

## POLITICAL DYSFUNCTION AND CONSTITUTIONAL CHANGE

*Richard L. Hasen\**

### ABSTRACT

*Signs of political dysfunction abound in the United States government. Perhaps the best illustration is the ongoing fight over the U.S. budget, the national debt, and tax and entitlement reform, which has led to extraordinary—and so far unsuccessful—efforts to resolve legislative stalemate including the "supercommittee" and the "sequester." The source of these deadlocks over budget reform is hardly a mystery: it is the mismatch between highly ideological political parties and our divided form of government which makes passing legislation difficult even in the absence of partisan deadlock. The partisanship of our political branches and mismatch with our structure of government raise this fundamental question: Is the United States political system so broken that we should change the U.S. Constitution to adopt a parliamentary system—either a Westminster system as in the United Kingdom or a different form of parliamentary democracy? Such a move toward unified government would allow the Democratic Party or Republican Party to act in a unified way to pursue a rational plan on budget reform on other issues. Voters could then hold the party in power accountable if the programs it pursued were against voter preferences. It seems a more logical way to organize politics and insure that each party will have a chance to present its platform to the voters, to have that platform enacted, and to allow voters at the next election to pass on how well the party has managed the country. But changing the Constitution is a big deal. Even if a sense of national crisis and paralysis allowed an opening for parliamentary constitutional change, we should not lightly change the fundamental rules of our governance. There is a value to our constitutional tradition. Change can have unintended consequences. The country has weathered many crises under our existing form of government, and tinkering with long-term success—even given profound recent dysfunction—can be dangerous.*

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\* Chancellor's Professor of Law and Political Science, University of California, Irvine School of Law. Thanks to Steve Ansolabehere, Matt Beckman, Barry Burden, Josh Chafetz, Pat Egan, David Kimball, Seth Masket, Michael McDonald, Nate Persily, Tom Mann, and Marty Wattenberg for useful comments and suggestions. Thanks to Keith Poole for permission to reprint data and charts originally appearing at [www.voteview.com](http://www.voteview.com). This Essay was prepared for a symposium at Drake University Law School on *The U.S. Constitution and Political Dysfunction: Is There a Connection?*

*In this Essay, Richard L. Hasen briefly examines four arguments against making constitutional change to deal with current political dysfunction. The first two arguments contend that the current governmental system is not that dysfunctional. First, the current political stalemate may reflect the preferences of the median voter or the public at large. Second, the current political system actually produces a good amount of legislation, and a parliamentary democracy might produce too much rash legislation. The third argument accepts the premise that the current system is dysfunctional, but contends the dysfunction could be cured by sub-constitutional change, such as eliminating the filibuster or adopting additional open primary systems to produce more moderate candidates. The fourth argument also accepts the premise that the current system is dysfunctional, but sees that dysfunction as temporary, and expects dysfunction to be self-correcting as voters reject the current Republican Party far from the median voter, leading the Republican Party, and then Democrats, to move to the center. Evidence supporting the first three of the arguments against constitutional reform is conflicting and somewhat weak, but that the fourth argument is plausible and hard to evaluate in the midst of a potentially transformative era. Americans are in the middle of a highly partisan moment in American history but it is hard to know how long it will last. Hasen concludes it is worth waiting to see if the political system self-corrects, especially given the risks of tinkering with the constitutional system and the value of not changing our constitutional traditions lightly. Given current political dysfunction which would block a move toward a parliamentary democracy in any case, waiting not only prudent but unavoidable.*

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#### I. INTRODUCTION

Signs of political dysfunction abound in the U.S. government. Perhaps the best illustration is the ongoing fights over the federal budget, the national debt, and tax and entitlement reform.<sup>1</sup> Faced with a large gap

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1. See generally Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE

between how the Democratic and Republican parties respond to these financial problems, the country has lurched from crisis to crisis.<sup>2</sup> In 2011, Republicans in Congress refused to raise the debt ceiling absent Democratic President Barack Obama's commitment to large spending cuts.<sup>3</sup> The standoff led to an unprecedented downgrade of the United States' credit rating.<sup>4</sup> Over the last few years, normal budgetary processes have broken down, with the Democratic Senate failing to pass a budget for three consecutive years.<sup>5</sup> Senators and Representatives in Congress, as part of a compromise to get out of one of these financial crises, agreed to cut their own pay if they did not pass a budget by a particular date<sup>6</sup>—a provision that may run afoul of the Constitution.<sup>7</sup>

The path to a “grand bargain” on taxes, spending cuts, and entitlement reform has eluded Congress.<sup>8</sup> And there has not been a less-than-grand bargain to stop the successive crises.<sup>9</sup> The first way out of the partisan deadlock was supposed to be the creation of a “supercommittee” made up of congressional budget leaders from both parties who would craft a grand compromise.<sup>10</sup> That effort fell apart,<sup>11</sup> as did efforts between President Obama and Speaker of the House John Boehner to negotiate a

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DAME L. REV. 2065, 2066–67 (2013) (chronicling the recent battles over the budget and debt ceiling).

2. *See id.*

3. THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 22–23 (2012).

4. *Id.* at 25.

5. Jonathan Weisman, *Senate Passes \$3.7 Trillion Budget, Setting Up Contentious Negotiations*, N.Y. TIMES, Mar. 24, 2013, <http://www.nytimes.com/2013/03/24/us/politics/senate-passes-3-7-trillion-budget-its-first-in-4-years.html> (“After an all-night debate that ended just before 5 a.m., the Senate on Saturday adopted its first budget in four years . . .”).

6. Jeremy W. Peters, *No Pay? Little Sacrifice for Many in Congress*, N.Y. TIMES, Jan. 29, 2013, <http://www.nytimes.com/2013/01/30/us/politics/give-up-pay-many-lawmakers-would-feel-little-pain.html>.

7. *See* U.S. CONST. amend. XXVII (“No law, varying the compensation for the services of Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.”); Peters, *supra* note 6.

8. *See* MANN & ORNSTEIN, *supra* note 3, at 16 (noting how a GOP division over increased tax revenues led House Speaker John Boehner to back away from one such “grand bargain” in July 2011).

9. *See* Chafetz, *supra* note 1 (summarizing the quick succession of fiscal crises during the last two years).

10. MANN & ORNSTEIN, *supra* note 3, at 27–28.

11. *See id.* at 28–29.

grand bargain behind closed doors.<sup>12</sup>

The second way out of the deadlock was supposed to be the “sequester,” a series of automatic budget cuts that would cut indiscriminately across the federal government, including the Department of Defense.<sup>13</sup> The automatic cuts were supposed to be so unpalatable to both political parties that they would induce the political branches to negotiate a more sensible compromise on spending cuts and budget reform before the cuts went into effect.<sup>14</sup> This precommitment strategy did not go as planned either.<sup>15</sup> Congressional Republicans calculated that the sequester would be their best chance to get some spending cuts enacted, and showed no interest in negotiating a broader compromise deal that would include closing tax loopholes or otherwise raising revenue.<sup>16</sup> Republicans believed they had given away enough on taxes when, soon after President Obama’s 2012 reelection, they agreed to allow the Bush tax cuts to expire for those making over \$400,000 per year in exchange for permanently locking in place the tax cuts for everyone else.<sup>17</sup>

The source of these deadlocks over budget reform is hardly a mystery: it is the mismatch between highly ideological political parties and our divided form of government that makes passing legislation difficult even in the absence of partisan deadlock.<sup>18</sup> In brief, the civil rights movement and other forces, such as reform of the primary system, led to a party realignment beginning in the 1970s and culminating in recent years.<sup>19</sup> Conservatives left the Democratic Party, especially in the South, and liberal Republicans left or were voted out of office.<sup>20</sup> The result is the largest and most uniform gap in the ideological orientation and voting

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12. Matt Bai, *Obama vs. Boehner: Who Killed the Debt Deal?*, N.Y. TIMES, Mar. 28, 2012, <http://www.nytimes.com/2012/04/01/magazine/obama-vs-boehner-who-killed-the-debt-deal.html>.

