dealing with safe-district gerrymandering in the purely partisan context are limited. Courts are not going to play a major role through constitutional law. This is not just because the Supreme Court has been so reluctant to get involved in this area.¹⁷³ Even if the Court were willing to get more involved, as I have urged, the Court's actions would still be likely to take place only at the margins. At most, courts would only address these issues in exceptionally extreme contexts—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 congressional elections, using the Article I, Section 4 powers discussed above. But it is far more likely to happen, if at all, only on a state-by-state basis. Of course, state legislatures generally have no interest, and every disincentive, to give up this power, which directly affects their career prospects. States that have direct democracy, such as Arizona, are more likely to take the lead in this area. And even so, the current system of self-interested gerrymandering does not appear to be a major cause of the decline in competitive

172. The population figures are taken from the 2008 American Community Survey, which is a periodic update to the census, produced through statistical sampling rather than an "actual enumeration." *American Community Survey*, U.S. CENSUS BUREAU, <http://www.census.gov/acs>.

173. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

elections, nor is there much evidence to support the view that less competitive elections produce more ideologically extreme and polarized officeholders.

C. Internal Legislative Rules

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 do, the direct voter-politician relationship. Instead, the changes have to do with the more mundane institutional rules concerning how power is distributed and organized within our national legislative bodies.

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”¹⁷⁴ run by “petty baron[.]”¹⁷⁵ 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.¹⁷⁶ The result of powerful leadership and these internal rule changes was disciplined party unity that lasted until World War I.¹⁷⁷

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 enforced more effectively and hence contributes to polarization, began again under Democratic control in the 1970s and 1980s.¹⁷⁸ As more liberal Democrats entered Congress and moved the median Democratic representative to the left,

174. WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 62 (Johns Hopkins Univ. Press 1981) (1885).

175. *Id.* at 76.

176. See ALDRICH, *supra* note 89, at 227–28; ROHDE, *supra* note 2, at 4–5; Joseph Cooper & David W. Brady, *Institutional Context and Leadership Style: The House from Cannon to Rayburn*, 75 AM. POL. SCI. REV. 411, 413 (1981).

177. See Cooper & Brady, *supra* note 176, at 413–14. For more on the decline of strong party unity through this period, see ALDRICH, *supra* note 89, at 228. The changes Democrats imposed occurred from 1970 to 1977, though Rohde argues the effects of these changes on party discipline were gradual and did not fully manifest themselves until 1983. ROHDE, *supra* note 2, at 16.

178. The best narrative of the internal changes in House rules and practices that have centralized power in party leaders over the last generation is ROHDE, *supra* note 2.

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.¹⁷⁹ Thus, committee chairs had to gain and maintain the approval of their party's leadership. Indeed, in the 104th Congress, Newt Gingrich went so far as to include every committee *and subcommittee* chair.¹⁸⁰ 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.¹⁸¹

Some apparently thought these centralizing tactics would be the monopoly of one party,¹⁸² 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 the leadership's power to name ranking members on all committees and all members on the most exclusive committees.¹⁸³ Moreover, while still in opposition, she argued—much as Republicans appeared to do during the first year of the Obama administration—that the Democrats should not assist in trying to improve Republican legislation, but should remain oppositional, in an effort to draw sharp contrasts with the aim of taking over the chamber in later elections.¹⁸⁴ She discouraged Democrats from co-sponsoring bills with Republicans in order to keep Republicans from looking bipartisan, and she discouraged ranking Democrats from negotiating with Republicans on their committees.¹⁸⁵ 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

179. JACOB S. HACKER & PAUL PIERSON, OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY 146 (2005).

180. BLACK & BLACK, *supra* note 61, at 398.

181. HACKER & PIERSON, *supra* note 179, at 147.

182. This is the general theme of HACKER & PIERSON, *supra* note 179.

183. BROWNSTEIN, *supra* note 3, at 342.

184. *Id.*

185. *Id.*

Bush, until the President gave up privatization.¹⁸⁶ 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, John Boehner, 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 power in the hands of party leaders.¹⁸⁷ But to the extent that Senate polarization can be said to have been caused by the ascension of post-1978 Republican House members to the Senate, who brought with them the House culture of polarized politics, it remains possible that, as with gerrymandering, this 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.

If 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.¹⁸⁸ Measures included the rise of the seniority system, which insulated promotion, particularly to committee chairs, from the exclusive control of a few party

186. *Id.* at 344.

187. ROHDE, *supra* note 176, at 177–79.

188. 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 general diffusion of power.” These passages are quoted in WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900*, at 116 (1982), which makes the argument that these reforms were part of the general late nineteenth century effort to fragment and diffuse political power in the combined wake of Jacksonian democracy and the demise of federalism. This demise and the rise of Jacksonian democracy had given America’s institutions a much more majoritarian thrust. *Id.*

leaders, and the redistribution of power among a larger number of more independent congressional committees.¹⁸⁹

Yet of the institutional features I have identified, this one seems the least likely to be malleable. As difficult as it might be to more widely create open primaries or independent districting bodies, 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.¹⁹⁰ 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 members would be able to stand more independent of party leaders, would have to be allocated in some other way; the most likely way would be a return to a seniority-based system. Would that approach produce more centrist policymaking in the House?

There are several reasons to doubt that a seniority-based system would be preferable. First, the most senior members come from the safest of congressional districts and 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 exercised by 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 it—then one committee chair either can be accountable to the party leadership, through the kind of centralized rules that exist in the House today, or otherwise accountable only to the voters of his or her own individual district. In any event, whatever the merits of decentralizing House control away from party leaders, this is the least likely to change the crucial institutional features that contribute to radical polarization.

189. *See id.*, at 114–19.

190. U.S. CONST. art. I, § 5.

D. Note on the Senate

Gerrymandering only directly affects House seats, of course, because Senate “districts” are fixed by unchanging state boundaries. Similarly, the internal-rules changes just described have taken place mostly in the House. If either gerrymandering or internal reorganization of Congress is thought to contribute significantly to polarization, then how could these factors affect polarization in the Senate? And if they cannot explain this polarization, how could they possibly account for the more general polarization of Congress?

Traditionally, nearly all studies of polarization focused only on the House. Recently, however, a spate of studies have explored polarization in the Senate.¹⁹¹ Most studies find the parties have polarized almost as much in the Senate as in the House.¹⁹² Moreover, a high degree of correlation exists between polarization in the two chambers.¹⁹³ Indeed, Frances Lee’s major, recent study, *Beyond Ideology*, concludes that, in the Senate, parties strongly disagree on policies even when no major competing “values” 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.¹⁹⁴ Moreover, 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.¹⁹⁵ Like the House, but to a modestly less excessive extent, the Senate is now highly polarized along partisan lines.

But how could gerrymandering, or institutional changes internal to the House, affect polarization in the Senate? The potential answer lies in a remarkable fact, according to at least two experts: 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

191. 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., *supra* note 138.

192. Most studies show the House to be somewhat more polarized than the Senate over the last generation, but not significantly so. Sean M. Theriault & David W. Rohde, Former Republican Representatives and Party Polarization in the U.S. Senate 2 (Oct. 24, 2009) (unpublished manuscript for Conference on Bicameralism); Fleisher & Bond, *The Shrinking Middle*, *supra* note 2, at 429. One 2006 study that compares increasing House versus Senate polarization from 1973 to 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, compared to a 16% change for Senate Democrats. Theriault, *Party Polarization*, *supra* note 6, at 487. Additional important works in the emerging literature on Senate polarization are Frances E. 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).

193. Sean M. Theriault, *The Case of the Vanishing Moderates: Party Polarization in the Modern Congress 17* (Sept. 23, 2003) (unpublished manuscript on file with author).

194. FRANCES E. LEE, *BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE 128–29* (2009).

195. *Id.* at 100.

elected to the House after 1978—the year Newt Gingrich, the architect of the unified Republican Party strategy, was first elected.¹⁹⁶ Put another way, there has been no increase in polarization from the early 1970s to today among Democratic senators who served in the House, Republican senators who served in the House before 1978, or Democratic or Republican senators who did not serve in the House at all.¹⁹⁷ While this fact does not conclusively demonstrate that House polarization caused Senate polarization, it is suggestive.¹⁹⁸ 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.”¹⁹⁹

Thus, polarization in the House perhaps might cause the similar, if somewhat lesser, polarization in the Senate. Study of Senate polarization is still in its infancy, but the theory that the culture of the House influences the culture of the Senate as members move from the former to the latter at least suggests a mechanism by which institutional structures and rules that directly affect only the House might also indirectly affect the Senate.

E. 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 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.”²⁰⁰ The parties played

196. See Theriault & Rohde, *supra* note 192.

197. 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. *Id.* at 14.

198. As is true in general throughout this Article, separating out the large scale transformations in American politics discussed *supra*, at Part III, from the discrete institutional changes addressed here is difficult. Theriault and Rohde note 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 (as 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. Theriault & Rohde, *supra* note 192, at 24, 26.

199. Allison Stevens, *Senators Pack a Sharper Edge*, 61 CQ WEEKLY 3069 (2003). Even in the early 2000s, when Simpson made these comments, some political scientists were reaching this conclusion about House polarization contributing to Senate polarization. See Nicol C. Rae & Colton C. Campbell, *Party Politics and Ideology in the Contemporary Senate*, in *THE CONTENTIOUS SENATE: PARTISANSHIP, IDEOLOGY, AND THE MYTH OF COOL JUDGMENT* 8 (Colton C. Campbell & Nicol C. Rae eds., 2001); Barbara Sinclair, *Bipartisan Governing: Possible, Yes; Likely, No*, 34 PS: POL. SCI. & POL. 75, 81 (2001).

200. Gary C. Jacobson, *A Collective Dilemma Solved: The Distribution of Party Campaign Resources in the 2006 and 2008 Congressional Elections* 4 (2009) (unpublished manuscript on file with author) [hereinafter Jacobson, *A Collective Dilemma Solved*].

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.²⁰¹ When Congress banned these soft-money contributions in the McCain-Feingold Act of 2002, many scholars thought the Act would weaken the role of parties in elections.²⁰²

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 and the National Republican Senatorial Committee—are extremely efficient at targeting their money to competitive races²⁰³ 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.²⁰⁴ 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 by this fact, the First Amendment protects the right of political parties to make independent expenditures on behalf of candidates.²⁰⁵

V.

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, or divided, with different parties each controlling at least one of these institutions.

The experience of either of these forms of government will likely differ from that in prior years. Each type of government, divided or unified, is likely to take on the extreme form of its type. Divided government was the norm for

201. *Id.* at 8.

202. *See, e.g.*, Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997).

203. Jacobson concludes that 87% of party money, but only 42% of candidate funds, was spent on competitive races. Jacobson, *A Collective Dilemma Solved*, *supra* note 200, at 15.

204. *Id.* at 16.

205. *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n*, 518 U.S. 604, (1996).

most of the last half of the twentieth century.²⁰⁶ 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 seventy-two years earlier that a president went into office with either chamber controlled by the opposite party.²⁰⁷ 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.²⁰⁸

Divided government has been characterized as producing a politics of “confrontation, indecision, and deadlock.”²⁰⁹ To the extent anything gets done, diluted, discrete compromises may tend to replace ideologically coherent, large initiatives.²¹⁰ 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.²¹¹

But whatever the merits of that historical debate,²¹² 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,” where 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 paralysis that will characterize divided government, amidst polarized parties, in the coming years.

206. See MORRIS P. FIORINA, *DIVIDED GOVERNMENT* 6–14 (2d ed. 1996).

207. See JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* 93 (revised ed. 1992).

208. *Id.* at 93. These figures 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 7 of the 11 elections between 1956 and 2000.

209. CGS REPORT, *supra* note 101, at 3; SUNDQUIST, *supra* note 207, at 96–97.

210. See MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 22–25 (2003).

211. DAVID MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002*, at 119–35 (2005).

212. I have questioned it elsewhere. See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

In other works, I have offered some suggestions for managing the peculiar risks of unified government during times of hyperpolarized parties.²¹³ 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 to 2006. When a party is united and bitterly opposed to its competition, a Congress controlled by the same party as the president is unlikely to be aggressive in overseeing the executive branch's actions, exposing failings in the president's administration, or holding the president accountable.²¹⁴ 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,²¹⁵ 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 or less deliberatively designed because it is not subject to partisan checks and balances over the details, responding to that risk is even more difficult. One possibility within our existing institutional structures might be to encourage a more aggressive approach to judicial review, either in the courts' role as statutory interpreters or their role as constitutional adjudicators. To compensate for the decline of internal legislative checks and balances likely to occur during times of unified government with highly polarized parties, that is, we might consider the courts playing more of this kind of function. In particularly sensitive areas, for example, courts might be stricter about insisting that a solid evidentiary or empirical foundation exists for legislation, or that there be legislation, before government action is lawful.

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

213. *Id.*

214. 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 the Senate for all but about eighteen months of that period, despite the momentous issues engaged in the aftermath of 9/11. BROWNSTEIN, *supra* note 3, at 274.

215. Levinson & Pildes, *supra* note 212; see also Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1045–56 (2004); David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 575–79 (2009).

approach gets the matter exactly backwards. It assumes 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 experience of California, with its voter-initiated requirement of two-thirds 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.²¹⁶ 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 govern 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. There might be justifications for minority vetoes when political parties are internally fragmented, but when parties are polarized, such vetoes are likely to shut government down.²¹⁷

Thus, if polarized politics and parties are likely to endure, we might see Senate majorities seeking to modify the filibuster rule for legislation²¹⁸ in various ways, such as reducing the number of votes needed to close off a filibuster from sixty to fifty-five, as the Senate did in 1975 when it reduced the number from sixty-six to sixty.²¹⁹ Doing so, however, would itself require a two-thirds Senate majority.²²⁰ Or the Senate could selectively disable the filibuster for additional types of legislation, as it has done already for budgetary

216. See John Wildermuth, *Efforts Seeks to Scrap Two-Thirds Vote Rule*, S.F. CHRON., Feb. 25, 2009, available at http://articles.sfgate.com/2009-02-25/news/17189120_1_two-thirds-rule-majority-rule-budget.

