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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 twentieth-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.<sup>1</sup> 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.<sup>2</sup> Moreover, this dramatic polarization, though

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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](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.”<sup>3</sup> 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%.<sup>4</sup> Similarly, in 1970, moderates constituted 41% of the Senate; today, that proportion is 5%.<sup>5</sup> A center in America’s governing institutions has all but disappeared.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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%.<sup>12</sup> 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

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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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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

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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.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> As difficult for Obama supporters as it may be to believe, those opposed to him are as vehemently

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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.<sup>24</sup> 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.<sup>25</sup>

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: unifiers, 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

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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.<sup>26</sup> 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.<sup>27</sup> 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.”<sup>28</sup> He embraced uncharacteristic issues for a Republican, such as his

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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.<sup>29</sup> 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.”<sup>30</sup> 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.”<sup>31</sup> 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.<sup>32</sup> 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

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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.”<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> “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.<sup>36</sup> 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

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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.<sup>37</sup> 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.<sup>38</sup> 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?"<sup>39</sup> 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.<sup>40</sup> And Republicans in the House vote with somewhat greater unity than do Democrats.<sup>41</sup> But the larger truth is that the polarized political system that has been a generation in the

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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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> 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

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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.<sup>45</sup>

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 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

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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.<sup>46</sup> During this era, the largest bloc was almost always composed of conservative Republicans, even though Democrats formally controlled the House.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> 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

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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.”<sup>50</sup>

### *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.<sup>51</sup>

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

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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;<sup>52</sup> Edsall and Edsall popularized this view.<sup>53</sup> Despite the popularity of this view, the concrete evidence supporting it is not overwhelming.<sup>54</sup>

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.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup>

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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.<sup>58</sup> 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.<sup>59</sup> As one major study puts it, “[c]onscious reapportionment in the 1990s then pushed both black and white Southerners out to the extremes.”<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup>

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,

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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.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup>

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.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup>

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

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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.<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup> 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

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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](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.<sup>74</sup>

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.<sup>75</sup> 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.”<sup>76</sup>

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.<sup>77</sup> Focusing on the dramatic changes in relative economic inequality that have emerged during this same period,<sup>78</sup> 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.<sup>79</sup> 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,<sup>80</sup> 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.<sup>81</sup> But in the ensuing years, during the era of polarization, these patterns sharply changed. For example, in the 1992, 1996, and

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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.<sup>82</sup>

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.<sup>83</sup> 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.<sup>84</sup>

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.<sup>85</sup> 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.<sup>86</sup> Thus, the correlation between income and partisan voting preferences is choppier 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,

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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.<sup>87</sup> For the House, for example, primary turnout averages about one-third that of general elections.<sup>88</sup> 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.<sup>89</sup> 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

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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.<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup> 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.<sup>93</sup> 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 primary<sup>94</sup>—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.<sup>95</sup> The central justification for doing so

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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.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup>

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

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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.<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup> 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

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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.<sup>106</sup>

That California is seeking to change its politics through institutional redesign is not surprising. California has the most polarized state legislature in the country.<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup>

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.<sup>110</sup> 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.<sup>111</sup> 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

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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.<sup>112</sup> 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.<sup>113</sup> Thus, moderates might win some races they otherwise would not.<sup>114</sup> 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.<sup>115</sup>

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.<sup>116</sup> 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

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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.<sup>117</sup>

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.<sup>118</sup> 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.<sup>119</sup>

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.<sup>120</sup> 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.<sup>121</sup> 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

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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.<sup>122</sup>

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

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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.<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup> 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.<sup>127</sup> I have criticized the analysis and the outcome in the Court’s decision elsewhere.<sup>128</sup> Even accepting the decision, though, only three states used

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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.<sup>129</sup> 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.<sup>130</sup> 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.<sup>131</sup> But as more empirical work has emerged, there is less evidence than one might think to suggest that

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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.<sup>132</sup> 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”<sup>133</sup>—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

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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.<sup>134</sup> 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.<sup>135</sup> 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%.<sup>136</sup> 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

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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.<sup>137</sup> The 2002 and 2004 elections were the least competitive in post-war history.<sup>138</sup> 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.<sup>139</sup> 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.<sup>140</sup> 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.<sup>141</sup> 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

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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](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.<sup>142</sup> 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.<sup>143</sup>

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.”<sup>144</sup>

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.<sup>145</sup> 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.<sup>146</sup> 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.<sup>147</sup> 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.<sup>148</sup> Similarly, the changes that affect incumbent reelection rates vary smoothly over time, rather than showing sharp changes associated with a redistricting year.<sup>149</sup> 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.<sup>150</sup> 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.<sup>151</sup> 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.