13. Jonathan Weisman, *Answers to Questions on Capital’s Top Topic*, N.Y. TIMES, Feb. 21, 2013, <http://www.nytimes.com/2013/02/22/us/politics/questions-and-answers-about-the-sequester.html>.

14. *Id.*

15. *Id.*

16. *See id.*

17. Jennifer Steinhauer, *Divided House Passes Tax Deal in End to Latest Fiscal Standoff*, N.Y. TIMES, Jan. 1, 2013, <http://www.nytimes.com/2013/01/02/us/politics/house-takes-on-fiscal-cliff.html>.

18. *See* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 277 (2011).

19. *Id.* at 287, 298.

20. *Id.* at 290.

patterns in the Senate and the House of Representatives in modern times.<sup>21</sup>

At the same time that the parties realigned, the form of the U.S. government has remained the same: a system of government divided among the President, Senate, and House of Representatives, which requires all three to come together to pass most legislation.<sup>22</sup> When liberals and conservatives were in both parties, bipartisan compromise was easier than it is now.<sup>23</sup> Aside from the requirements of bicameralism and presentment, within the Senate and House are a series of “vetogates,” such as committee chairs, which make it easy to block legislation.<sup>24</sup> The most important vetogate—the Senate filibuster rules requiring sixty votes to get almost anything out of the chamber—has doomed a great deal of legislation and executive nominations in the last few decades as polarization and partisanship have risen, especially since the beginning of the Obama presidency.<sup>25</sup> The persistence of blockage led Congress to try extraordinary measures such as “the supercommittee”<sup>26</sup> and “the sequester.”<sup>27</sup> Yet, while these extraordinary legislative measures have become more commonplace, they have not solved the fundamental problem.

The partisanship of our political branches and the mismatch with our structure of government raise this fundamental question: Is the United

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21. I recount this history in more detail in Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550, 581–83 (2012) (reviewing LAWRENCE LESSIG, *REPUBLIC LOST: HOW MONEY CORRUPTS POLITICS—AND A PLAN TO STOP IT* (2011) and JACK ABRAMOFF, *CAPITOL PUNISHMENT: THE HARD TRUTH ABOUT WASHINGTON CORRUPTION FROM AMERICA’S MOST NOTORIOUS LOBBYIST* (2011)).

22. *The Legislative Process*, CONGRESS.GOV, <http://beta.congress.gov/legislative-process/> (last visited Sept. 17, 2013).

23. Nolan McCarty, *The Policy Effects of Political Polarization*, in *THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM* 223, 223 (Paul Pierson & Theda Skocpol eds., 2007).

24. WILLIAM N. ESKRIDGE, JR. ET. AL, *LEGISLATION AND STATUTORY INTERPRETATION* 70 (2d ed. 2006).

25. See Editorial, *Filibustering Nominees Must End*, N.Y. TIMES, Jan. 28, 2012, <http://www.nytimes.com/2012/01/29/opinion/sunday/filibustering-nominees-must-end.html>.

26. See Scott Wong & Jennifer Haberkorn, *Lawmakers Eye Super Committee*, POLITICO (Aug. 1, 2011), <http://www.politico.com/news/stories/0811/60447.html>.

27. Dylan Matthews, *The Sequester: Absolutely Everything You Could Possibly Need To Know*, in *One FAQ*, WASH. POST: WONKBLOG (Mar. 1, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/20/the-sequester-absolutely-everything-you-could-possibly-need-to-know-in-one-faq/>.

States political system so broken that we should change the Constitution to adopt a parliamentary system—either a Westminster system, as in the United Kingdom, or a different form of parliamentary democracy? Such a move toward unified government would allow the Democratic or Republican parties to act in a unified way to pursue a rational plan on budget reform and other issues. Voters could then hold the party in power accountable if the programs it pursued were against voter preferences. It seems a more logical way to organize politics and ensure that each party will have a chance to present its platform to the voters, to have that platform enacted, and to allow voters at the next election to determine how well the party has managed the country.<sup>28</sup>

But changing the Constitution is a big deal. Supermajority requirements for constitutional amendments make change very difficult—and the very dysfunction of Congress, which must approve constitutional amendments on a supermajority basis before they go to the states for ratification,<sup>29</sup> makes the ability to fix dysfunction more difficult. But even if a sense of national crisis and paralysis allowed an opening for parliamentary constitutional change, we should not lightly change the fundamental rules of our governance. There is a value to our constitutional tradition, and change can have unintended consequences. The country has weathered many crises under our existing form of government, and tinkering with long-term success, even given profound recent dysfunction, can be dangerous.

In this Essay, I briefly examine four arguments against making constitutional change to deal with current political dysfunction. The first two arguments contend that the current governmental system is not that dysfunctional. First, the current political stalemate may reflect the

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28. As Tom Mann and Norman Ornstein put it:

A Westminster-style parliamentary system provides a much cleaner form of democratic accountability than the American system. A party or coalition of parties forms a government after an election and is in a position in parliament to put most of its program in place. The minority party will be aggressively adversarial, but it is unable to indefinitely delay or defeat the government's program. When the next election arrives . . . , there is no confusion in the public over which party is to be held accountable. If the government is thrown out of office, the minority party can govern on its own terms, within an institutional setting and political culture that accepts the legitimacy of the new government and the policy changes that will follow.

MANN & ORNSTEIN, *supra* note 3, at 198.

29. See U.S. CONST. art. V.

preferences of the median voter or the public at large.<sup>30</sup> Second, the current political system actually produces a good amount of legislation, and a parliamentary democracy might produce too much rash legislation.<sup>31</sup> The third argument accepts the premise that the current system is dysfunctional, but contends the dysfunction could be cured by sub-constitutional change, such as eliminating the filibuster or adopting additional open primary systems to produce more moderate candidates.<sup>32</sup> The fourth argument also accepts the premise that the current system is dysfunctional, but it sees that dysfunction as temporary.<sup>33</sup> This argument expects dysfunction to be self-correcting as voters reject the current Republican Party—which is far from the median voter—thus leading the Republican Party, and then Democrats, to move to the center.<sup>34</sup>

Evidence supporting the first three of the arguments against constitutional reform is conflicting and somewhat weak, but the fourth argument is plausible and hard to evaluate in the midst of a potentially transformative era. We are in the middle of a highly partisan moment in American history, but it is hard to know how long it will last. I conclude it is worth waiting to see if the political system self-corrects, especially given the risks of tinkering with the constitutional system and the value of not changing our constitutional traditions lightly. Given current political dysfunction, which would block a move toward a parliamentary democracy in any case, waiting is not only prudent but unavoidable.