217. Again, for those tempted to consider that desirable, that would depend on the prevailing status quo.

218. I leave aside use of the filibuster for judicial nominations. Different considerations might be thought involved there. 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.

219. See generally GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* 266–68 (2007) (describing process leading to the 1975 change). As these authors note, “The primary legislative impact of obstruction today is to expand the ‘gridlock interval’ to include an additional ten senators (up to the 60th percentile senator) on the opposite side of the status quo from the president. This expansion of the gridlock interval often has a major impact on policy . . .” *Id.* at 279.

220. See SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE? FILIBUSTERING IN THE U.S. SENATE* 208–09 (1997).

changes, which only require a simple majority vote—thus avoiding the California scenario at the national level.²²¹

The ideas sketched out here are meant to be speculative. All are obviously fraught with their own countervailing concerns. In raising these ideas, 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, has its 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,”²²² a view endorsed by the well-known American Political Science Association Committee on Political Parties in 1950, chaired by Schattschneider.²²³ Responsible-party government theorists, then and now, argue that strong parties with coherent, sharply differentiated ideologies are critical to a healthy democracy.²²⁴ On this view, stronger and more programmatic 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 to 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 among 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

221. WAWRO & SCHICKLER, *supra* note 219, at 279–80.

222. See E.E. SCHATTSCHNEIDER, *PARTY GOVERNMENT* (1942).

223. See Austin Ranney, *Toward A More Responsible Two-Party System: A Commentary*, 45 AM. POL. SCI. REV. 488, 488–499 (1951).

224. See, e.g., 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 WILSON, *supra* note 174. The most fully developed 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, 1634–35 (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).

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.²²⁵

Indeed, our era of polarized politics strongly suggests that all of these virtues are being realized. Voters appear to have a clearer understanding of what they are voting for: the correlation between voters' expressed ideological views and their candidate preferences is stronger than at any time in the last forty years.²²⁶ The percentage of voters who now report seeing important differences between the parties and perceiving a great amount at stake in who wins the presidency is higher than previously recorded.²²⁷ In addition, turnout in the last two presidential elections has been higher than in any presidential election since 1968.²²⁸ Similarly, participation in other political activities, in addition to voting, has gone way up.²²⁹

If American democracy were a simple majoritarian system, as are most parliamentary democracies, these virtues might have few offsetting costs. But American democracy has many built-in antimajoritarian features that make effective governance exceptionally difficult when political parties are hyperpolarized. These features include the separation of powers between the legislative and executive branches, which includes the presidential veto; the further division of the legislative branch into two chambers, House and Senate; the dramatic over-representation of small states in the Senate; and the Senate filibuster. Overcoming all these structural hurdles to legislation requires far more than the mere majority support that might underwrite the election of a President; to legislate in the American system inherently requires large supermajority support. In an era of hyperpolarized political parties, that support will not come from cross-party coalitions. It will come, if at all, only in moments when one highly unified party has such overwhelming political backing—at least enough to control the presidency, House, and Senate by a large enough margin to overcome the Senate filibuster—that such a party can effectively control government. Those moments are likely to be quite rare. In their absence, hyperpolarized parties are likely to yield little more than

225. See, e.g., Alan Abramowitz, Comment, in 1 RED AND BLUE NATION?, *supra* note 26, 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.”).

226. ABRAMOWITZ, *supra* note 2, at 159.

227. *Id.* at 159–60. In 2004, for example, 76% of the electorate saw important differences between the parties, a level not recorded since this question was first asked in 1952 as part of the American National Election Studies. See William A. Galston and Pietro S. Nivola, *Delineating the Problem*, in 1 RED AND BLUE NATION?, *supra* note 26, at 11.

228. For the data from one of the leading experts on voter turnout, see Michael McDonald, *Voter Turnout*, UNITED STATES ELECTION PROJECT, http://elections.gmu.edu/voter_turnout.htm.

229. ABRAMOWITZ, *supra* note 2, at 159.

legislative gridlock and paralysis.²³⁰ One of the well-established consequences is the concentration of effective political power in the president, who will pursue ways to act through unilateral action, such as his or her control over the regulatory—rather than the legislative—system.²³¹

Given this, perhaps American democracy involves an unfortunate tradeoff between accountability and governability. The qualities of partisan politics that enable voters to best hold political leaders responsible are qualities that, perversely, make it more difficult for those leaders to govern effectively. The responsible-party government theorists of the 1950s who touted sharply differentiated parties perhaps did not see this for two reasons. First, the practice of the filibuster has changed dramatically since the 1950s. In the past, the filibuster, which required the minority to stop all Senate business and hold the floor, was much less common than it has become today.²³² Second, as I have emphasized throughout, the political parties of the 1950s—or the parties that any responsible-party government proponents could have experienced—bore little resemblance to the much more ideologically pure and hyperpolarized parties of today. While responsible-party government proponents might have urged that parties become more programmatic than what they were in the

230. Although David Mayhew famously argued that divided government did not produce any less major legislation than unified government, MAYHEW, *supra* note 211, at 129, other studies have reached a different conclusion once the character of the political parties of different eras is taken into account. See, e.g., SARAH A. BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK* (2003); Sarah A. Binder, *The Dynamics of Legislative Gridlock, 1947–1996*, 93 AM. POL. SCI. REV. 519, 527 (1999). Indeed, Nolan McCarty, *The Policy Effects of Political Polarization*, in *THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM* 223 (Paul Pierson & Theda Skocpol eds., 2007), concludes that Congress since World War II has tended to enact its most significant legislation during its least polarized periods, and that polarization generally has significantly negative effects on legislative output. McCarty, Poole, and Rosenthal conclude that polarization over the last 25 years has reduced the responsiveness of national political institutions to changing economic and social problems, has shifted influence to the presidency and less accountable institutions, such as the courts, and has generally weakened the ability of the legislative branch to engage in policymaking. MCCARTY ET AL., *supra* note 2, at 189.

231. See, e.g., WILLIAM HOWELL, *POWER WITHOUT PERSUASION* (2003); DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* (2003); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

232. See, e.g., WAWRO & SCHICKLER, *supra* note 219, at 26–29 (noting the much greater costs to the minority party of filibustering before time constraints on the Senate gave way to “costless filibustering” late in the twentieth century). One way to measure the use of the filibuster is by the number of cloture motions filed; these are filed not only to shut off actual filibusters but to preempt likely anticipated ones. In the 1960s, there were no more than 7 cloture votes in any term; by 2010, the number of votes on cloture per Senate term had risen to no fewer than 49. The 110th Congress broke the record for cloture votes, reaching 112 at the end of 2008. See *Senate Action on Cloture Motions*, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm (last visited Feb. 17, 2011); Margaret Talev, *Senate Tied in Knots by Filibusters*, MCCLATCHY (July 20, 2007), <http://www.mcclatchydc.com/2007/07/20/18218/senate-tied-in-knots-by-filibusters.html>; *Cloture Motions, 110th Congress*, http://www.senate.gov/pagelayout/reference/cloture_motions/110.htm (last visited Feb. 17, 2011).

1950s, they could hardly have imagined highly unified majority and opposition parties in a world where filibusters are routine.

I have not directly argued that extreme partisanship is necessarily or always bad. To some extent, judging partisanship inevitably depends on the policy ends for which intense partisanship is used and whether it is effective; in the service of “good” causes, partisanship can be desirable—of course, democracy entails that we often disagree about which ends are “good.” But most of the time, hyperpolarized parties in American democracy will lead to paralysis in the legislative-executive relationship, absent overwhelming one-party control. And the further intuition fueling this essay, not provable or falsifiable in any rigorous way, is that public policy in the United States will be better, in the long run, if made with some degree of cross-party support.²³³ 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.

The main theme of this Article has been that our radically polarized politics, and the absence of a center in American democracy today, reflect long-term structural and historical changes in American democracy that are likely to endure for some time to come. Contrary to what many Americans would like to believe, this radical polarization should not be attributed to the individual personalities who happen to occupy leadership positions, including the presidency, at particular moments. Nearly two years into the Obama era, this should be increasingly apparent even to those who blamed the previous eight years of intense partisanship on President George W. Bush. Presidents Bush and Obama have different personalities and presidential styles, but the essential structure of politics that has characterized the last generation—of parties and citizens who see political choices through radically different lenses, with no common ground between them—has not changed at all. Indeed, it might even be intensifying. The forces fueling this generation of partisanship are much deeper, and more enduring, than a matter of particular personalities. If anything, political leaders are caught within these structures, even those who might genuinely desire to forge more common ground and seek a more consensual politics. We should not delude ourselves into thinking that the next election, or the one after that, will change any of this.

Instead, this polarization reflects the deep structural and historical transformation in American democracy unleashed in 1965 by the enactment of the VRA. That moment began the process of ideologically realigning the political parties and of purifying them, so that both parties are far more ideologically coherent, and differentiated from each other, than at any time in many generations. The culmination of that historical transformation—which

233. This conclusion is reflected in one of the leading political science studies of polarization. See SINCLAIR, *supra* note 2, at 184 (2006) (“Surely this [hyperpolarized] atmosphere forecloses principled compromises that might otherwise be possible.”).

2011]

WHY THE CENTER DOES NOT HOLD

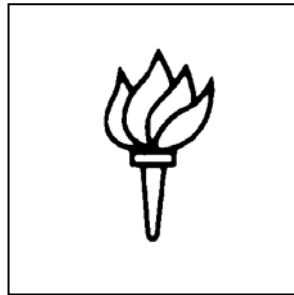
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can be seen as the maturation or full realization of American democracy—is today’s hyperpolarized partisan politics. No amount of individual desire or effort to will back a center in our political parties can make that happen. And while many have suggested that polarization is caused by specific institutional features of how elections are currently run, the one institutional change that appears most relevant to polarization, a potential move away from closed primaries to more open ones, of various sorts, seems likely to have at best only a modest effect on whether more moderate candidates run and get elected. 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, and divided government that is paralyzed—fare quite differently from those the Constitution’s designers anticipated. But then, they did not anticipate political parties at all, let alone the radically polarized parties—and radically polarized, engaged citizens—that define the nature of democracy in America today.

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Outsourcing Politics: The Hostile Takeovers of Our Hollowed Out Political Parties

Samuel Issacharoff

March 2017

ADDRESS

OUTSOURCING POLITICS: THE HOSTILE TAKEOVER OF OUR HOLLOWED-OUT POLITICAL PARTIES

*Samuel Issacharoff**

ABSTRACT

In 2016, both the Republicans and Democrats experienced efforts at hostile takeover of their presidential campaigns. On the Republican side of the ledger, the takeover was successful and ultimately yielded the presidency of Donald Trump. The Democratic effort, by a candidate who never actually joined the party, was beaten back only after a long and bruising primary campaign.

This Article examines some of the sources of weakness of contemporary political parties that leave them less able to control their internal party selection processes, and that further hamper their ability to govern effectively. The key insight is taken from a view of the political party as a firm, following the pioneering work of Ronald Coase, and then merges that onto the modern understanding of political parties as a precarious balance of the desires of the electoral faithful, the interests of the party apparatus, and the governance needs of the party's elected officials. In effect, this paper joins the economic insights of Coase to the political analysis of V. O. Key.

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Historically, American political parties managed divergent interests by control over three critical political functions: access to campaign funding, delivery of patronage governmental positions, and control over the nomination process. Each of these functions has been compromised by legal reforms over the past century. With the inability to internalize control over critical organizational functions, the various constituencies of the modern political party have the choice to “buy not make,” in the language of modern firm economics. Over time, the external option has changed the dynamic of politics, as evident in the last presidential election.

This Article does not offer a simply story of redemption through reform. The political party of old would strike modern sensibilities as insufficiently transparent and inclusive. But in the absence of the coordinating role of the party, politics becomes more atomized, rhetoric hardens, and governance becomes more complicated.

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I. INTRODUCTION

There is much to lament in the current state of politics and political parties. We find ourselves in a presidential election year in which the prevailing Republican candidate had little or no prior affiliation with the party. A similar fate nearly befell the Democrats with the second leading vote-getter having become a Democrat on the eve of the first primary and without the side benefit of ultimately winning the presidential election.

Neither party appeared to have a mechanism of internal correction. Neither could muster the wise elders to steer a more

conventional course. Neither could use its congressional leadership to regain control of the party through its powers of governance. Neither could lay claim to financial resources that would compel a measure of candidate loyalty. Neither could even exert influence through party endorsements. The parties proved hollow vehicles that offered little organizational resistance to capture by outsiders. And what was captured appeared little more than a brand, certainly not the vibrant organizations that are heralded as the indispensable glue of democratic politics. If indeed the “political parties created democracy and that modern democracy is unthinkable save in terms of the parties”¹ something seemed deeply remiss.

Turning back the clock to insights from eighty or so years ago may help understand some of the sources of our current party instability. The aim here is not to come up with a simple menu of options that will somehow restore political parties to a more robust sense of purpose—even if modern political science continually questions whether parties were ever as coherent as might appear in current nostalgic gaze. Rather, the goal is more narrowly to understand some of the factors that have contributed to the forms of current politics, and to examine specifically a few areas in which the current state of the law has contributed to weakening the traditional glue that had held parties together. The insights may perhaps be harnessed for assessing the wisdom of proposed future legal reforms, but they do not yield either a comprehensive account of American politics or a simple recipe for change.

In thinking about the state of American political parties, let me offer a personal observation from having participated in the 2008 and 2012 election efforts of President Obama. In 2008, then-Senator Obama was a decided outsider who became the party’s nominee only in June of that year. In the quick run-up to the election, Obama for America put together a national field operation, including campaign attorneys, across the country, with particular focus on the battleground states for that November. I served as one of the senior legal advisors to the campaign and worked extensively with the legal representatives in states around the country. I was not surprised that an outside candidate would not have a working command of the state party structure and would instead quickly organize a national operation based on the presidential campaign and its resources.