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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.<sup>152</sup> By 2008, 60% of Senate seats were safe and only 30% were marginal.<sup>153</sup> 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.<sup>154</sup> 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.<sup>155</sup>

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,<sup>156</sup> 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.<sup>157</sup> Yet viewed in

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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.<sup>158</sup>

Members of Congress, Republican or Democratic, from competitive districts, for example, vote in only slightly less polarized patterns than members from safe seats.<sup>159</sup> 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.<sup>160</sup> 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.<sup>161</sup> 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.<sup>162</sup> 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

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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 are appears 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.<sup>163</sup>

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.<sup>164</sup> 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.<sup>165</sup> Racially polarized elections are defined as elections in which minority voters overwhelmingly prefer a particular

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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.<sup>166</sup> 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.<sup>167</sup>

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.<sup>168</sup>

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.<sup>169</sup>

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

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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.<sup>170</sup> 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.<sup>171</sup>

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

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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.<sup>172</sup> 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.<sup>173</sup> 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

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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”<sup>174</sup> run by “petty baron[.]”<sup>175</sup> 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.<sup>176</sup> The result of powerful leadership and these internal rule changes was disciplined party unity that lasted until World War I.<sup>177</sup>

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.<sup>178</sup> As more liberal Democrats entered Congress and moved the median Democratic representative to the left,

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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.<sup>179</sup> 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.<sup>180</sup> 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.<sup>181</sup>

Some apparently thought these centralizing tactics would be the monopoly of one party,<sup>182</sup> 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.<sup>183</sup> 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.<sup>184</sup> 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.<sup>185</sup> 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

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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.<sup>186</sup> 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.<sup>187</sup> 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.<sup>188</sup> Measures included the rise of the seniority system, which insulated promotion, particularly to committee chairs, from the exclusive control of a few party

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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.<sup>189</sup>

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.<sup>190</sup> 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.

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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.<sup>191</sup> Most studies find the parties have polarized almost as much in the Senate as in the House.<sup>192</sup> Moreover, a high degree of correlation exists between polarization in the two chambers.<sup>193</sup> 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.<sup>194</sup> 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.<sup>195</sup> 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

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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.<sup>196</sup> 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.<sup>197</sup> While this fact does not conclusively demonstrate that House polarization caused Senate polarization, it is suggestive.<sup>198</sup> 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.”<sup>199</sup>

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.”<sup>200</sup> The parties played

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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.<sup>201</sup> 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.<sup>202</sup>

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 races<sup>203</sup> 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.<sup>204</sup> 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.<sup>205</sup>

## 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

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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.<sup>206</sup> 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.<sup>207</sup> 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.<sup>208</sup>

Divided government has been characterized as producing a politics of “confrontation, indecision, and deadlock.”<sup>209</sup> To the extent anything gets done, diluted, discrete compromises may tend to replace ideologically coherent, large initiatives.<sup>210</sup> 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.<sup>211</sup>

But whatever the merits of that historical debate,<sup>212</sup> 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.<sup>213</sup> 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.<sup>214</sup> 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,<sup>215</sup> 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

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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.<sup>216</sup> 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.<sup>217</sup>

Thus, if polarized politics and parties are likely to endure, we might see Senate majorities seeking to modify the filibuster rule for legislation<sup>218</sup> 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.<sup>219</sup> Doing so, however, would itself require a two-thirds Senate majority.<sup>220</sup> Or the Senate could selectively disable the filibuster for additional types of legislation, as it has done already for budgetary

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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](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.<sup>221</sup>

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,”<sup>222</sup> a view endorsed by the well-known American Political Science Association Committee on Political Parties in 1950, chaired by Schattschneider.<sup>223</sup> Responsible-party government theorists, then and now, argue that strong parties with coherent, sharply differentiated ideologies are critical to a healthy democracy.<sup>224</sup> 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

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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.<sup>225</sup>

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.<sup>226</sup> 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.<sup>227</sup> In addition, turnout in the last two presidential elections has been higher than in any presidential election since 1968.<sup>228</sup> Similarly, participation in other political activities, in addition to voting, has gone way up.<sup>229</sup>

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

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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](http://elections.gmu.edu/voter_turnout.htm).

229. ABRAMOWITZ, *supra* note 2, at 159.

legislative gridlock and paralysis.<sup>230</sup> 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.<sup>231</sup>

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.<sup>232</sup> 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

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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](http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm) (last visited Feb. 17, 2011); Margaret Talev, *Senate Tied in Knots by Filibusters*, MCLATCHY (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](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.<sup>233</sup> 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

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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.”).

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.