## II. GIVE THE PEOPLE WHAT THEY WANT

It is hard to believe that anyone actually *wants* the level of stalemate and brinksmanship we have seen in recent years in national politics. After all, the entire country suffers when, for example, ratings agencies downgrade our credit rating because the government appears weak and ineffectual.<sup>35</sup>

Dismal congressional approval ratings point to serious dissatisfaction

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30. *See infra* Part II.

31. *See infra* Part III.

32. *See infra* Part IV.

33. *See infra* Part V.

34. *See infra* Part V.

35. *See* MANN & ORNSTEIN, *supra* note 3, at 4 (discussing the disruption of the financial markets and the economy caused by “less stable, less effective, and less predictable” governance (quoting *Downgrading Our Politics*, ECONOMIST: FREE EXCHANGE (Aug. 6, 2011), <http://www.economist.com/blogs/freeexchange/2011/08/sps-credit-rating-cut>)).

with Congress as a whole.<sup>36</sup> Approval for Congress dropped to an abysmal 10 percent in February 2012.<sup>37</sup> Support for one's individual member of Congress is high, however, suggesting that many voters are satisfied with the ideological position and job of their own member,<sup>38</sup> but not with the legislative output (or non-output) of Congress overall.<sup>39</sup> Democrats and liberals want the government to pursue a set of issues that they "own," while Republicans want the government to pursue a different, and mostly contradictory, set of issues.<sup>40</sup> Stalemate means that neither party gets much of what it wants.

Nonetheless, some observers believe that voters want divided government to check the excesses of both political parties. As Jonathan Rauch puts it, "In the last two decades, a strong and persistent pattern has emerged, one that will dominate our politics for some time to come, because it is rooted in two important political realities. First, the public strongly prefers divided government. Second, it has every reason to."<sup>41</sup> My intuition is that those espousing this normative position—that divided government is desirable—are also more apt to think that the public likes

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36. See *id.* at xii. For a discussion on how the public evaluates congressional approval generally and on its connection to the reelection chances of particular members, see generally DAVID R. JONES & MONIKA L. MCDERMOTT, *AMERICANS, CONGRESS, AND DEMOCRATIC RESPONSIVENESS: PUBLIC EVALUATIONS OF CONGRESS AND ELECTORAL CONSEQUENCES* (2009).

37. Frank Newport, *Congress' Job Approval at New Low of 10%*, GALLUP POL. (Feb. 8, 2012), <http://www.gallup.com/poll/152528/Congress-Job-Approval-New-Low.aspx>.

38. See Stephen Ansolabehere & Philip Edward Jones, *Constituents' Responses to Congressional Roll-Call Voting*, 54 AM. J. POL. SCI. 583, 592 (2010) ("The analyses show strong evidence that constituents choose Representatives with whom they agree on public policies and vote against those with whom they disagree.").

39. See Scott Clement, *Fire Congress, but Not My Congressman*, WASH. POST: BEHIND THE NUMBERS (Dec. 9, 2011), [http://www.washingtonpost.com/blogs/behind-the-numbers/post/poll-watcher-fire-congress-but-not-my-congressman/2011/12/01/gIQAal6giO\\_blog.html](http://www.washingtonpost.com/blogs/behind-the-numbers/post/poll-watcher-fire-congress-but-not-my-congressman/2011/12/01/gIQAal6giO_blog.html) (noting that a 2011 poll showed 51% of voters believed their own member of Congress deserved reelection, but only 20% of voters believed most members of Congress deserved reelection); see also Aaron Blake, *Americans Love Government—As Long as It's Their Own*, WASH. POST: THE FIX (Apr. 15, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/04/15/americans-love-government-as-long-as-its-their-own/> ("Congress as a whole is less popular than head lice, brussels sprouts and—perhaps most illustrating—Nickelback.").

40. PATRICK J. EGAN, *PARTISAN PRIORITIES: HOW ISSUE OWNERSHIP DRIVES AND DISTORTS AMERICAN POLITICS* 184 (2013).

41. Jonathan Rauch, Op-Ed., *Divided We Thrive*, N.Y. TIMES, Nov. 6, 2010, <http://www.nytimes.com/2010/11/07/opinion/07rauch.html>.

divided government.

There are good reasons to doubt Rauch's empirical claim that the public prefers divided government. One imperfect way of thinking about this question is looking at the number of voters who split their tickets for President and Congress.<sup>42</sup> Some split ticket voters could be doing so out of a desire to create divided government; others may simply be voting for their first choices for each office independently, not considering the implications for divided government.

If Rauch is right that the public strongly prefers divided government, congressional approval should not be so low—voters should be liking the (non-) output. Further, split ticket voting should be on the rise as voters try to keep government divided.

But the evidence is to the contrary. As Figure 1 shows, according to American National Election Studies data, approximately 15% of voters in the 1950s split their tickets.<sup>43</sup> The rate of split ticket voting spiked in the 1960s and 1970s, at one point hitting 30%,<sup>44</sup> as many more people voted for a Republican presidential candidate and a Democratic member of Congress during the party realignment in the South.<sup>45</sup> But since the early 1990s, with realignment completing and conservatives coalescing in the Republican Party, the split ticket voting rate has consistently stayed below 20%, and in 2012, hit a modern low of 10%.<sup>46</sup> If voters really liked the idea

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42. This way of thinking is not perfect for two reasons. First, a voter votes for an individual member of Congress knowing that member is very unlikely to be the one who tips the chamber to one party or another. Second, voters know that their votes are extremely unlikely to tip the congressional race in which they are voting.

43. *The ANES Guide to Public Opinion and Electoral Behavior: Split Ticket Voting Presidential/Congressional 1952–2008*, AM. NAT'L ELECTION STUD. (Aug. 5, 2010), [http://www.electionstudies.org/nesguide/text/tab9b\\_2.txt](http://www.electionstudies.org/nesguide/text/tab9b_2.txt) [hereinafter *The ANES Guide*]; see *infra* Figure 1.

44. See *infra* Figure 1.

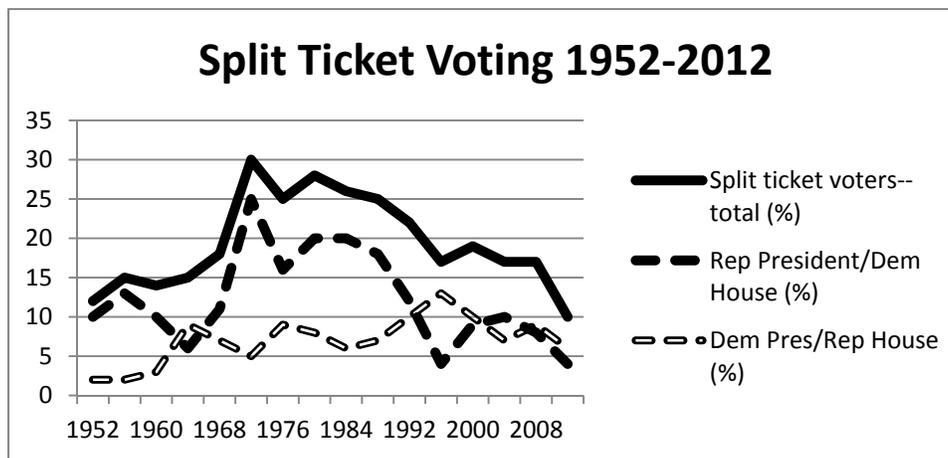
45. The rates of Southern voters voting for a Republican presidential candidate and a Democratic congressional candidate declined markedly in the 1990s. *The ANES Guide to Public Opinion and Electoral Behavior: Split Ticket Voting Presidential/Congressional 1952–2008, Percent Among Demographic Groups Who Responded: 'Rep. Pres./Dem. Congr.'*, AM. NAT'L ELECTION STUD. (Aug. 5, 2010), [http://www.electionstudies.org/nesguide/2ndtable/t9b\\_23.htm](http://www.electionstudies.org/nesguide/2ndtable/t9b_23.htm). This likely happened as conservative Southerners choosing Republican presidential candidates began voting for Republican congressional candidates as well, as Democratic candidates retired, switched parties, or were defeated.