What did surprise me, however, was the 2012 campaign, where I again served as a senior legal advisor to Obama for America. With the benefits of Obama’s incumbency and what was

1. E. E. SCHATTSCHEIDER, *PARTY GOVERNMENT* 1 (1942).

essentially a four-year run up to the re-election effort, I had expected that the 2012 campaign would be largely organized around the state political parties in conjunction with state and local election efforts. Notably, and with few exceptions, that was not the case. There were certainly more points of contact with state officials that helped smooth the voting process on Election Day and more time to litigate contested issues before Election Day. But in terms of organizational structure, the campaign was run through the presidential effort and not through the state parties.

Nor was this a quirk of the Democratic Party or the particulars of Obama for America. I am told that the same pattern held in the campaign of Governor Romney in 2012, even as he emerged from extended front-runner status in the Republican Party. Combining the observations from 2012 with the permeability of both parties to outsiders in 2016 leads to the subject of this Article. What accounts for the weakness of the national political parties at present? The presidential campaigns may serve as an initial focal point, but the problem exists across institutional domains. The distance of the parties from the operation of the presidential campaigns is also evident in the greater distance of the party leadership from the organization of legislative efforts. The exasperation over the dysfunctionality of Congress returns time and again to the absence of a leadership structure able to corral hot-headed members of the legislative caucus in order to just get things done—even on matters where there is reasonably broad agreement on the general contours of needed legislation. This is the process well captured by Richard Pildes in focusing not so much on polarization among political activists or even elected officials but on political fragmentation: “the external diffusion of political power away from the political parties as a whole and the internal diffusion of power away from the party leadership to individual party members and officeholders.”²

The main thrust of this Article is to examine the modern political party by analogy to the business firm, as an institution subject to various regulatory and transactional pressures, all of which help shape how the firm will be most effectively organized. Like all firms in the market domain, political party firms have to confront pressures to internalize some functions while outsourcing others. This “make or buy” decision is well understood in terms of economic actors, but is not appreciated in these terms in the political domain.³ In the economic domain, the

2. See Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 *YALE L.J.* 804, 809 (2014).

3. I have spent much time over the past 20 years examining the legal overlap in structural problems facing actors in both private and public law settings. See, e.g., Samuel

decision to integrate production has been understood for the past eighty years as heavily driven by the transaction costs associated with contracting out for goods or services, versus the corresponding transaction costs of supervision and coordination if matters beyond the core competencies of the firm are internalized.⁴ One of the key variables in defining transaction costs is the role of government through matters such as regulation and taxation.

Applying the same analytic structure to political parties invites an inquiry into the legal constraints that may have contributed to the observed weakness of the current political parties. To do so requires first setting forth the appropriate understanding of the make-or-buy decision of market firms, and then, second, showing the parallels to the classic understanding of the multiple roles played by political parties. Curiously, at the same time as a transactional theory of the firm was being developed in economics, a corresponding theory of the integrated functions of political parties was being developed in political science.⁵ The aim here is to harness these two insights and use them to look at some of the legal constraints that may have contributed to current party weakness.

A cautionary note is in order as to the scope of the claim. I intend to examine only three areas of law that have changed significantly over time: the ability of parties to raise money, the ability of party insiders to control the candidate nomination process, and the ability of parties to reward loyal workers with patronage. Translated to party activities, these are the fundraising ability of the party itself, the insider control of the political agenda and the nomination process, and the ability to induce loyalty to the party through the dispensation of patronage. My claim is not that this is an exhaustive list, or even that legal reforms are the most important factor in compromising the vitality of political parties. Rather, the argument is simply that these are contributing factors whose cumulative effect may be productively assessed by examining their impact on the viability of integrated political parties as ongoing firms.

Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 *FORDHAM L. REV.* 3165 (2013); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *STAN. L. REV.* 643 (1998). For those familiar with my earlier work, this present effort will be an unsurprising continuation of those efforts to a theory of political parties as firms.

4. Trevor L. Brown & Matthew Potoski, *Transaction Costs and Institutional Explanations for Government Service Production Decisions*, 13 *J. PUB. ADMIN. RES. & THEORY* 441, 443 (2003).

5. R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

Implicit in this discussion is the belief in the value of political parties, despite their uncertain pedigree in American law. Political parties are not mentioned in the United States Constitution, and the founding generation despaired of their becoming part of the American Republic.⁶ Nonetheless, national parties began to form as early as the first contested presidential election in 1796, and parties of the modern form became thoroughly entrenched and institutionalized in the 1830s.⁷ As they consolidated in the 19th century, the two major political parties came to define some elements of American democracy as we understand it even to this day.

Nonetheless, any contrast of contemporary politics with the past is not necessarily to a halcyon age in which all was right with American politics. Party politics dominated by backroom deals, well-lubricated with funds of sketchy provenance and reinforced by public employment of oftentimes scant public interest, is hardly a normatively compelling account of a healthy democracy. There was much to 19th century politics which does not correspond to contemporary realities: “For most of the nineteenth century, parties operated without any legal recognition or restriction. Party organizations, the descendants of local, elite clubs, chose their own nominating procedures and established their own bodies for internal governance.”⁸

We live in more democratically transparent times, and the image of the political parties as they emerged from the 19th century may seem aberrant, even shocking. But politics is dynamic and as the party organization falters, other actors emerge, from the lone-wolf candidate-entrepreneur to the rival special interest groups and private financiers of the Super PAC and related domains. The aim here is not to resolve the normative claim of how best to organize political parties, nor even to propose a reform agenda to restore party vitality. Rather it is to examine the ways in which some legal reforms have contributed to the current sorry state of political party organization. As Bruce Cain has well cautioned, eager political reformers too often ignore the institutional settings of politics at considerable peril to their desired aims.⁹

6. See THE FEDERALIST NO. 9 (Alexander Hamilton), NO. 10 (James Madison); George Washington, Farewell Address (Sept. 19, 1796), *reprinted in* S. DOC. NO. 108-21 at 14 (2d Sess. 2004).

7. Jonathan Rauch, *How American Politics Went Insane*, ATLANTIC, <http://www.theatlantic.com/magazine/archive/2016/07/how-american-politics-went-insane/485570/> [<https://perma.cc/HA56-KCAA>].

8. Adam Winkler, *Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886–1915*, 100 COLUM. L. REV. 873, 876 (2000).

9. BRUCE E. CAIN, DEMOCRACY MORE OR LESS: AMERICA'S POLITICAL REFORM QUANDARY 6 (2015).

II. THE POLITICAL PARTY AS A FIRM

A. *Make or Buy*

In 1937, Ronald Coase published his seminal work on *The Nature of the Firm*.¹⁰ The signature contribution of this and much of Coase's work was to model economic behavior as conditioned by the transactions costs of operating in the real world. To the prevalent neo-classical model of marginal costs and benefits driving economic decision-making, Coase introduced a separate inquiry into how the transactional costs of bargaining, supervising, negotiating, searching and other such day-to-day necessities powerfully shaped the decision of economic firms to expand production, contract out for production or services, or even to stay in business.¹¹

Firms must always decide whether to produce. The decision to engage in any of the economic activities of a firm, from subparts production to bookkeeping to janitorial services, follows from a decision to undertake the task internally rather than to contract out that necessity to another firm. Firms decide whether to specialize narrowly or to assume broad responsibility for their market ventures. Colloquially, this is the make or buy decision.

In principle, the market should set the price for goods and services and in the absence of transaction costs, such as monitoring of quality, the ability to buy or make should be fairly interchangeable. This is clearly not the case, as firms seek to control internally that which is within their core competencies and leave to market actors secondary activities, such as providing coffee and lunch. As Coase explained, "Within a firm, these market transactions are eliminated and in place of the complicated market structure with exchange transactions is substituted the entrepreneur-co-ordinator, who directs production. It is clear that these are alternative methods of co-ordinating production."¹² Accordingly, "the main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism."¹³ Responding to these transactional advantages means that "[a] firm becomes larger as additional transactions . . . are organised by the entrepreneur and becomes smaller as he abandons the organisation of such transactions."¹⁴

10. Coase, *supra* note 5.

11. *Id.* at 390–91.

12. *Id.* at 388 (citation omitted).

13. *Id.* at 390.

14. *Id.* at 393.

Firms are constantly revisiting the decision to make or buy based on the costs of substitution of one function for another. Relying exclusively on price to control production has its costs, as developed extensively in the work of Oliver Williamson.¹⁵ The basic insight is that price alone is an imperfect monitor of the quality of production. If a manufacturer depends heavily on product quality, the consequences of a drop in subpart quality will be borne only indirectly by those further down the supply chain. Such circumstances compel the decision to make rather than buy, even though that decision requires expenditure of firm capital and the need to monitor production internally.

On the flip side of the equation, shifting costs may result in functions that were once internalized being outsourced. Put simply, an increase in the transaction costs of internalizing production may increase the attractiveness of finding other institutional arrangements, as with the outsourcing of production to overseas suppliers, for example. Of critical importance for the present inquiry is a secondary observation by Coase as to the role that government regulation might play in shifting the decision to make or buy, or more precisely, to the advantages that might come from internalizing multiple functions within a single firm: "Another factor that should be noted is that exchange transactions on a market and the same transactions organised within a firm are often treated differently by Governments or other bodies with regulatory powers."¹⁶

For Coase, the critical issues in regulation were the level of taxes and other direct factors of production.¹⁷ But in the era of a far more expansive set of government regulations, the point extends as well to all sorts of decisions affecting the efficient deployment of firm resources, including such matters as labor laws, environmental regulations, access to government contracts, and the broad spectrum of state involvement in economic decision-making.

Focusing on the role of government regulation as a transaction cost that determines at least in part the most efficient use of resources then leads to the next part of the inquiry. If political organizations are viewed as firms that operate in a market for political effectiveness, a corresponding Coasean analysis sheds light on the question of the advantages held by political parties over other actors in the electoral arena and over

15. Oliver E. Williamson, *The Modern Corporation: Origins, Evolution, Attributes*, 19 J. ECON. LITERATURE 1537, 1540–42 (1981).

16. Coase, *supra* note 5, at 393.

17. *Id.*

the comparative advantages that political parties may have as integrated organizations.

B. The Battleground Within the Party

Roughly contemporaneous with Coase's groundbreaking writing on the nature of the firm came the first sustained inquiry in political science into the nature of the political party as an organization and of the divergent forces that were harnessed in the modern political party. In 1942, V. O. Key published his landmark work on the inherent conflict between the contending factions within political parties, *Politics, Parties, and Pressure Groups*.¹⁸ Although the insights into the nature of the party stem from that publication, the foundations of Key's investigation into the factors that hold parties together as institutions can be found a decade earlier in his doctoral dissertation, making his inquiry truly a product of the same period as Coase's work.¹⁹

As framed by Nathaniel Persily and Bruce Cain, Key's great insight was to "disaggregate[] the simple description of 'party' into three components: the party-in-the-government, professional political workers, and the party-in-the-electorate."²⁰ While Key's writings are now routinely referenced in legal writing on politics,²¹ the attention in legal scholarship to the precarious internal balance of political parties crystallized with a 2000 *Columbia Law Review* Symposium on Law and Political Parties.²²

18. V. O. KEY, JR., *POLITICS, PARTIES, & PRESSURE GROUPS* (1st ed. 1942).

19. Valdimer Orlando Key, Jr., *The Techniques of Political Graft in the United States* (1934) (unpublished Ph.D. dissertation, University of Chicago) (on file with University of Chicago Libraries).

20. Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 778 (2000) (citations omitted) (citing V. O. KEY, JR., *POLITICS, PARTIES AND PRESSURE GROUPS* 163–65 (5th ed. 1964) [hereinafter KEY (5th ed.)]).

21. E.g., Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 98–99; Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 351; Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 279 n.14 (2001); Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 166 (2005); Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 818 (2000); David Schleicher, "Politics as Markets" Reconsidered: *Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, 14 SUP. CT. ECON. REV. 163, 212 (2006); Lauren Hancock, Note, *The Life of the Party: Analyzing Political Parties' First Amendment Associational Rights when the Primary Election Process Is Construed Along a Continuum*, 88 MINN. L. REV. 159, 167 n.51 (2003).

22. Persily & Cain, *supra* note 20, at 778. For one of the earlier endeavors, see Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1743, 1757 (1993).

As its name implies, the party-in-the-government may include elected politicians and executive party heads.²³ Key describes a popular conception of “a group which could be held accountable for the conduct of the government,” but he also describes smaller groups, such as “Democratic Representatives” and “Republican Senators.”²⁴ Key’s “professional political workers” constitute the group that staffs the political organization.²⁵ The “party-in-the-electorate” is formed of voters at-large who identify as party members.²⁶ According to Key, this group activates only on Election Day, but party views frame voters’ understanding of issues even in between election cycles.²⁷

Starting from Key’s framework, the modern political party can be seen as an uneasy amalgam of electoral engagement, popular ideology, and governance. In this way, a model of political parties becomes much more complicated than one of corporations whose primary and unambiguous goal is to maximize profits.²⁸ The outside societal interest in corporate structuring is a generalized public interest in the efficient use of firm resources, an aim largely internalized into the wealth-maximization focus of the business firm. By contrast, proper party functioning is critical to the central public good of democratic self-governance. The public good dominates any particular consideration purely internal to the political party. As a result, no simple metric, such as efficiency, can fully integrate the internal momentary objectives to the overall public aims. Facing competing goals, parties must at times weigh difficult sacrifices. For example, achieving legislative or governance objectives may require exposing swing-district candidates to unpopular votes. This in turn requires considerations derived not so much from the Coasean concern for minimizing transaction costs but from the need to ensure loyalty and voice rather than exit from the parties.²⁹

The public face of any political party is its candidates for office and particularly its successful candidates who hold office, and it is this portion of the party that is most vulnerable to organizational

23. KEY (5th ed.), *supra* note 20, at 164.

24. *Id.*

25. *Id.* (providing as examples national committeemen, state central committees, county chairmen and organizational staffers).

26. *Id.*

27. *Id.*

28. Of course, corporations also confront complexity in the form of principal-agent problems, competing short- and long-term objectives, and uncertain payoffs for investment opportunities.

29. See generally ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1990 ed. 1970).

failure. This group foremost looks to winning elections, generally by hewing close enough to the center of the political distribution of voters, which is presented in the political science literature as the median voter theory of politics.³⁰ Depending on the particular constituency and the ultimate ambitions of the candidate, a wide variety of positions could ensue, even from nominal members of the same party. A candidate running in a swing district and one running in a gerrymandered district with little to fear from the other party would be pushed closer or further away from the national center of politics. Absent some organizational reason for cohesion, candidates would likely drift from a coherent set of policies or priorities.

The same lack of cohesion afflicts the party-in-the-electorate. Key conceived voter loyalty and partisanship as “a set of concentric circles,” with declining levels of enthusiasm at further distances from the core of highly engaged activists.³¹ Most surveys of overall voter preferences reveal generally bell-shaped normal distributions of views, resulting in the unsurprising truism that the center is, well, centrist.³² Even in our current polarized era, where the centers of the two main parties have pulled apart, the ideological distance between the parties tends to be less than in the more fractured preferences of parties operating in proportional representations systems, for example.³³ But the electorate has no way of presenting itself in the political system except on Election Day, and so the candidate positions and the party platform tend to be shaped by activists and donors who represent a far more polarizing constituency than the bulk of the electorate.³⁴

Key incorporates his observations on the conflicts among professional political workers with a larger discussion of party organization. Though parties are commonly conceived as an ordered hierarchy, Key describes the successively broader

30. See Roger D. Congleton, *The Median Voter Model*, in 1 THE ENCYCLOPEDIA OF PUBLIC CHOICE 382, 384 (Charles K. Rowley & Friedrich Schneider eds., 2004).

31. KEY (5th ed.), *supra* note 20, at 212.

32. See, e.g., Morris P. Fiorina, *Has the American Public Polarized?*, HOOVER INSTITUTION 10–12 (Sept. 14, 2016), http://www.hoover.org/sites/default/files/research/docs/fiorina_finalfile_0.pdf [<https://perma.cc/22JK-8LU7>].

33. See, e.g., Jay K. Dow, *A Comparative Spatial Analysis of Majoritarian and Proportional Elections*, 20 ELECTORAL STUD. 109, 111 (2001); F. A. HERMENS, *DEMOCRACY OR ANARCHY? A STUDY OF PROPORTIONAL REPRESENTATION* 16 (reprt. 1972); KEY (5th ed.), *supra* note 20, at 220 (“[T]he diversity of pressures from within the party upon the leadership drives it toward moderation. . . . The situation generates a radically different sort of imperative for the leadership than does the context in which party leaders of a multiparty system operate: they may be driven to accentuate the separatism of their electoral following.”).

34. Fiorina, *supra* note 32, at 2–5.

geographical party units—"layers of organization"—as seized with independent electoral interests; cooperation cannot be coerced.³⁵ The role of national committee chairmen in setting policy can provoke conflict with other components of the party, including congressional leadership, i.e., the party-in-the-government.³⁶ Unsurprisingly, Key observed that strong electoral prospects for candidates drive greater organizational discipline and cohesion whereas weakness can lead to muted support or outright defection within the party organization, anticipating the concept of organizational exit as used today.³⁷ Even writing in the mid-twentieth century, Key observed significant upheaval and conflict in party organizations, as machine systems came under pressure from candidate- and personality-driven factions.³⁸

Lack of cohesion also threatens the effectiveness of elected representatives, Key's party-in-the-government. Just as candidates may move across a range of issues and positions depending on their personal ambitions and the particular needs of their constituencies, so too do those candidates once in office bring with them competing agendas. In theory, there are so many competing interests, and such inconsistency in potential political outcomes depending on control of the agenda setting what is presented in what form, that there is a risk of complete incoherence to the legislative process. For political scientists like Bruce Cain, the legislative process is where the rubber hits the road. The various rules and power structures that control Congress can serve to amplify majority party power and compel compromises.³⁹ The problem of cycling of preferences, the great insight of Kenneth Arrow and the ensuing study of public choice theory,⁴⁰ threatens to collapse the capacity of any legislative body charged with policy leadership. The need for coordination is apparent, with the Supreme Court long ago observing that parties

35. KEY (5th ed.), *supra* note 20, at 316 ("[C]ollaboration comes about, to the extent that it does come about, through a sense of common cause rather than by the exercise of command.").

36. *Id.* at 323.

37. *Id.* at 331.

38. *Id.* at 341 ("Tightly managed statewide party organization has become exceptional and has been largely replaced by a fractionalized system of personal and factional cliques of professionals within each party."). Key links this decentralizing upheaval to both a decline in patronage, disruptive new mass media technologies, and the adoption of direct primaries. *Id.* at 342. Those factors have only intensified in the intervening period.

39. CAIN, *supra* note 9, at 134–35 (identifying the majoritarian consolidation of power in the House and antimajoritarian "holds, unanimous consent, and cloture rules" in the Senate).

40. See Dennis C. Mueller, *Public Choice: An Introduction*, in 1 THE ENCYCLOPEDIA OF PUBLIC CHOICE 32 (Charles K. Rowley & Friedrich Schneider eds., 2004).

emerged “so as to coordinate efforts to secure needed legislation and oppose that deemed undesirable.”⁴¹

Despite the great academic search for examples of cycling, it never seemed to happen very much in Congress.⁴² In theory every amendment could trigger a shift in preferences, meaning that, whereas A is preferable to B, the consideration of C makes B preferable, even if C is the losing option.⁴³ And so it is when D is offered up as yet another option, and on and on. The simplest reason “we do not see cycling of positions” is that the party hierarchy serves to coordinate message and preferences for the party-in-the-government, just as it does among the candidates. With strong committee structures, rewards in the form of pet projects for constituencies or earmarks, not just any measure can get to the floor. Just as planets do not spin out of orbit, so too the gravitational force of the party organization reins in the tendencies toward entropy. In politics as in physics, energy is required to conquer entropy.

To give a concrete example, consider the fate of Senate Bill 1 in every Texas legislative session. By Senate rules, every bill must be taken up in order unless the order is altered by a three-fifths vote of the Senate.⁴⁴ Senate Bill 1 is the first bill introduced and at each legislative session it has no content. It is merely a parliamentary blocking device that in practice means that nothing will come to the Senate without an affirmative act of the Lieutenant Governor, who historically has been the most powerful political official in the state.⁴⁵ There is no cycling of preferences because the agenda is set by one individual wielding the collective power of the dominant party.⁴⁶

41. *Ray v. Blair*, 343 U.S. 214, 221 (1952).

42. See Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a “Reasonable Choice” Modeler*, 71 TEX. L. REV. 1541, 1558–59 (1993). For some examples of cycling in legislative settings, see William H. Riker & Steven J. Brams, *The Paradox of Vote Trading*, 67 AM. POL. SCI. REV. 1235, 1246–47 (1973).

43. For example, consider a situation where there are 19 voters on an issue with three choices. 8 voters prefer option B the most, followed by option C, and then option A (B>C>A). 6 voters prefer option C, followed by option A, then option B (C>A>B). Finally, 5 voters prefer option A, followed by option B, followed by option C (A>B>C). Here, it is difficult to model what choice would win in a vote. A is preferred over B by 11 out of 19 voters, C is preferred over A by 14 out of 19 voters, and B is preferred over C by 13 out of 19 voters. For a further illustration of this example, see Jan Kok, Clay Shentrup & Warren Smith, *Condorcet Cycles*, RANGEVOTING.ORG, <http://rangevoting.org/CondorcetCycles.html> [<https://perma.cc/6KKP-FRAP>].

44. See Senate Rule 5.13, http://www.senate.state.tx.us/_assets/pdf/SenateRules85.pdf [<https://perma.cc/WH4K-M93R>].

45. See House Research Organization, Tex. House of Representatives, *How a Bill Becomes Law; 84th Legislature*, HOUSE RES. ORG. (Feb. 26, 2015), <http://www.hro.house.state.tx.us/pdf/focus/hwbill84.pdf> [<https://perma.cc/E6J7-W2NP>] (“The Senate traditionally lodges a “blocker” bill at the top of the calendar.”).

46. Ben Philpott, *Why Is the Lieutenant Governor the Most Powerful Office in Texas?*

On this view, the party provides coherence to politics, disciplines candidates not to stray too far from the party message, offers a mechanism for the ineffectual center to be protected from the extremes within each party, and maintains the ability to govern effectively. Key attributes the moderating influence of parties to their diversity of constituent interests; electoral success on the national stage requires not deviating too far from the party's center of gravity toward any particular interest, even if catering to particular interests is advantageous at a local level.⁴⁷ This is quite an undertaking. While the mass of the electorate would have great difficulty organizing itself, the same cannot be said of candidates, officeholders, and the party activists. Each one of these groups necessarily bristles at the restraints imposed by the party and threatens to go it alone or withdraw its support. Yet somehow the party perseveres, through organizational assistance, financial support, rewards to the faithful—in other words, by wielding its organizational energy so it remains the center of authority. And it does so, as noted by John Aldrich, primarily in the service of the capacity to govern through elected officials.⁴⁸

C. Coase Meets Key

Oddly, there appears to be no scholarly tradition of integrating the insights from the marginal cost economics of the firm to the institutional structure of political parties. Scholars have recognized that the weakness in political parties gives space to interest groups to assert themselves, noting that, in the words of Schattschneider, “[P]ressure groups thrive on the weaknesses of the parties.”⁴⁹ But insights that could be garnered from the

And Who Wants that Power?, KUT 90.5 (Oct. 16, 2014), <http://kut.org/post/why-lieutenant-governor-most-powerful-office-texas-and-who-wants-power> [https://perma.cc/CK78-WJGA] (“The lieutenant governor appoints all the committee chairs of the committees in the Senate, determines where the bills are going to be sent and to what committees and the timing.” (quoting Sherri Greenberg)).

47. KEY (5th ed.), *supra* note 20, at 219 (“[T]he makeup of each party also restrains the zeal of the leadership in the advocacy of the cause of any single element within the party. Leaders in congressional districts may be extremists . . . nevertheless, that segment of the party leadership with a national outlook—fundamentally those concerned with victory in presidential elections—must keep in view all elements within the party.”).

48. JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 4 (1995).

49. See Katherine Krimmel, *The Efficiencies and Pathologies of Special Interest Partisanship* 5 (June 22, 2015) (unpublished manuscript) (on file with author) (quoting E. E. Schattschneider, *Pressure Groups Versus Political Parties*, ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 1948, at 18). Professor Krimmel's doctoral dissertation appears to be the first effort to take seriously the Coasean insights into the nature of a firm for the role of political parties. Professor Krimmel focuses on the ability and incentives for political parties to outsource communication functions to interest groups as a contributing factor to the polarization of political parties at present.

merger of transactional cost economics with the integrity of political parties seems to have been lost in the jurisdictional divide between economics and political science. Yet Key's critical contribution of the party as a precarious balance among competing functions and constituencies points directly to some systematic analysis of how parties respond to the cost of internal organization imposed by different legal regimes, technologies, and other transformative factors. As Elizabeth Garrett noted, Key's insights lead to further points of fissure beyond the three core constituencies of the party:

There are subparts within each of these elements, further complicating the analysis and providing additional, occasionally contending forces. Take, for example, the party organization. Not only are there layers of organizations because of federalism and separation of powers, but party leaders are a different group from professional campaign consultants, who may affiliate with a party or an ideology but are, in the end, paid political guns who may also work for candidates affiliated with other parties. Separate from both these groups are political activists, whose volunteered time and energy are important to the party organization, but who may be more committed to specific ideological goals than to the overriding objective of party leaders: gaining party control of government.⁵⁰

A transactional approach to the party would view each of these constituencies as part of a make-or-buy continuum of potential organizations. As a general matter, the party leadership holds an inevitable advantage in the battle for control of political parties. The mass of the party-in-the-electorate is disabled by a collective action problem in organizing for its interests—usually center-leaning.⁵¹ The candidates would historically have been disabled without the endorsement and organizational resources of the party. And the party-in-the-government could not govern effectively and deliver on its campaign promises without the party providing coherence to the legislative agenda.

In Coasean terms, the transactional costs of overseeing disparate entities would be too great for any individual politician to stray too far from the party. Instead of agreeing with the party whip on support for one piece of legislation in order to achieve a private concern, each congressman would have to reach out to enough other congressmen to get the requisite 218 members to support the bill. As well captured by Seth Masket:

50. Garrett, *supra* note 21, at 99 (footnotes omitted).

51. Kang, *supra* note 21, at 167.

Quite simply, a partyless legislature is a collective action nightmare. Having to cobble together a winning coalition on every bill one cares about is nearly impossible, ensuring that incumbents will fail to enact much of the agenda on which they ran for office and will fail to deliver redistributive benefits to their district.⁵²

The transaction costs of repeating this across all legislation disciplined the members to the party historically, as well as the credible threat by the party to retaliate for defection from the core legislative agenda. Similarly, the ability of the party to reward its activists with both access and positions in government keeps centripetal forces at bay. And finally, the party's authority in who gets to speak as a candidate of the party disciplines the message in the electoral arena.

Further following Coase leads to viewing the party's role not as static, but as a dynamic process in which the various constituencies are deciding whether to continue to accept the constraints of the party or set off on their own. There are endless sources of discontent within a political party, and everyone from voters to activists to candidates to incumbent officeholders are always evaluating whether they are better off setting off on their own, crossing the aisle, or just withdrawing altogether from politics. For those committed to the political enterprise, the question is whether putting up with the inevitable frustration within the party is worth it, or whether independence or an alternative institutional arrangement is superior. In other words, the various constituencies within the party are searching for an optimal equilibrium between making or buying. That is what the Coasean perspective on marginal trade-offs adds to Key's insights about the multiple party constituencies.