46. See *infra* Figure 1; see generally BARRY C. BURDEN & DAVID C. KIMBALL, WHY AMERICANS SPLIT THEIR TICKETS: CAMPAIGNS, COMPETITION, AND

of divided government and the dysfunction it produces, the rate of split-ticket voting should be on the rise as voters seek to replicate and solidify the current political stalemate.<sup>47</sup>

On the other hand, given the current polarization between the parties, split-ticket voters today are more likely than in the past to be choosing ideological opposites, showing a greater desire for divided government.

FIGURE 1.<sup>48</sup>



DIVIDED GOVERNMENT (2002) (providing a broad discussion on the use and decline of split-ticket voting). The availability of straight-ticket voting options has a significant impact on split-ticket voting. See Stephen Ansolabehere et al., *What Did the Direct Primary Do to Party Loyalty in Congress?*, in 2 PARTY, PROCESS, AND POLITICAL CHANGE IN CONGRESS 21, 35 (David W. Brady & Mathew D. McCubbins eds., 2007) (discussing the nearly double effect of straight-ticket voting devices on split-ticket voting compared to the effect of direct primaries). The decline in straight-ticket voting options for voters makes split-ticket voting easier than ever, which suggests split-ticket voting should rise. Additionally, putting aside the possibility of protest votes, it is worth noting that voters who choose a third-party or independent presidential candidate necessarily are voting in favor of divided government, as there is no chance their candidate's party will control either chamber of Congress.

47. *But see infra* Figure 1.

48. The ANES data used in Figure 1 on split ticket voting from 1952 to 2008 appear in a table posted at *The ANES Guide*, *supra* note 43. Professor David Kimball computed the 2012 data using the August 2013 release of the ANES 2012 data. See E-mail from David Kimball, Professor, Dep't of Political Sci., Univ. of Mo., to author (Sept. 24, 2013) (on file with author).

Another way of thinking about voters' desire for divided government is to consider direct polling on the question of its desirability. Gallup has been polling the question about divided government since 2002.<sup>49</sup> In its most recent poll in 2012, only 23% of voters favored divided government, compared to 38% who thought it better when the President and Congress were from the same party, and 33% who said it made no difference.<sup>50</sup>

As the Gallup analysis pointed out, a voter's views on this question depended a great deal on the current political situation and intimated that voters may be even less enamored with divided government than first appears.<sup>51</sup> In 2006, when George W. Bush was president, 38% of Democrats—compared to only 15% of Republicans—favored divided government.<sup>52</sup> In contrast, in 2010 with President Obama in office, only 13% of Democrats compared to 44% of Republicans favored divided government.<sup>53</sup> The polling suggests *not* that Americans like divided government, *but* that given the identity of the President, voters from the other party want a congressional majority from their party to check executive power. As further proof against Rauch's claim that the American public "strongly prefers" divided government, in 2010 the number of voters believing that divided or unified party government makes no difference for public policy hit an all-time high of 40%.<sup>54</sup>

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49. See Andrew Dugan, *Americans' Preference Shifts Toward One-Party Government*, GALLUP POLITICS (Sept. 27, 2012), <http://www.gallup.com/poll/157739/americans-preference-shifts-toward-one-party-government.aspx> (tracking survey data from 2002 to 2012); *infra* Figure 2.

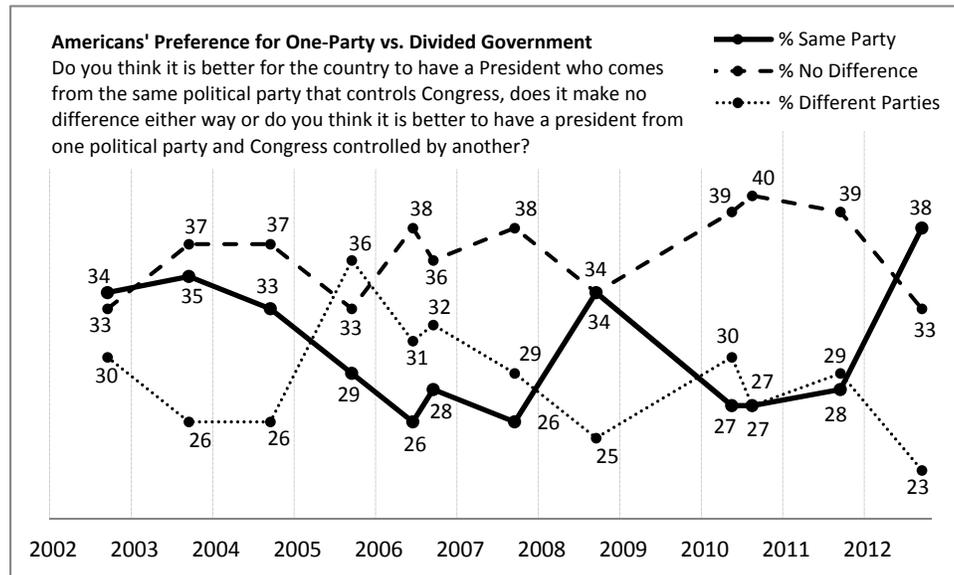
50. See *infra* Figure 2. The question read: "Do you think it is better for the country to have a president who comes from the same political party that controls Congress, does it make no difference either way or do you think it is better to have a president from one political party and Congress controlled by another?" Dugan, *supra* note 49.

51. See Dugan, *supra* note 49.

52. *Id.*

53. *Id.* In 2006, 36% of self-identified "Independents" favored divided government. *Id.* That figure was 34% in 2010, and 30% in 2012. *Id.*

54. See *id.*; Figure 2. The number has since retreated to tie its all-time low of 33% in 2012. See *infra* Figure 2.

FIGURE 2.<sup>55</sup>

Interestingly, the American National Election Studies (ANES) data on public preferences shows more public support for divided government than reflected in the Gallup surveys.<sup>56</sup> Some of the difference in polling may be attributable to different wording of the questions in each survey.<sup>57</sup> In any case, it is not clear whether ANES respondents who like divided government actually vote for split tickets.<sup>58</sup> Voters may express a desire for

55. *Id.*

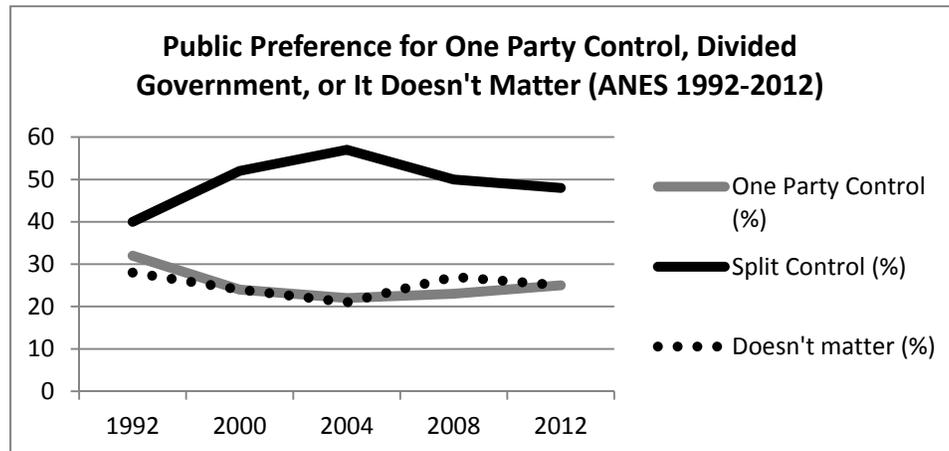
56. *See infra* Figure 3.