It has always been possible for independent entrepreneurs, whether candidates themselves or outside interest groups, to engage politics outside the framework of the political party. Independents from Teddy Roosevelt to Ross Perot have engaged at the presidential level, and likely turned the outcome from one major party candidate to another. But only the unitary organization within the party can translate political activism into election results and the prospect of actually governing. Treating the party as a contractual partner to be discarded at will means foregoing the benefits available through the unitary party organization.

Specifically, the question presented here is what happens if the benefits available through a unified party organization are

52. SETH E. MASKET, *THE INEVITABLE PARTY: WHY ATTEMPTS TO KILL THE PARTY SYSTEM FAIL AND HOW THEY WEAKEN DEMOCRACY* 18 (2016).

compromised by changes in the legal rules governing politics. Viewed as a firm whose dimensions are altered by transaction costs, political parties and their various constituencies would be expected to respond to altered efficiencies from maintaining activity within the party as opposed to outside the party. The chief efficiency gain of political parties is their ability to coordinate among the competing constituencies and in turn to deliver to each a superior ability to realize goals than could be achieved by going it alone. This efficiency gain is potentially challenged across two different dimensions. First, it may be that candidates conclude that the party franchise is too weak or too unenforceable and may decide to set off on their own contrary to the party elders. We may think of this as the strategy of a Ted Cruz, a person claiming the Republican brand, but defiantly refusing to be disciplined by it.⁵³ Alternatively, it may be that entire categories of erstwhile party activities may be performed more effectively outside the party. The best example of this is when constraints on party fundraising make Super PACs a better vehicle for channeling campaign finances.⁵⁴

In what follows, I turn to three examples of altered regulatory environments in which the advantages enjoyed by parties historically have been compromised by changes in the legal status of parties. The three domains are party access to funds, party control over government jobs, and party control over candidate nominations. The argument is neither that these changes alone were decisive in weakening political parties, nor that they were necessarily bad reforms. Rather it is to cast them in the analytic frame of party weakening reforms whose cumulative effect plays out on the contemporary political stage. Looked at prescriptively, it may be that “stronger parties—or parties stronger in certain dimensions—ironically might be the most effective vehicle for enabling the compromises and deals necessary to enable more effective governance despite the partisan divide.”⁵⁵

53. Theodore Schleifer & Stephen Collinson, *Defiant Ted Cruz Stands by Refusal to Endorse Trump After Being Booed During Convention Speech*, CNN (July 22, 2016, 12:14 PM), <http://www.cnn.com/2016/07/20/politics/ted-cruz-republican-convention-moment/> [<https://perma.cc/WHL5-WVCK>].

54. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 544–50 (5th ed. 2016).

55. Pildes, *supra* note 2, at 809–10.

III. REGULATORY INCENTIVES UNDER
CAMPAIGN FINANCE LAWS

Trying to tread lightly into the domain of campaign finance is a fraught undertaking. The battle lines have long since hardened on whether money is speech, whether limiting expenditures is like burning books, and even on whether *Citizens United* is the *Dred Scott* of our time. The point of this venture is not to engage the substance of campaign finance law but to frame a part of the campaign finance debate in terms of the practical effects that different forms of funding politics have on the prospects of political parties. I take as the point of departure the insight that Pam Karlan and I offered up a number of years ago concerning the hydraulic quality of money in politics: like water, money will seek its own level and restrictions on its flow in one direction will soon generate other outlets.⁵⁶

Campaign donors tend to be more ideologically polarized than the electorate at-large.⁵⁷ Following Keys, however, the party should be a mediating large tent whose primary consideration is the electability of its slate of candidates and of their subsequent capacity to government. In a recent study, Professors La Raja and Schaffner find that a party-centered finance system tends to blunt the polarizing effect of ideological donors and candidates because parties have “the potential to dampen the tendency to elect highly ideological candidates who will not necessarily receive financial support from the political party.”⁵⁸ But the trend in campaign finance reform has been not to channel money to the parties, but to try to limit the amount of money available and, by extension, the role of money altogether.⁵⁹ With unfortunate similarity to the drunk searching for the lost car keys under the streetlight, reform attention turns to those domains that are most readily subject to restrictive regulation, most notably both parties and candidates.

The jurisprudential point of departure here is not *Buckley v. Valeo*, or its permutations into the precarious distinctions between contributions and expenditures, but a series of cases emerging from the 1986 Senate campaigns in Colorado. In these cases, the Court confronted the relation between the Colorado Republican

56. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999).

57. Carroll Doherty, *7 Things to Know About Polarization in America*, PEW RES. CTR. (June 12, 2014), <http://www.pewresearch.org/fact-tank/2014/06/12/7-things-to-know-about-polarization-in-america/> [<https://perma.cc/GR5F-SZ3B>] (finding higher rates of political donations amount “ideologically consistent” partisans).

58. RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, *CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL* 59 (4th ed. 2015).

59. Issacharoff & Karlan, *supra* note 56, at 1717–18.

party and the party's eventual candidate for an open Senate seat. For a majority of the Court, a political party was found to be just another electoral actor, no different in kind from any other supplicant seeking to curry favor with an actual or potential officeholder.⁶⁰ Accordingly, in *Colorado Republican I*, the Court found no violation of the campaign finance laws when the state Republican party attacked the Democratic nominee—but only on the bizarre grounds that, because the attack ads aired before there was a formal Republican nominee, there could have been no coordination.⁶¹ As Justice Kennedy noted in concurrence, “It makes no sense . . . to ask, as FECA does, whether a party's spending is made ‘in cooperation, consultation, or concert with’ its candidate.”⁶² The answer, per Justice Kennedy, not only is likely yes, but should be yes and should have offered a measure of constitutional protection to the party.⁶³ The Court then compounded the injury in *Colorado Republican II* in holding that where a party acts in concert with its candidates, its expenditures may be treated as de facto contributions from the party to the candidate, no different from the contribution from any other private actors, and subject to the same restrictions to avoid the risk of a pass-through to the candidate.⁶⁴

In following the elusive trail of corruption and circumvention, the Court lost sight of the complex institutional forms of politics in two ways. First, parties are not merely potential conduits for money. Parties do not serve simply as a pass-through to launder illicit quid-pro-quo contributions to officeholders. Parties, as institutional actors, have organizational aims of their own—a critical insight from Key on the struggle for control among the competing constituencies of the party.⁶⁵ Second, the Court assumed away any hydraulic pressures that would cause funds to flow to other actors outside the regulated domain. Here the Court acted in the manner of naïve regulators who presume the singularity of their covered domain and take no account for the displacement of economic activity that will simply seek out less regulated environs to pursue the same aims.

60. See *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado Republican II)*, 533 U.S. 431, 455 (2001); *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado Republican I)*, 518 U.S. 604, 614 (1996) (recognizing protection of party independent expenditures so long as not coordinated with any candidate).

61. *Colorado Republican I*, 518 U.S. at 623 (resolving as applied challenge to avoid broader constitutional issue).

62. *Id.* at 629.

63. *Id.* at 629–30 (finding that party activity and spending on behalf of candidate is the heart of party political engagement).

64. *Colorado Republican II*, 533 U.S. at 465.

65. See KEY (5th ed.), *supra* note 20, at 163, 166–67.

Colorado provides an interesting further example of the dislocations caused by reducing the financial resources of the parties. In 2002, the same year as the major federal reform effort, Colorado voters passed Amendment 27, which drastically reduced the amount of money candidates could raise, but which targeted parties more directly. In effect, Amendment 27 sidelined the parties in state legislative elections in the same fashion as the federal election laws at issue in the *Colorado Republican* cases. Parties were limited to spending only \$18,000 to support state senate candidates and \$13,000 for the state house—as opposed to unlimited sums before the amendment.⁶⁶ Even more significant, the amount that any individual could give to a party was reduced from \$25,000 to \$3,000.⁶⁷ As usual, the argument in favor was the need to promote transparency and curb the influence of special interests.⁶⁸

When gay rights and other cultural issues began to occupy the attention of the legislature, four wealthy liberal activists formed a Section 527 organization dubbed the “Roundtable” to try to steer state politics.⁶⁹ Move begat countermove and soon conservative independent expenditure outfits began to occupy the political space vacated by the Republican party, just as the Roundtable began to act as the de facto liberal party.⁷⁰ As a result, “Colorado’s political elites increasingly began to see the Roundtable’s 527s as the locus of Democratic Party activity and the formal party as something of an atavistic relic.”⁷¹ The same occurred on the Republican side of the ledger.

Returning to the main theme of this Article, the Court in the *Colorado Republican* cases compromised one of the competitive advantages that parties have in the race for campaign funding. The integration of access to voters, candidates, and officeholders allowed parties a privileged position as political actors, and there were significant returns to scale of being able to coordinate all of these functions inside the party viewed as a firm. Once the party was no longer able to raise money to support its candidates on any basis distinct from any other contributor and once the interaction between party and candidate was limited by a principle of

66. Legis. Council of the Colo. Gen. Assembly, *2002 Ballot Information Booklet* (Sept. 10, 2002), <http://www2.cde.state.co.us/artemis/gamonos/ga49502internet/ga49502-9internet.pdf> [<https://perma.cc/HF85-MS77>].

66. *Id.*

67. *Id.*

68. MASKET, *supra* note 52, at 36.

69. *Id.* at 38–39.

70. *Id.* at 40.

71. *Id.* at 41–42.

non-coordination, the logic of internalizing the candidate's campaign within the political party dissipated. In Coasean terms, there was no longer a manifest advantage to making as opposed to buying from outside vendors.

Even with the constraints from *Colorado Republican I* and *II*, the parties were able to recover an edge in the 1990s. The weaker restrictions on campaign contributions to state parties allowed another of the constituencies identified by Beth Garrett to play a stronger role. First the Democrats and then the Republicans figured out how to channel national funding activities through state parties, who would in turn transmit the money raised up to the national parties⁷²—a contrived transformation of non-federal funds into clean federal dollars, a practice remarkably similar to money laundering. Even the going terms of a 15% charge by the state parties looked like standard rates for money laundering.⁷³ And so were born the White House sleepovers, the rides on Air Force One, and the golfing weekends with Republican House leaders⁷⁴ (alas, there are no presidential prerequisites for the party out of power).

No doubt, the perception of access for sale could not have been worse.⁷⁵ But amid the stench, the soft money period of the 1990s restored a unifying role to the national parties and lent coherence to the party messages. Again, this was not an unalloyed good as it drove to the government shutdown of 1995⁷⁶ and then the essentially straight-line party voting on the impeachment of President Clinton.⁷⁷ Nonetheless, channeling money through the

72. See Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598, 614–15 (2000).

73. See *id.* at 606–07 (roughly 15% held back by state parties); PETER REUTER & EDWIN M. TRUMAN, CHASING DIRTY MONEY: THE FIGHT AGAINST MONEY LAUNDERING 36 (2004) (“Experienced investigators refer to a general price range of 7 to 15 percent for laundering for drug dealers, but some reports are inconsistent with such estimates.”).

74. See Andy Kroll, *Follow the Dark Money*, MOTHER JONES (July/Aug. 2012), <http://www.motherjones.com/politics/2012/06/history-money-american-elections> [<https://perma.cc/RKX2-HFVU>].

75. See, e.g., Stephen Labaton, *House Aide Links a Top Lawmaker to Embezzlement*, N.Y. TIMES (July 20, 1993), <http://www.nytimes.com/1993/07/20/us/house-aide-links-a-top-lawmaker-to-embezzlement.html?smid=tw-share>; Press Release, Former Delegate Fauntroy Is Charged, Agrees to Plead Guilty (Mar. 22, 1995), https://www.justice.gov/archive/opa/pr/Pre_96/March95/153.txt.html [<https://perma.cc/9QGU-B63B>].

76. KEVIN R. KOSAR, CONG. RESEARCH SERV., 98-844 GOV. SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, EFFECTS, AND PROCESS 2 (2004), <http://archives.democrats.rules.house.gov/archives/98-844.pdf> [<https://perma.cc/2THG-TX4L>].

77. *How the Senators Voted on Impeachment*, CNN (Feb. 12, 1999, 12:51 PM), <http://www.cnn.com/ALLPOLITICS/stories/1999/02/12/senate.vote/> [<https://perma.cc/B5N5-GDZZ>].

parties meant that parties emerged as the centerpieces of politics⁷⁸ and, as with the Contract with America,⁷⁹ gave a national coherence to electoral politics—with warts and all.

Despite the role of *Citizens United* in the public imagination as the placeholder for the rise of unaccountable money in the political system, the history points to several shocks to politics as usual in the 2000s as having provided the impetus for the emergence of political funding outside the parties. The first is the passage in 2002 of the Bipartisan Campaign Reform Act (BCRA), known after its sponsors as the McCain-Feingold Act.⁸⁰ The Act targeted soft money accumulation by the parties and, after being upheld by the Supreme Court in *McConnell v. FEC*,⁸¹ effectively shut down the flow of campaign funds through the state political parties. But, as anticipated by the hydraulics account, new outlets emerged for political donations outside the candidates and parties. Between 2000 and 2008, independent expenditures in the federal domain increased by at least 425%,⁸² a broader version of what occurred in Colorado at the state level. The losers were the political parties, most notably the state parties.⁸³ The winners were what Joey Fishkin and Heather Gerken call the shadow parties, ranging from the independent expenditure outfits to the self-sustaining campaigns of individual candidates.⁸⁴

One of the early shocks to the system came in the presidential election of 2004. That year the Democratic Primary

78. For example, much of the “Republic Revolution” of 1994 was driven by a united attack by the Republican Party on Bill Clinton’s healthcare reform and perceived liberalism. See Stuart Rothenberg, *How High the Wave? Don’t Just Think 1994; Think 1974, 1958, 1982*, INSIDE ELECTIONS (Oct. 26, 2006, 12:02 AM), <http://insideselections.com/news/article/how-high-the-wave-dont-just-think-1994-think-1974-1958-1982> [https://perma.cc/BB9M-2BD2].