57. *Compare* AM. NAT'L ELECTION STUDIES, USER'S GUIDE AND CODEBOOK FOR THE ANES 2012 TIME SERIES STUDY 291 (2013), available at [http://www.electionstudies.org/studypages/anes\\_timeseries\\_2012/anes\\_timeseries\\_2012\\_userguidecodebook.pdf](http://www.electionstudies.org/studypages/anes_timeseries_2012/anes_timeseries_2012_userguidecodebook.pdf) ("Do you think it is better when ONE PARTY CONTROLS both the presidency and Congress, better when CONTROL IS SPLIT between Democrats and Republicans, or DOESNT [sic] IT MATTER?"), with Dugan, *supra* note 49.

58. *Compare* Lee Sigelman, Paul J. Wahlbeck & Emmett H. Buell, Jr., Vote Choice and the Preference for Divided Government: Lessons of 1992, 41 AM. J. POL. SCI. 879, 889 (1997) (finding no connection between a desire for divided government and split-ticket voting), with Michael S. Lewis-Beck & Richard Nadeau, Split-Ticket Voting: The Effects of Cognitive Madisonianism, 66 J. POL. 97, 110 (2004) (finding a

divided government in surveys but do not necessarily vote that way.

**FIGURE 3.**<sup>59</sup>



correlation and noting that “[v]oters who say they want to split control [between different parties] tend to vote that way, and that relationship holds up under extensive testing”).

59. For the 1992 data, see James C. Garand & Marci Glascock Lichtl., *Explaining Divided Government in the United States: Testing an Intentional Model of Split-Ticket Voting*, 30 BRIT. J. POL. SCI. 173, 174 (2000). For the 2000 data, see *Preference for Divided Government*, SDA: SURV. DOCUMENTATION & ANALYSIS: 2000 AM. NAT’L ELECTION STUDY at v397, (2000) <http://sda.berkeley.edu/cgi-bin/hsda3?sdaprogram=describe&var=v397&sdapath=%2Fvar%2Fwww%2Fsdaprogs%2Fsd&study=%2Fvar%2Fwww%2Fhtml%2FD3%2FNES2000%20%2Fvar%2Fwww%2Fhtml%2FNpubvars%2FNES2000&varcase=lower&subtmpdir=%2Fvar%2Fwww%2Fhtml%2FTMPDIR>. For the 2004 data, see *Better when One Party Controls Presidency and Congress*, SDA: SURV. DOCUMENTATION & ANALYSIS: 2004 AM. NAT’L ELECTION STUDY at v3060 (2004), <http://sda.berkeley.edu/cgi-bin/hsda3?sdaprogram=describe&var=v3060&sdapath=%2Fvar%2Fwww%2Fsdaprogs%2Fsd&study=%2Fvar%2Fwww%2Fhtml%2FD3%2FNES2004public%20%2Fvar%2Fwww%2Fhtml%2FNpubvars%2FNES2004public&varcase=lower&subtmpdir=%2Fvar%2Fwww%2Fhtml%2FTMPDIR>. For the 2008 data, see *Is It Better when One Party Controls Presidency and Cong*, SDA: SURV. DOCUMENTATION & ANALYSIS: 2008 AM. NAT’L ELECTION STUDY at v083053 (2009), <http://sda.berkeley.edu/cgi-bin/hsda3?sdaprogram=describe&var=v083053&sdapath=%2Fvar%2Fwww%2Fsdaprogs%2Fsd&study=%2Fvar%2Fwww%2Fhtml%2FD3%2FNES08new%20%2Fvar%2Fwww%2Fhtml%2FNpubvars%2FNES08new&varcase=lower&subtmpdir=%2Fvar%2Fwww%2Fhtml%2FTMPDIR>. For the 2012 data, see AM. NAT’L ELECTION STUDIES, *supra* note 57, at 291.

In sum, the evidence on split-ticket voting, the direct evidence of public opinion on divided government, and the public approval ratings of Congress do not suggest that the American people are clamoring for the kind of partisan division and dysfunction we see now in the federal government. Moreover, some of the people who say they like divided government appear to be saying it because they want a check on the President from the other party rather than because they want the parties to check each other all of the time.<sup>60</sup> If the President were from the voter's party, then united government would suit that voter just fine.<sup>61</sup> The best that can be said about the evidence is that there simply is no agreement among the American public as to the best way to resolve the most contested issues in politics, and that without public agreement we should not expect Congress to agree.<sup>62</sup> There is generally no greater support for unified government than divided government.<sup>63</sup> That conclusion, however, is not the same as saying that a majority of the public is happy with the current political situation.

### III. DYSFUNCTION? WHAT DYSFUNCTION?

A second argument against changing the current federal political branches into a parliamentary democracy focuses not on public satisfaction with divided government or Congress but instead with the quality of legislative output.<sup>64</sup> Yale political scientist David Mayhew is probably most associated with the view that congressional output has been satisfactory even during times of divided government. In particular, he finds that Congress has persisted in passing "major legislation" during periods of intensely divided government.<sup>65</sup>

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60. Jones, *supra* note 52.

61. *See id.*; *see also* Dugan, *supra* note 49 (showing that preference for united government was at an all-time high shortly before President Obama's reelection).

62. Chafetz, *supra* note 1, at 2080.

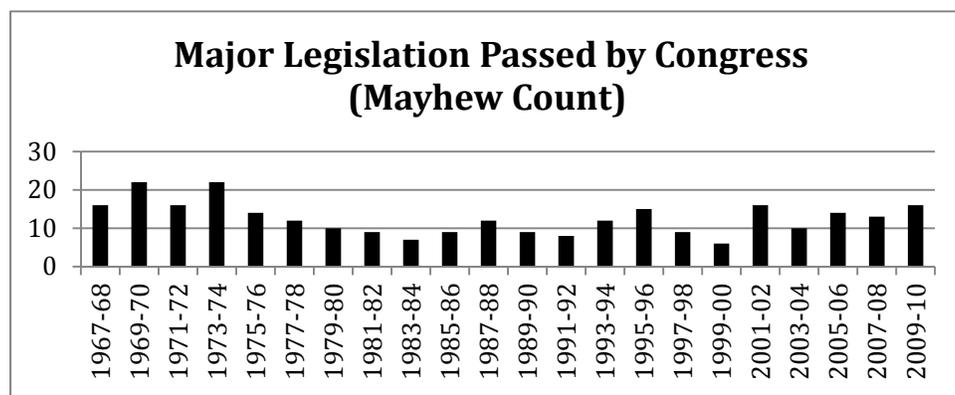
63. *See* Dugan, *supra* note 49; *supra* Figure 2.