79. Jeffrey B. Gayner, *The Heritage Lectures: The Contract with America: Implementing New Ideas in the U.S.*, HERITAGE FOUND. 1–2 (1995), http://s3.amazonaws.com/thf_media/1995/pdf/hl549.pdf [https://perma.cc/R3FZ-VFLM].

80. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002); Robert Kelner & Raymond La Raja, Opinion, *McCain-Feingold’s Devastating Legacy*, WASH. POST (Apr. 11, 2014), https://www.washingtonpost.com/opinions/mccain-feingolds-devastating-legacy/2014/04/11/14a528e2-c18f-11e3-bcec-b71ee10e9bc3_story.html?postshare=6571486243964249&tid=ss_tw&utm_term=.47ef21cd605b [https://perma.cc/6HT5-85UF].

81. *McConnell v. FEC*, 540 U.S. 93, 133 (2003).

82. In the 2000 election cycle, the Center for Responsive Politics reports that independent expenditures totaled \$33,763,452, across all federal elections. The 2008 total was \$143,630,578, representing a 425% increase. Ctr. for Responsive Pol., *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS, http://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2014&view=Y&chart=N [https://perma.cc/P2A6-CH55].

83. Michael J. Malbin, *McCutcheon Could Lead to No Limits for Political Parties—With What Implications for Parties and Interest Groups?*, 89 N.Y.U. L. REV. ONLINE 92, 99–100 (2014).

84. Joseph Fishkin & Heather K. Gerken, *The Two Trends that Matter for Party Politics*, 89 N.Y.U. L. REV. ONLINE 32, 35 (2014).

was not held until the end of July. Through the course of a contested primary season, John Kerry had exhausted his war chest by early July and would not be eligible for federal funds until after the nomination.⁸⁵ For all practical purposes, the Kerry campaign went silent in July.⁸⁶ During that month George Soros raised over \$20 million, much of it his own money, through Move On, America Coming Together, and other entities formed independently of the Democratic Party.⁸⁷ Until Kerry's formal nomination, the presidential campaign was given over to a private organization that maintained formal separation from not only the Democratic Party but even from the presidential candidate himself.⁸⁸ Clearly what could be done for one month could then be the model for an outsourced component of any presidential campaign.

What began to change after 2008 was the organizational form of outsourced campaign funding away from both traditional PACs and even 501(c)(4) organizations that are supposedly furthering civic engagement:

Although some Super PAC funds come from corporations and unions, the vast majority have been provided by wealthy individuals who, well before *Citizens United*, were permitted to spend unlimited sums independently, but were subject to a federal statutory limit of \$5000 on the amounts they could give to the federal PACs that expressly support or oppose federal candidates.⁸⁹

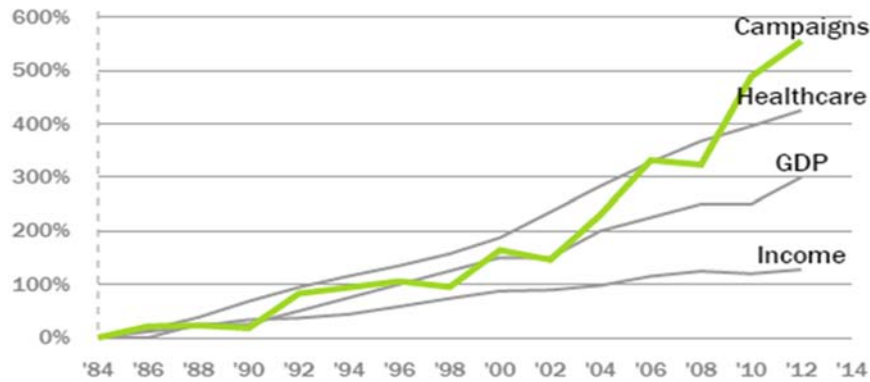
85. Michael J. Malbin, *A Public Funding System in Jeopardy: Lessons from the Presidential Nomination Contest of 2004*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 219*, 237–42 (Michael J. Malbin ed., 2006).

86. *Id.*

87. *Cf.* Ctr. for Responsive Pol., *Moveon.Org Spending by Cycle*, OPENSECRETS, <https://www.opensecrets.org/pacs/lookup2.php?strID=C00341396&cycle=2004> [https://perma.cc/V4U2-KVYR] (outlining Move On's total receipts during the 2004 cycle).

88. Dan Balz & Thomas B. Edsall, *Democrats Forming Parallel Campaign*, WASH. POST (Mar. 10, 2004), <http://www.washingtonpost.com/wp-dyn/content/article/2004/03/10/AR2005040309958.html> [https://perma.cc/P3XJ-CDLS].

89. Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1645 (2012).

*Percent Growth in Cost*⁹⁰

While the rise of Super PAC and 501(c)(4) spending has been well chronicled,⁹¹ less attention has been given to another systemic shock from 2008: the decision of President Obama to forego public funding altogether. As a result of both intensive and innovative fundraising, the Obama campaign had roughly three times the resources in the general election as did the McCain campaign.⁹² Roughly one-quarter of the Obama fundraising came from small donors, totaling about \$200 million—about the same amount of money as available to McCain in the general election.⁹³ The

90. Michael Scherer, Pratheek Rebala & Chris Wilson, *The Incredible Rise in Campaign Spending*, TIME POL. (Oct. 23, 2014, 11:39 AM), <http://time.com/3534117/the-incredible-rise-in-campaign-spending/> [<https://perma.cc/7TMC-2GSA>]; see also Ctr. for Responsive Politics, *Outside Spending*, OPENSECRETS, <http://www.opensecrets.org/outsidespending/> [<https://perma.cc/6P53-4XSG>].

91. See, e.g., *id.* at 1672, 1674–75 (providing an overview of the law of Super PACs and their role in recent campaigns); Terence Dougherty, *Section 501(c)(4) Advocacy Organizations: Political Candidate-Related and Other Partisan Activities in Furtherance of the Social Welfare*, 36 SEATTLE U. L. REV. 1337 (2013) (summarizing the treatment of 501(c)(4) organizations and their political activities); Michael S. Kang, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902 (2013) (discussing the influence of Super PACs in the 2012 presidential election cycle); Garrick B. Pursley, *The Campaign Finance Safeguards of Federalism*, 63 EMORY L.J. 781 (2014) (tracing the rise of Super PACs and their weakening of federalism); Bradley A. Smith, *Super PACs and the Role of “Coordination” in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603 (2013) (describing the rise of Super PACs and the anti-coordinating requirements); Molly J. Walker Wilson, *Financing Elections and “Appearance of Corruption”: Citizen Attitudes and Behavior in 2012*, 63 CATH. U. L. REV. 953 (2014) (reviewing the rise of Super PACs and their effect on voters’ perceptions of political corruption).

92. In the 2008 cycle, Barack Obama raised approximately \$750 million from donors, while John McCain raised roughly \$238 million from donors. Tahman Bradley, *Final Fundraising Figure: Obama’s \$750M*, ABC NEWS (Dec. 5, 2008), <http://abcnews.go.com/Politics/Vote2008/story?id=6397572&page=1> [<https://perma.cc/V999-TKEZ>].

93. Twenty-four percent of Barack Obama’s \$746.1 million in contributions in the 2008 cycle (pre-nomination and general election contributions combined) came from donors who gave less than \$200. Press Release, Campaign Fin. Inst., All CFI Funding Statistics

Obama for America strategy revealed that a presidential campaign could raise large amounts of money (assisted by the rise in individual contributions under BCRA⁹⁴) outside the party structure. Even more significant, the small contributions showed that technology had lowered the transaction costs of dealing directly with what Key would term the party-in-the-electorate without any intermediation by the party apparatus. Not surprisingly, small donor appeals have been the hallmark of the two major party outsider candidates in 2016: Sanders and Trump.⁹⁵

Certainly the rise of new technologies cannot be attributed to legal intervention. But the combined effects of recent reforms have been to hamper the ability of parties to raise money and to push hard dollars to the candidates independently, or to direct major funding of politics outside the regulated domain altogether. The new campaign finance regime “puts individuals and relatively small coalitions on a fairly equal footing with political parties.”⁹⁶ As La Raja and Schaffner show, money mediated through parties tempers the ardor of the more polarizing contributors, and disciplines the candidates to the governance message of the party.⁹⁷ Neither the funders nor the candidates risked going it alone so long as the party controlled campaign resources, could maintain the discipline of the party apparatus, and controlled candidate access to the nomination process. Removing party organization of campaign resources was a significant step in eroding this entire organizational framework.

Without the integrative power of the party and the efficiency of political integration that party politics could deliver, the different components of the party could look to contract for the apparatus they needed or seek the nomination outside the customary party structures. Indeed, as was seen with the Koch brothers in 2016, outsiders could even hold beauty pageants to

Revised and Updated for the 2008 Presidential Primary and General Election Candidates (Jan. 8, 2010), http://www.cfinst.org/press/releases_tags/10-01-08/Revised_and_Updated_2008_Presidential_Statistics.aspx [<https://perma.cc/79K3-6W5W>].

94. The BCRA raised the individual contribution limit to candidate committees to \$2,000 and indexed it to inflation with the 2015–2016 limit coming to \$2,700 per election. Press release, FEC, FEC Chart: 2015–2016 Campaign Cycle Contribution Limits (Mar. 20, 2015), <http://www.fec.gov/press/press2015/pdf/20150320release.pdf> [<https://perma.cc/87PR-KLYU>].

95. See Nicholas Confessore & Nick Corasaniti, *Small Donations Help Trump Cut Fund-Raising Gap*, N.Y. TIMES, Aug. 3, 2016, at A1, A12 (“Mr. Trump has the potential to be the first Republican nominee whose campaign could be financed chiefly by grass-roots supporters pitching in \$10 or \$25 apiece, echoing the success of Senator Bernie Sanders of Vermont during the Democratic primary.”).

96. CAIN, *supra* note 9, at 202.

97. LA RAJA & SCHAFFNER, *supra* note 58, at 59.

shop for suitable candidates.⁹⁸ Even in the absence of these external forces, however, the party infrastructure cannot necessarily block a candidate who bypasses the party and appeals directly for support in the electorate, to wit, President Trump. Further, an outsider capturing the party in the electorate then has tremendous leverage to compel the party in government to knuckle under—a complete inversion of the internal party relations of a bygone era.⁹⁹

IV. THE DEMISE OF PATRONAGE

Historically, the prospect of public employment was the glue that held together the party apparatus, particularly at the local level. Following Key, patronage was “the response of government to the demands of an interest group—the party machine—that desires a particular policy in the distribution of public jobs.”¹⁰⁰ Patronage promoted party coherence by maintaining loyalty—at a price—for those who might diverge from the party’s platform.¹⁰¹ Patronage provided the party with the disciplined organization necessary to win the primary, “[a]nd if one controls the primary, he has gone a long way toward controlling all.”¹⁰² American political parties leveraged patronage to ensure that the ideological fringe of their parties remained within the parties,¹⁰³ or even to

98. See Fredreka Schouten, *2016 GOP Hopefuls Gear up for ‘Koch’ Primary*, USA TODAY (July 29, 2015, 2:59 PM), <http://www.usatoday.com/story/news/politics/elections/2016/2015/07/29/charles-koch-donors-meeting-california/30803357/> [<https://perma.cc/Q6L7-8K6U>] (“GOP candidates are headed to California to tout their conservative credentials in person before [the Kochs] and . . . hundreds of wealthy donors . . . [The candidates] will participate in question-and-answer sessions during the gathering of about 450 contributors who have pledged to spend nearly \$900 million ahead of the 2016 election.”).

99. Karen Yourish, Larry Buchanan & Alicia Parlapiano, *More Than 160 Republican Leaders Don’t Support Donald Trump. Here’s When They Reached Their Breaking Point.*, N.Y. TIMES (Oct. 9, 2016), https://www.nytimes.com/interactive/2016/08/29/us/politics/at-least-110-republican-leaders-wont-vote-for-donald-trump-heres-when-they-reached-the-ir-breaking-point.html?smid=tw-share&_r=0 [<https://perma.cc/33GV-V4JF>].

100. KEY (5th ed.), *supra* note 20, at 348.

101. V. O. KEY, JR., *POLITICS, PARTIES, & PRESSURE GROUPS* 402–03 (4th ed. 1958) [hereinafter KEY (4th ed.)]; Frank J. Sorauf, *The Silent Revolution in Patronage*, in *URBAN GOVERNMENT* 308, 309–10 (Edward C. Banfield ed., 1961). The standard narrative that patronage promotes party cohesion has been challenged, including by Carolyn Warner who argues that patronage instead may result in a lack of cohesion where members’ primary allegiance to the party is material gain rather than ideological unity and where individual politicians themselves take credit for patronage distributed by the party. Carolyn M. Warner, *Political Parties and the Opportunity Costs of Patronage*, 3 *PARTY POL.* 533, 540–41 (1997). In the heyday of the city machines, the pull of material benefit appears to have trumped these countervailing considerations.

102. Key, *supra* note 19, at 78.

103. Compare MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* 288 (1998) (discussing how American political parties ideologically adapted in order to avert challenges by third parties), with MARTIN & SUSAN TOLCHIN, *TO THE VICTOR . . . POLITICAL*

forge alliances with third parties where local law favored their existence.¹⁰⁴ Particularly in times of political ferment, patronage loyalists “will impose fewer constraints on the party’s flexibility in terms of policy and organizational innovation” compared to activists who are motivated by ideological or social goals.¹⁰⁵ Per Bruce Cain, patronage represents the “necessary transaction costs for a decentralized and dispersed political system,” critical building blocks for both compromise and coalitions.¹⁰⁶

Moreover, patronage allowed the integration of an expanding electorate and new immigrants into democratic politics.¹⁰⁷ In the words of Carl Russell Fish, “[t]he true cause for the introduction of the spoils system was the triumph of democracy.”¹⁰⁸ The party apparatus served to educate the expanded electorate and enable it to meaningfully exercise its voice in policymaking.¹⁰⁹ Patronage, in turn, served as the necessary means to fund this party apparatus, supplementing limited party funds.¹¹⁰ Permitting this type of de facto public funding of political parties prevented politicking from becoming the exclusive prerogative of the rich, who without funding assistance would be the only ones able to engage in such an endeavor full time.¹¹¹

The big-city patronage machines spawned a distinct type of politics based on a huge apparatus.¹¹² One account of George Washington Plunkitt, the consummate Tammany Hall ward boss, well captures real-life political parties a century ago:

Everybody in the district knows him. Everybody knows where to find him, and nearly everybody goes to him for

PATRONAGE FROM THE CLUBHOUSE TO THE WHITE HOUSE 300–02 (1971) (portraying New Deal programs as patronage disguised as ideological concessions in order to “neutralize and incorporate the disaffected groups”).