64. I draw some of the discussion below from Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205 (2013).

65. *See generally* DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002* (2d ed. 2005) [hereinafter MAYHEW 2005]. Mayhew originally compiled data on major legislation through 1990 for his book, DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–1990* (1991), and posted that data, along with updates on major legislation (for the second edition of his book) through 2012 on his website. David Mayhew, *Datasets and Materials: Divided We Govern*, <http://davidmayhew.commons.yale.edu/datasets-divided-we-govern/> (last visited Sept.

As Figure 4 below demonstrates, there has been a decline in Mayhew's major legislation figures since the boom in the late 1960s and early 1970s.<sup>66</sup> But since the 1970s, rates of major legislation have been pretty stable, even rising slightly in the last few decades: 9.2 pieces of major legislation per Congress in the 1980s, 10 per Congress in the 1990s, and 13.8 per Congress in the 2000s.<sup>67</sup>

**FIGURE 4.**<sup>68</sup>



Mayhew's figures suggest that the amount of dysfunction is exaggerated, but these figures may be misleading. To begin with, it is not clear that the term *major legislation* has been applied consistently over time.<sup>69</sup> Legislation may get major status only in comparison to the other things that Congress has done in the same Congress; what might seem major today could be relatively minor compared to major legislation in prior years.

17, 2013).

66. *See infra* Figure 4.

67. *See infra* Figure 4.

68. *See Datasets and Materials: Divided We Govern, supra* note 65 (compiling data found through the links to "List of Important Enactments" 1947–2010).

69. Mayhew himself tried to take the change in which legislation should be considered "major" over time into account by including in his count of "important laws enacted" both enactments that were thought to be important near the time they were passed and enactments that have been particularly notable retrospectively. *See* MAYHEW 2005, *supra* note 65, at 37–50.

Within political science there is considerable controversy—beyond the scope of this short Essay—over the usefulness of this measure of legislative output.<sup>70</sup> A cursory look at Mayhew’s list<sup>71</sup> reveals that not all major legislation is equally important, and Congress always has an incentive to pass *some* legislation to show that Congress is “working.” For this reason, a simple count of “major legislation” could be a misleading measure of significant congressional output. In part, it may depend upon whether circumstances call upon Congress to pass major legislation. Further, Congress sometimes passes major legislation in response to major external events (such as the September 11, 2001, terrorist attacks in New York or the 2008 financial crisis) but cannot pass much major legislation otherwise.<sup>72</sup> A Congress that primarily acts only in times of crisis might produce a fair amount of major legislation,<sup>73</sup> but it is not a normally-working legislative body.

In any case, high polarization within Congress does not always mean legislative stalemate or gridlock. In the relatively rare periods of united government—President, House, and Senate of the same party, with the Senate at or close to a 60-vote majority—parties will act quickly to enact as much of their agenda as possible. As Josh Chafetz observed about the 111th Congress (2009–2010), dominated by Democrats:

[T]he 111th Congress was tremendously prolific. A very abbreviated list of its major accomplishments includes legislation making it easier for plaintiffs to recover in instances of pay discrimination; a massive fiscal stimulus that had the collateral effect of advancing a wide range

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70. See SARAH A. BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK* 79 (2003) (noting that Mayhew and his critics disagree on whether the consequence of major legislation differs in times of divided or united government). For a discussion on the relationship between Mayhew’s “important” laws and political polarization, see McCarty, *supra* note 23, at 237–40, and NOLAN MCCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 181–83 (2006). Overall “[p]olarization appears to reduce output across a broad spectrum of possible legislation.” MCCARTY ET AL., *supra*, at 183.

71. See *Datasets and Materials: Divided We Govern*, *supra* note 65 (evaluating the data in the six “List of Important Enactment” hyperlinks).

72. See, e.g., USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). According to Mayhew’s count, only two of the seven important enactments in 2001 were not in response to the events of September 11, 2001. See MAYHEW 2005, *supra* note 65, at 212 tbl.E.2.

73. See MAYHEW 2005, *supra* note 65, at 212 tbl.E.2 (finding Congress had passed seven pieces of major legislation in 2001, six of which were enacted after September 11, 2001).

of domestic policy goals; the largest expansion of the social safety net since (at least) the Great Society, in the form of the provision of near-universal health insurance; a massive restructuring of student loans; the largest overhaul of financial regulation since the Great Depression; a significant reduction in the crack-cocaine sentencing disparity; the repeal of the military's "Don't Ask, Don't Tell" policy regarding homosexual service members; the most sweeping reform of food safety laws in decades; and the ratification of a major nuclear arms reduction treaty. Whatever one thinks about the policy merits of particular items on that list, it is hard to describe the output as anything less than substantial.<sup>74</sup>

The stalling and lurching between periods of divided and united government, when aggregated together, can mask some of the dysfunction of Congress overall. The 112th Congress (2011–2012), again divided by party, achieved much less than the united 111th Congress: patent reform and free trade agreements with South Korea, Colombia, and Panama are the greatest legislative accomplishments Chafetz can point to from this congressional session, aside from emergency temporary legislation to deal with financial crises of Congress's own making.<sup>75</sup>

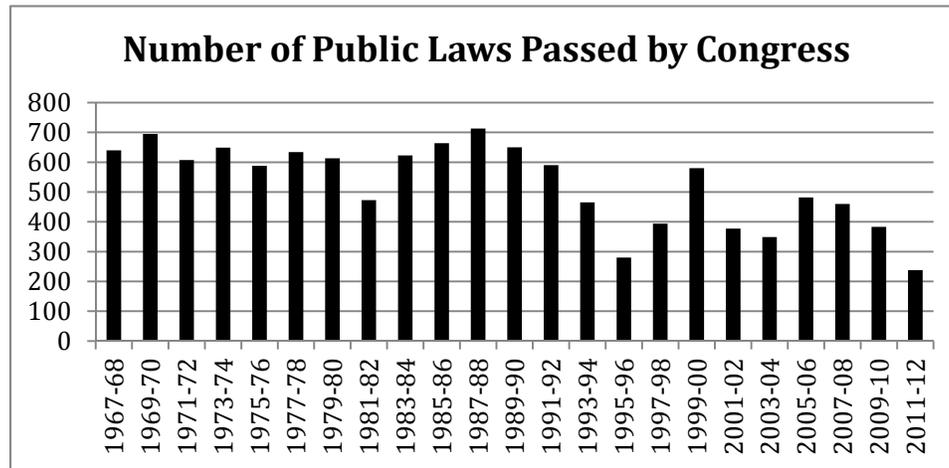
A further measure of possible dysfunction is total—as opposed to “major”—legislative output. Regarding that score, as Figure 5 shows, the 112th Congress had the lowest legislative output in modern times.<sup>76</sup>

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74. Chafetz, *supra* note 1, at 2078 (footnotes omitted).

75. *Id.* at 2079 (footnotes omitted). Chafetz does note that despite the electoral backlash following the 111th Congress, “there was significantly less democratic impetus for specific legislative action in the 112th Congress than its predecessor.” *Id.*

76. See *infra* Figure 5; see also Thomas E. Mann & Norman J. Ornstein, Op-Ed., *Five Myths About the 112th Congress*, WASH. POST (Jan. 4, 2013), [http://www.washingtonpost.com/opinions/five-myths-about-the-112th-congress/2013/01/04/9aa40962-55c6-11e2-bf3e-76c0a789346f\\_story.html](http://www.washingtonpost.com/opinions/five-myths-about-the-112th-congress/2013/01/04/9aa40962-55c6-11e2-bf3e-76c0a789346f_story.html) (comparing the 112th Congress to the 80th “do nothing” Congress during the Truman era and finding the comparison “completely unfair—to the 80th Congress”).

**FIGURE 5.**<sup>77</sup>

The quantitative decline in legislation reveals only a part of the 112th Congress's dysfunction. Qualitatively, in the last Congress, many of the measures Congress passed were temporary stopgap measures, not following the usual rules of congressional order, and not passed as long-term solutions to major problems.<sup>78</sup> The temporary solutions were not “miracles” as Chafetz argues,<sup>79</sup> but signs of something gone terribly wrong. The decline of regular order—with bills passing through committees in each chamber, presented to a conference committee, and then signed by the president—was a strong sign that it has not been business as usual in the Congress.

Dysfunction is no surprise, as the 112th Congress was the most ideologically and politically polarized on record.<sup>80</sup> “Instead of producing

77. I compiled the data using the *Résumé of Congressional Activity* for each Congress posted at *Résumé of Congressional Activity*, U.S. SENATE, [http://www.senate.gov/pagelayout/reference/two\\_column\\_table/Resumes.htm](http://www.senate.gov/pagelayout/reference/two_column_table/Resumes.htm) (last visited Sept. 17, 2013).

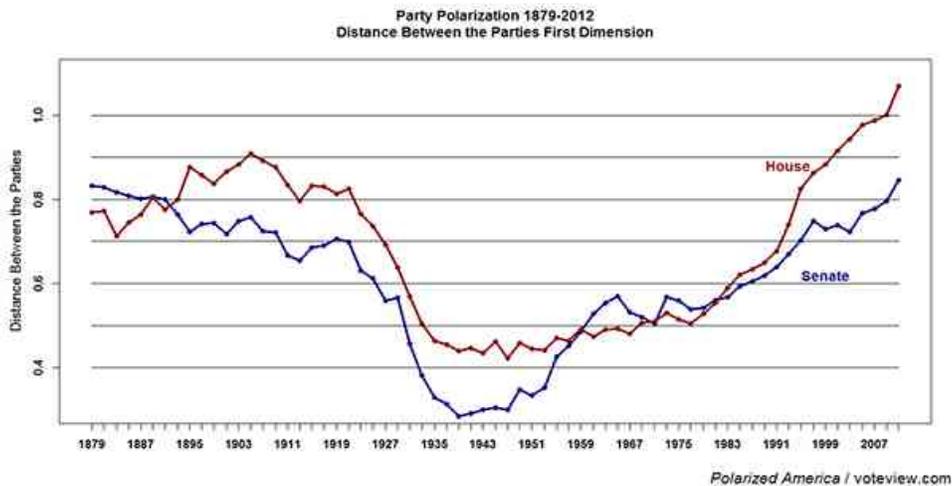
78. See, e.g., Chafetz, *supra* note 1, at 2066–68 (highlighting the numerous temporary budget and fiscal measures passed by the 112th Congress).

79. See *id.* (manuscript at 2).

80. Dylan Matthews, *It's Official: The 112th Congress Was the Most Polarized Ever*, WASH. POST: WONKBLOG (Jan. 17, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/17/its-official-the-112th-congress-was-the-most-polarized-ever/>.

legislation the old-fashioned way, Republicans and President Obama jostled over a series of deadlines—expiring funding for federal agencies, exhausting Treasury’s borrowing authority, expiring tax cuts—that led to a recurring series of crises that left Congress deeply unpopular.”<sup>81</sup> The current disparity can be seen in Figure 6, showing the Keith Poole and Howard Rosenthal DW-Nominate scores measuring the polarization of the political parties in Congress.<sup>82</sup>

**FIGURE 6.**<sup>83</sup>



The deepening divide within Congress also has had an effect on the separation of powers, increasing the power of the other two branches of government compared to Congress. The Supreme Court has gained a great deal of power, as Congress now acts much less frequently to override Supreme Court statutory decisions. As Figure 7 illustrates, Congress overrode an average of twelve cases per two-year congressional term

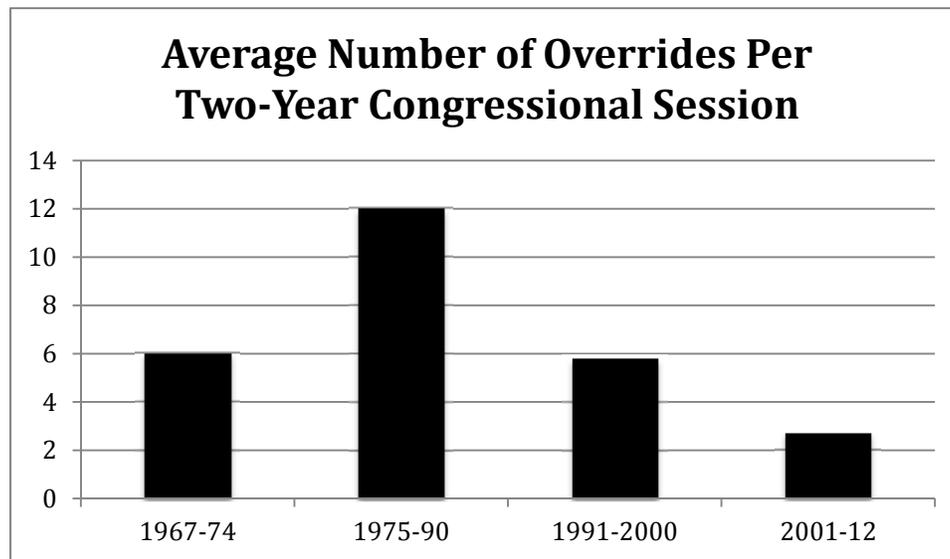
81. Paul Kane, *Congress’s Committee Chairmen Push to Reassert Their Power*, WASH. POST (Feb. 16, 2013), [http://www.washingtonpost.com/politics/congress-committee-chairman-push-to-reassert-their-power/2013/02/16/2acb7770-6a6a-11e2-af53-7b2b2a7510a8\\_story.html](http://www.washingtonpost.com/politics/congress-committee-chairman-push-to-reassert-their-power/2013/02/16/2acb7770-6a6a-11e2-af53-7b2b2a7510a8_story.html).

82. See *infra* Figure 6.

83. *An Update on Political Polarization Through the 112th Congress*, VOTEVIEW BLOG (Jan. 16, 2013), <http://voteview.com/blog/?p=726> [hereinafter *Update on Political Polarization*].

before 1990; overrides then fell to 5.8 per Congress from 1991–2000 and fell even further to 2.8 overrides per Congress from 2001–2012.<sup>84</sup>

FIGURE 7.<sup>85</sup>



The President, too, has gained power at the expense of Congress, in foreign affairs and domestically—through executive orders, agency decisions, and other unilateral action.<sup>86</sup> Although the trend could be reversed, congressional power is diminishing.