104. See BRUCE F. BERG, *NEW YORK CITY POLITICS: GOVERNING GOTHAM* 165, 253 (2007).

105. Wolfgang C. Müller, *Party Patronage and Party Colonization of the State*, in *HANDBOOK OF PARTY POLITICS* 189, 191 (Richard S. Katz & William Crotty eds., 2006).

106. CAIN, *supra* note 9, at 159.

107. LEON D. EPSTEIN, *POLITICAL PARTIES IN WESTERN DEMOCRACIES* 105, 110 & n.25 (1979); CARL RUSSELL FISH, *THE CIVIL SERVICE AND THE PATRONAGE* 156 (1905). Patronage also served to democratize not only voters but the public service. By introducing the “spoils system” for federal employment Jackson aimed to “democratize public service by expanding the class of persons eligible for public positions, ensuring bureaucratic responsiveness to the popular will, and limiting the extent to which corruption developed during lengthy tenure in office might taint the public service.” *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1624 (1984).

108. FISH, *supra* note 107, at 156.

109. *Id.*

110. *Id.* at 156–57; KEY (5th ed.), *supra* note 20, at 348.

111. FISH, *supra* note 107, at 156–57.

112. EPSTEIN, *supra* note 107, at 106 (citing HAROLD F. GOSNELL, *MACHINE POLITICS: CHICAGO MODEL* (1937)).

assistance of one sort or another, especially the poor of the tenements.

He is always obliging. He will go to the police courts to put in a good word for the “drunks and disorderlies” or pay their fines, if a good word is not effective. He will attend christenings, weddings, and funerals. He will feed the hungry and help bury the dead.

A philanthropist? Not at all. He is playing politics all the time.

Brought up in Tammany Hall, he has learned how to reach the hearts of the great mass of voters. He does not bother about reaching their heads. It is his belief that arguments and campaign literature have never gained votes.¹¹³

Patronage provided the structural support necessary to maintain the hierarchy of the machine.¹¹⁴ The party boss used patronage as an inducement to his ward committeemen to garner their loyalty¹¹⁵ and to incentivize performance. As one Chicago ward leader exhorted his field captains seeking promotion, “Carry your precinct or you not only won’t get it, but you’ll lose your job altogether.”¹¹⁶ And the stakes were substantial; there were more than 450 patronage jobs per congressional district available in Chicago.¹¹⁷

Whatever the benefits, patronage could not shake the association with graft, as Chicago well exemplifies. Defending patronage on the basis of the benefits it provided to the parties risked allowing that a political party should be able to appropriate government resources for its own benefit. Not surprisingly, patronage is most commonly perceived as a form of political corruption. Indeed, even a commentator so sensitive to the structure of political parties as V. O. Key included patronage in his Ph.D. dissertation as among forms of political graft, which he defined as the misappropriation of public resources to further private or party ends.¹¹⁸ Pushed to the extreme, patronage-besotted

113. WILLIAM L. RIORDON, *PLUNKITT OF TAMMANY HALL* 90–91 (E. P. Dutton & Co., Inc. 1963) (1905).

114. KEY (5th ed.), *supra* note 20, at 337 (“Patronage is an important factor in building up lines of command and in establishing internal cohesion and discipline in the machine.”).

115. James Q. Wilson, *The Economy of Patronage*, 69 J. POL. ECON. 369, 373 (1961). Wilson describes the conflict inherent in different uses of patronage: maintaining boss’s power, controlling elected officials, maximizing the vote, and attracting party workers. *Id.* at 371.

116. KEY (5th ed.), *supra* note 20, at 338 (quoting CARROLL HILL WOODY, *THE CHICAGO PRIMARY OF 1926: A STUDY IN ELECTION METHODS* 8 (1926)).

117. Wilson, *supra* note 115, at 372 (noting that there were only 115–120 jobs available in New York at the same time).

118. Key, *supra* note 19, at 5, 10.

parties are less defined by any public or ideological purpose and compete in elections only to secure the benefits of government patronage.¹¹⁹

Beginning with the Civil Service reforms of the Progressive Era, and continuing through the Hatch Act of 1937, political currents began to turn against the patronage machines. The Pendleton Act of 1883¹²⁰ required that positions that fell within the scope of the federal “classified service” be filled by competitive examination and established the United States Civil Service Commission to oversee the Act.¹²¹ The Act also impaired the ability of parties to house politically active members in the bureaucracy by prohibiting civil service members to “coerce the political action of any person or to interfere with any election.”¹²² An amendment in 1907 gave that prohibition more bite by forbidding civil service employees from taking “active part in political management or in political campaigns.”¹²³ The Hatch Act of 1939 extended these prohibitions on political involvement, previously applicable only to members of the classified service, to all executive branch and agency employees with the exception of certain high-level officials.¹²⁴

A similar current took hold at the state and local level. Between 1880 and 1894, New York City and then New York State mandated public hiring through competitive examinations.¹²⁵ Similar reforms were adopted in cities throughout the country. An empirical study of municipal civil service reform found that adoption was fastest where required by the state, namely, in New York, Massachusetts, and Ohio.¹²⁶ But even where the state provided no such mandate, over 60% of cities in the study’s sample adopted reforms between 1880 and 1935.¹²⁷

In 1934 when Key wrote his dissertation, he commented that “[t]he patronage system has served, and still serves, as the principal method of consolidating into a cohesive mass the politically effective sector of the population.”¹²⁸ By the time the fourth edition of

119. RIORDAN, *supra* note 113, at 89.

120. Pendleton Act (Civil Service), ch. 27, 22 Stat. 403 (1883).

121. KEY (4th ed.), *supra* note 101, at 390 (discussing the implications of civil service reform with respect to patronage).

122. *Id.*

123. *Id.* at 391.

124. *Id.* at 391–92.

125. BERG, *supra* note 104, at 251.

126. Pamela S. Tolbert & Lynne G. Zucker, *Institutional Sources of Change in the Formal Structure of Organizations: The Diffusion of Civil Service Reform, 1880–1935*, 28 ADMIN. SCI. Q. 22, 28–29 (1983).

127. *Id.*

128. Key, *supra* note 19, at 396.

Politics, Parties & Pressure Groups was published in 1958, his portrayal of the modern import of patronage in maintaining party unity had considerably weakened.¹²⁹ The effectiveness of patronage as a party unifier waned over the first half of the twentieth century as civil service reforms reduced the number of patronage jobs available and government-provided social services took the place of those provided by the local precinct captain.¹³⁰ In a preface to *Plunkitt of Tammany Hall*, Terrence McDonald referred to Plunkitt's writing as "not a set of timeless maxims for practical politics but an invaluable record of public political views on the verge of oblivion."¹³¹ The civil service reforms took aim at the inefficiencies of a patronage system, but they also undermined the economic foundations of the big city, immigrant-run machines.¹³²

The Supreme Court then got in the act in 1976 with *Elrod v. Burns*.¹³³ The case arose from Cook County, effectively ground zero of patronage in America, and concerned a group of Republican patronage appointees who were either fired or about to be fired when political control shifted to the Democrats.¹³⁴ Per Justice Brennan, the Court found that firing public employees for their political affiliation violated the First Amendment, notwithstanding the political provenance of their patronage appointments.¹³⁵ As against the potential impact on political parties, the Court held:

[W]e are not persuaded that the elimination of patronage practice or, as is specifically involved here, the interdiction of patronage dismissals, will bring about the demise of party politics. Political parties existed in the absence of active patronage practice prior to the administration of Andrew Jackson, and they have survived substantial reduction in their patronage power through the establishment of merit systems.¹³⁶

At the very least, the Court thought that "[p]atronage dismissals . . . are not the least restrictive alternative to achieving the contribution they make to the democratic

129. KEY (4th ed.), *supra* note 101, at 375 ("The spoils system has not been eradicated and state and local services on occasion are shot through with patronage abuses, but for the country as a whole organizational cohesion born of a shared anxiety about job security is probably not what it was a half century ago.")

130. *See id.* at 375–76.

131. Terrence J. McDonald, *Preface* to WILLIAM L. RIORDON, *PLUNKITT OF TAMMANY HALL* viii (Terrence J. McDonald ed., Bedford Books of St. Martin's Press 1994) (1905).

132. Tolbert & Zucker, *supra* note 126, at 23.

133. 427 U.S. 347 (1976).

134. *Id.* at 350.

135. *Id.* at 372.

136. *Id.* at 369.

process.”¹³⁷ In sum, Justice Brennan wrote that “any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms,”¹³⁸ which are also “essential to a meaningful system of democratic government.”¹³⁹

In *Rutan v. Republican Party of Illinois*, Justice Scalia challenged that the Court’s “categorical pronouncement reflects a naive vision of politics and an inadequate appreciation of the systemic effects of patronage in promoting political stability and facilitating the social and political integration of previously powerless groups.”¹⁴⁰ For Justice Scalia,

[T]he statement that “political parties have already survived” has a positively whistling-in-the-graveyard character to it. Parties have assuredly survived—but as what? As the forges upon which many of the essential compromises of American political life are hammered out? Or merely as convenient vehicles for the conducting of national Presidential elections?¹⁴¹

In Justice Scalia’s view, this decline of the party could be combatted by the patronage system:

What the patronage system ordinarily demands of the party worker is loyalty to, and activity on behalf of, the organization itself rather than a set of political beliefs. He is generally free to urge *within the organization* the adoption of any political position; but if that position is rejected he must vote and work for the party nonetheless.¹⁴²

V. TAKING NOMINATIONS AWAY FROM THE PARTY

Just as control over public employment and other benefits provided the operational drive of the parties, the main disciplining device enjoyed by political parties has been the capacity to ensure that any candidate for office be committed to its core political agenda. In turn, “[h]e who can make the nominations is the owner of the party.”¹⁴³ But that power has been increasingly pulled from the party hierarchy. The Supreme Court placed the causal responsibility for replacing “the caucuses

137. *Id.*

138. *Id.* at 373.

139. *Id.* at 370.

140. 497 U.S. 62, 103–04 (1990) (Scalia, J., dissenting).

141. *Id.* at 106.

142. *Id.* at 109.

143. SCHATTSCHNEIDER, *supra* note 1, at 64.

of self-appointed legislators or other interested individuals” on “[d]issatisfaction with the manipulation of conventions.”¹⁴⁴ But the result of a primary-based system was to “allow candidates to appeal over the heads of voters. They have become a prime device for weakening party discipline.”¹⁴⁵

The rise of the primaries for candidate selection was part and parcel of late 19th century efforts to thwart the power of political parties: “Party reforms sought to deprive local bosses of control over elections, and thereby diminish bosses’ ability to leverage their influence over electoral outcomes to secure post-election indebtedness and loyalty.”¹⁴⁶ Reforms proceeded as “state legislatures across the country adopted ‘Australian’ (i.e., state-printed, secret) ballot and party primary laws to regulate general elections, party nominating procedures, and the internal governance structure of parties.”¹⁴⁷ Between the 1890s and World War I, more than half the states had enacted laws requiring direct primary nomination of candidates for office.¹⁴⁸

There was little legal resistance to the rise of the primary requirement. These reforms predate the Brandeis and Holmes dissents that auger the modern law of political liberties.¹⁴⁹ The challenges to the mandatory primary were brought in state court and the decisional law of the time saw parties not as rights-bearing entities capable of claiming liberty of association or expression but as “agents of the state, whose functions were intimately tied up to the machinery of the state.”¹⁵⁰ Further, “the election law jurisprudence of the time was fueled by profound distrust of party leaders, viewed to be corrupters of the electorate’s will.”¹⁵¹

In short order, the primary system spread across the country, though typically as part of a mixed system of selection.

By the end of 1915, the direct primary had become the most widely employed nominating system in the United States. All but three states (Connecticut, New Mexico, and Rhode Island) used it for selecting candidates to at least some

144. Ray v. Blair, 343 U.S. 214, 221 (1952).

145. DANIEL H. LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, *ELECTION LAW* 414–16 (5th ed. 2012) (discussing Ray v. Blair, 343 U.S. 214 (1952)).

146. Winkler, *supra* note 8, at 877.

147. *Id.* at 876.

148. Robin Miller, Annotation, *Constitutionality of Voter Participation Provisions for Primary Elections*, 120 A.L.R. 5th § 2 (2004).

149. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Holmes, J., dissenting); *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

150. Winkler, *supra* note 8, at 879.

151. *Id.*

elective offices. Most of these forty-five states nominated virtually all offices in this way—78 percent of states in the east and 95 percent of western states did so.¹⁵²

The direct primary set in motion a system pointing to the demise of the inherited model of the parties. Political scientists Jamie L. Carson and Jason M. Roberts posit that primary reform, along with many other reforms such as the Australian secret ballot, “ended the parties’ firm-like control over ballot access and effectively created a ‘market’ for candidate entry. With the demise of party control over the electoral machinery, the party subsidy on ballot entry was removed.”¹⁵³ Most provocatively, they write,

The direct primary essentially “neutered” political parties. Without direct control over nominations, parties could no longer determine the identity, loyalty, or quality of candidates appearing on the ballots under their name. As such, they could no longer effectively offer insurance to losing candidates as the number of party controlled positions rapidly diminished throughout the country. The cartel-like system of nominations was transformed into a political market, where individual, strategic politicians had to now make their own determination as to whether seeking a particular elective office was a worthwhile venture.

. . . .

For ambitious and strategic politicians, the incentive structure changed quite dramatically with the movement toward the direct primary. On the one hand, the loss of the party insurance mechanism increased the cost of candidate entry as the candidates themselves had to bear the full risk of running (i.e., they are now insuring themselves). Nevertheless, individuals now controlled their own electoral destiny.¹⁵⁴

Even so, party leaders maintained considerable power over the vetting of candidates and over likely primary nominations by a variety of means, most notably through the ongoing role of the convention in selecting the party’s presidential nominee.¹⁵⁵ The events of 1968 set off changes relatively quickly, as “[t]he disastrous Democratic Convention of that year . . . set in train a series of events that led, eventually, to a report that

152. ALAN WARE, *THE AMERICAN DIRECT PRIMARY: PARTY INSTITUTIONALIZATION AND TRANSFORMATION IN THE NORTH* 227 (2002).

153. JAMIE L. CARSON & JASON M. ROBERTS, *AMBITION, COMPETITION, AND ELECTORAL REFORM: THE POLITICS OF CONGRESSIONAL ELECTIONS ACROSS TIME* 35–36 (2013).

154. *Id.* at 43–44, 92–93.

155. WARE, *supra* note 152, at 251–52.

recommended reform of rules governing the selection of delegates.”¹⁵⁶ After 1972, party control of even the presidential nomination process diminished drastically. The reforms following this period occurred in both parties, resulting in today’s familiar system where: “A frontrunner emerges after the early primaries and all rivals then fall by the wayside; since 1972, there has always been one candidate in each party who has a clear majority of delegates committed to him by the start of the National Convention.”¹⁵⁷

Paradoxically, the post-1968 reforms failed in their major objective of shifting the nomination power from the party apparatus to the party-in-the-electorate. Primaries, and even party caucuses, draw scant voter participation, with less than 20% of eligible voters participating, and at times shockingly few.¹⁵⁸ As a result, “[p]rimary races now tend to be dominated by highly motivated extremists and interest groups, with the perverse result of leaving moderates and broader, less well-organized constituencies underrepresented.”¹⁵⁹ By conferring decisional responsibility directly to the citizens, populist reformers create additional openings for media and interest groups to influence policy and electoral outcomes.¹⁶⁰ Not only is the party apparatus weakened, but even incumbent politicians—once virtually untouchable in primary elections—are vulnerable to money and activism only loosely tethered to the party. In bottom-line terms, “[e]veryone worries about being the next Eric Cantor.”¹⁶¹

Invariably, the loosening up of party controls over nomination weakens the hold of the party on not just candidates

156. *Id.* at 252.

157. *Id.* at 253.

158. Drew Desilver, *So Far, Turnout in this Year’s Primaries Rivals 2008 Record*, PEW RES. CTR. (Mar. 8, 2016), <http://www.pewresearch.org/fact-tank/2016/03/08/so-far-turnout-in-this-years-primaries-rivals-2008-record/> [https://perma.cc/VV7L-3ZFA]. In Nevada, for example, Clinton won the 2008 state Democratic caucuses with fewer than 20,000 people participating, in a state with a population of 2.7 million. *See Election 2008 Nevada Caucus Results*, N.Y. TIMES (Jan. 19, 2008), <http://www.nytimes.com/elections/2008/primaries/results/states/NV.html>; Tim Richardson, *Nevada Falls to No. 8 in Population Growth*, L.V. SUN (Dec. 22, 2008, 10:35 AM), <https://lasvegassun.com/news/2008/dec/22/nevada-falls-no-8-population-growth/> [https://perma.cc/2EGV-EP66].

159. Rauch, *supra* note 7.

160. *See* CAIN, *supra* note 9, at 89 (“Voters compensate for [their] knowledge deficiency by relying heavily on electoral appeals and voting cues communicated by more ‘expert’ individuals and groups through paid and unpaid media. Ballot box measures, consequently, give well-organized and well-resourced interest groups an additional avenue of influence beyond lobbying and donating to candidates.”).

161. Rauch, *supra* note 7 (describing Eric Cantor, “the Republican House majority leader who, in a shocking upset, lost to an unknown Tea Partier in his 2014 primary”). For other examples of successful incumbent challenges in primary contests brought about by ideological activists and low voter turnout, see CAIN, *supra* note 9, at 9.

but on elected officials: “Without direct control over nominations, . . . [t]he cartel-like system of party control in place during much of the nineteenth century gradually began to give way to a political marketplace that is more common in today’s largely candidate-centered electoral environment.”¹⁶²

VI. CONCLUSION

The demise of the political party is a common refrain in American political history. Many of the reforms of the Progressive era were designed to kill off what Robert LaFollette termed the “impersonal, irresponsible, extra-legal” political machine.¹⁶³ At each stage, parties proved resilient and adapted to the changed legal environment. In LaFollette’s own Wisconsin, the centerpiece of the reform effort was the open primary movement, finally approved by citizen referendum in 1904. Within a decade, however, the parties had reasserted themselves through stronger command of the patronage system and other levers of power, with LaFollette himself proving to be a master of the darker political arts.¹⁶⁴

Perhaps the apparent weakness of contemporary political parties is a phase that will pass, as has been true in the past. Perhaps. But parties are complex institutional actors that play an essential coordinating role in politics. Absent such a coordinating role, there is no particular reason for activists or funders or candidates or elected officials to harness themselves to the inevitable constraints of the party. There are many advantages to the scale of the modern political party, returning to the basic idea of the party as a political firm, but historically control over funds, government employment, and the ability to stand for office were the levers of party power. All have been compromised by legal reforms and, perhaps, we are witnessing the unraveling of the institutional form of American politics for the past two centuries.

At stake is far more than the candidacies of Trump or Sanders; Goldwater and McGovern were hardly inspired nominations at earlier times. Rather the unraveling of the integrative function of the parties means not only that the nomination process can spin out of control, but the coordination function of the unified firm is lost across the dimensions of party activity, most notably in governance. The dysfunctionality of

162. CARSON & ROBERTS, *supra* note 153, at 143.

163. MASKET, *supra* note 52, at 133 (quoting La Follette in an 1897 address).

164. *Id.* at 147.

Congress today is in no small measure the product of weak political institutions unable to cohere the disparate actors of the political arena into the ultimate aim of democratic governance. Our political entrepreneurs have developed a taste for buying, not making.

Two myths about the unruly American primary system



By Richard Pildes May 25

In yesterday's New York Times, [a story suggests](#) that after this year's election, the U.S. political parties might struggle over whether to re-design our primary system. But before we think about potential changes, let's examine the unique system we have today — and expose two myths usually told about how we got here.

Many Americans will be surprised to learn that few democracies give primary elections a dominant role in selecting their parties' nominees for the country's highest office. In most systems, elected party members take a major role in choosing or filtering potential candidates.

In Britain, for example, to be a Labour Party nominee for prime minister, you need to be nominated by 15 percent of Labour's members in Parliament; the Conservative Party members nominate just two candidates. The wider party membership then chooses from this narrowed field, although only 1 percent of registered voters are party members (compared with 60 percent or so in the United States), because party membership entails more significant obligations.

But starting in the 1970s, the United States stumbled — and I do mean stumbled — into a system that eliminated any meaningful role for party figures. Instead, unmediated popular participation, through caucuses and primary elections, came to control the way we choose presidential nominees.

That uniquely populist system, which we now take for granted, has culminated in our current, stunning moment. Two essentially freelance, independent political figures — Donald Trump and Bernie Sanders — will either represent, or come surprisingly close to representing, the nation's two major parties in the 2016 election.

Let's consider two myths usually told about how we got to this point.

Myth 1: Once upon a time, party bosses alone decided on the nominee.

For most of the 20th century, from 1912 to 1972, we used one system for presidential nominations. The conventional story about this “old” system is that party bosses got together in smoke-filled back rooms and chose the parties’ candidates, without much popular input. But that old system was actually far more complex and would be more accurately described as a “mixed system.” Starting in 1912, when Teddy Roosevelt pressed for primary elections to enable him to challenge his own party’s incumbent president, this mixed system included some primary elections, but they didn’t dominate.

As late as 1968, only 16 to 17 states used primaries. Those primaries selected fewer than half the delegates. The other delegates were institutional party figures from the national, state and local level (some chosen because of their positions in government or the party organization, others chosen through party-selection processes).

In this mixed system, the popular primaries and the party leaders checked and balanced each other’s influence. No committee designed the system in a single moment to create the “perfect” mix of popular and party roles; as often happens with democratic institutions, the system emerged from competing pressures over time.

Nonetheless, primaries kept the system from being too closed. “Outsiders” could challenge existing party hierarchy and orthodoxy and force the parties to remain responsive, at least up to a point. Meanwhile, the institutional party figures had incentives to put their weight behind candidates likely to hold the party’s factions together, run a competitive election, govern effectively and reflect the party’s general ideology.

Primaries enabled candidates to show skeptical party leaders that they could win votes — as happened when John F. Kennedy won the West Virginia primary in May 1960 and proved that voters were ready to support a Catholic. Even an insurgent candidate, such as Barry Goldwater in 1964, could successfully work the mixed system.

But no candidate could succeed without also winning over enough institutional party figures throughout the country. In 1960, for example, Kennedy won only 10 primaries. To win the nomination, he therefore had to persuade enough party regulars to back him. When candidates ran in the primaries they were always constrained to keep party regulars on board, too. Although personal appeal mattered, so did the ability to put together coalitions within the party. And party figures could bring to bear more personal knowledge than voters of how candidates actually functioned in government, which potentially could weed out nominees temperamentally unsuited to governing.

Under this system, some candidates “ran” on the inside track. For instance, the Democrats nominated Adlai Stevenson in 1952, even though he had not run in any primary. Others, such as Kennedy, effectively took advantage of the outside track to demonstrate their popular appeal. Whichever path a candidate took, this system combined populist and party-centered features.

This mixed system collapsed after 1968

This old system was dismantled, of course, after the turbulent 1968 Democratic convention in Chicago, at which the

Democratic Party was ripped apart by the Vietnam War. Outside the convention hall, there were violent confrontations between Mayor Richard Daley's police force and tens of thousands of anti-war demonstrators. Inside, many Democrats were outraged that the convention chose the establishment candidate, Vice President Hubert Humphrey, who supported the war — despite the fact that he had not won any primaries, and the party caucuses he won were even more Byzantine than those we have today.

Remarkably, that dismantling was radical and immediate, and it took a path largely unintended.

Within two election cycles, the United States had a populist-dominated selection process virtually unlike anywhere else in the world. By 1976, the system had changed completely. More than 30 states were using presidential primaries, with a majority of delegates chosen, in effect, through these primaries (today, more than 40 states use primaries).

But strikingly, this change to one of our most important democratic institutions was not the intended aim of many reformers. Indeed, this change was exactly the opposite of their intent.

Myth 2: The post-1968 reforms were designed to create a populist, primary-dominated system.

This brings us to the second myth about the history of presidential nominations. The conventional story is that after the 1968 turmoil, the Democratic Party created the all-important McGovern-Fraser Commission, which aimed to open up the process and therefore created our modern primary system. The first half of that story is true, but the second is not.

The Democratic Party indeed had to respond to demands for change and a more open selection process. But the commission was not trying to create a purely populist, primary-controlled system that essentially eliminated the voice of the institutional party figures. In fact, the commission wanted to avoid that result through reforms that would preserve a critical role for the party itself.

One of the commissioners was Austin Ranney, a prominent political scientist who throughout his career had aimed to strengthen the parties, not to hollow them out. He described the mismatch between what the commission had meant to do and what actually happened when its recommendations were implemented:

I well remember that the first thing we members of the Democratic party's McGovern-Fraser commission (1969-72) agreed on ... was that we did not want a national presidential primary or any great increase in the number of state primaries. Indeed, we hoped to prevent any such development by reforming the delegate-selection rules so that the party's non-primary process would be open and fair, participation in them would greatly increase, and consequently the demand for more primaries would fade away. ... But we got a rude shock. ... We accomplished the opposite of what we intended.

What had the commission actually intended to do? And how did we end up instead with our current primary-dominated system?

The recommended reforms aimed to make the caucus system more open, more transparent and more accessible to all Democrats. Until then, the caucuses were often open only to those who held party office. Some states chose delegates an entire year before the campaign began. Even when the caucuses were nominally open, anyone who wasn't a party official had a hard time finding out where and when they were. In some cases, different parts of the state might caucus on different days.

The McGovern-Fraser Commission recommended ways to make the caucus process more open and representative. But it did not push for a greater role for primaries, nor for reducing the institutional party's role. Indeed, the hope was that the recommended reforms would legitimize a continuing central role for the institutional party.

So why did states respond to these recommendations by shifting overwhelmingly to primary elections? That's something of a mystery, as [James Ceaser](#) notes in his magisterial history of our presidential selection processes (from which I borrow heavily here). The new caucus rules were complex. Failing to follow them properly could lead a state delegation to be disqualified at the convention. Apparently, party leaders in many states thought primaries would be simpler and safer.

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Republicans were pulled down the same path, partly because in many states in which Democrats controlled the legislature they passed laws creating a primary for both parties. And as more open and participatory Democratic processes attracted greater media attention, Republicans also felt the need to move in the same direction.

Despite its accidental birth, that's the origin of the populist, primary-dominated system we have today — a system that has virtually eliminated any filtering or mediating role for the institutional party and made our current moment possible. As this “modern” system was taking shape, leading political scientists [warned](#) that it

might lead to the appearance of extremist candidates and demagogues, who unrestrained by allegiance to any permanent party organization, would have little to lose by stirring up mass hatreds or making absurd promises.

After this fall's election, there might be pressure to recapture more of a role for the institutional parties, as well as competing

pressure to make the system even more populist and participatory. The election's outcome will have much to say about the future of our nomination process.

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