In sum, it is hard to make a case against congressional dysfunction by pointing to the total amount of legislation or major legislation passed by Congress. Qualitatively and quantitatively, we see declines in the work product of Congress and a decline in Congress's power compared to the other branches. The cause appears to be increasing polarization.

84. Hasen, *supra* note 64, at 209; *see infra* Figure 7.

85. Hasen, *supra* note 64, at 218 fig.1.

86. *See* Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 762 (2012); Hasen, *supra* note 64, at 208 n.15.

## IV. THE MODEST NUCLEAR OPTION

A third argument against moving the United States to a parliamentary system acknowledges the dysfunction of the current system, but blames that dysfunction on sub-constitutional rules and practices. These rules and practices include the Senate filibuster (which effectively blocks any significant legislation unless it garners the votes of sixty Senators); rules making it difficult for members of the Senate minority party to offer floor amendments; the decline of regular order and the tyranny of the majority in the House; and election rules, such as closed primaries, which purportedly make it harder for moderate candidates to win primaries, get elected to Congress, and engage in bipartisan compromise. Josh Chafetz<sup>87</sup> and Jack Balkin<sup>88</sup> both point to potential sub-constitutional sources of dysfunction. Mann and Ornstein suggest a host of sub-constitutional changes such as open primaries, eased voter registration, and redistricting reform to deal with political dysfunction rather than parliamentary-style reform.<sup>89</sup>

There is no question that the *means* by which current political dysfunction manifests itself is through the filibuster in the Senate and through the breakdown of regular order in the House. Further, in both chambers the minority claims that the majority imposes unfair rules under which the minority chafes.<sup>90</sup> The bigger question is one of endogeneity: rather than seeing these problems as a *cause* of dysfunction, they are better thought of as dysfunction's *manifestation*.

To explain, there is no question that senators (usually from the minority party) have dramatically increased use of the filibuster, effectively

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87. Chafetz, *supra* note 1, at 2082–84 (describing the filibuster's role as one of the consensus-frustrating procedural mechanisms).

88. Jack Balkin, *Dysfunctional Constitution or Regime Change?*, BALKINZATION (Jan. 30, 2013), <http://balkin.blogspot.com/2013/01/dysfunctional-constitution-or-regime.html> (suggesting changes to form of primary, filibuster and hold rules, and campaign financing as means of addressing dysfunction).

89. MANN & ORNSTEIN, *supra* note 3, at 131–78. I argue that these fixes would be insufficient to address current congressional polarization in Hasen, *supra* note 21, at 584–85.

90. See, e.g., Ginger Gibson, *Democrats Call for Regular Budget Order*, POLITICO (Apr. 24, 2013), <http://www.politico.com/story/2013/04/harry-reid-regular-budget-order-90493.html> (discussing the House minority's criticism of the majority's obstruction of regular order); Manu Raju, *Mitch McConnell Blows Up at Harry Reid Over Filibuster Rules*, POLITICO (July 18, 2012), <http://www.politico.com/news/stories/0712/78665.html> (discussing the Senate minority leader's reaction to the majority leader's desire to change the filibuster rules).

imposing a supermajority (sixty-vote) requirement to pass any legislation or executive nomination of significance. The use of the filibuster has dramatically risen, especially in the Obama era.<sup>91</sup> The effect of the sixty-vote cloture rule may be understated;<sup>92</sup> virtually everything that does not get filibustered or subjected to a cloture rule *also* must make it over the sixty-vote hurdle.

Over the course of two books, Tom Mann and Norm Ornstein describe the breakdown of norms in the House and the decline of regular order. In their first book, *The Broken Branch*,<sup>93</sup> the authors

documented the demise of regular order, as Congress bent rules to marginalize committees and deny the minority party in the House the opportunity to offer amendments on the floor; the decline of genuine deliberation in the lawmaking process on such important matters as budgets and decisions to go to war; the manifestations of extreme partisanship; the culture of corruption; the loss of institutional patriotism among members; and the weakening of the checks-and-balances system.<sup>94</sup>

In their sequel, *It's Even Worse Than It Looks*, the authors examine the behavior of Republicans in the House and Senate during the Obama administration, concluding that they engaged in “hostage-taking” and made the situation far more dysfunctional than it was before 2008.<sup>95</sup>

Further, in the current political divide, even when the Democratic-dominated Senate can overcome the sixty-vote requirement and pass legislation, it is often legislation with no chance of passing the Republican-

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91. See Ezra Klein, *The History of the Filibuster, in One Graph*, WASH. POST: WONKBLOG (May 15, 2012), [http://www.washingtonpost.com/blogs/wonkblog/post/the-history-of-the-filibuster-in-one-graph/2012/05/15/gIQAVHf0RU\\_blog.html](http://www.washingtonpost.com/blogs/wonkblog/post/the-history-of-the-filibuster-in-one-graph/2012/05/15/gIQAVHf0RU_blog.html).

92. See *id.*

93. THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2008).

94. MANN & ORNSTEIN, *supra* note 3, at xi; see generally MANN & ORNSTEIN, *supra* note 93.

95. See MANN & ORNSTEIN, *supra* note 3, at 1–30 (detailing the debt ceiling clash between President Obama and the Republicans). Mann and Ornstein’s thesis that Republicans are more to blame is controversial. See *id.* at xiv (“When one party moves this far from the center of American politics, it is extremely difficult to enact policies responsive to the country’s most pressing challenges.”). To the extent they are correct, the coming moderation of the Republican Party predicted by Jack Balkin could go a long way toward a return to regular order in the House and Senate. See Balkin, *supra* note 88.

dominated House. Similarly, Republican-led bills often can easily clear the House but do not even come up for a vote in the Democratic Senate.

While partisans in Congress use the filibuster and various other means to block legislation, this does not mean that these devices are the *reason* for the dysfunction. That is, critics such as Josh Chafetz who attack the filibuster as a major source of dysfunction (and argue that the filibuster is unconstitutional<sup>96</sup>) treat these legislative rules as exogenous rather than endogenous to the political dysfunction that currently exists in Washington, D.C. To put this another way, in an era of all-out political warfare among ideologically opposed and competing political parties, political actors in Congress will use whatever tools they have at their disposal for political advantage. The rise of the filibuster is a symptom rather than a cause of the disease.

Imagine the unlikely event that a court miraculously strikes down the filibuster as unconstitutional. Alternatively, and more realistically, imagine that a Senate stalemate (perhaps over a battle to replace a retiring “swing” Supreme Court Justice Anthony Kennedy) leads the Senate majority leader to eliminate the filibuster using a simple majority vote under a Senate procedure that detractors call “the nuclear option” and supporters call “the constitutional option.”<sup>97</sup> (Under current Senate rules, rule changes effectively require a two-thirds affirmative vote thanks to cloture requirements.)<sup>98</sup>

The reason detractors (first Democrats when Republicans were in charge, and now Republicans with Democrats in charge) call it the “nuclear option” is that it would markedly exacerbate tension in the Senate, and Senators in the minority would use other Senate rules and prerogatives to gum up the Senate works.<sup>99</sup> Thus, eliminating the filibuster without

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96. Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1011–16 (2011).

97. William Safire, *Nuclear Options*, N.Y. TIMES (Mar. 20, 2005), <http://www.nytimes.com/2005/03/20/magazine/20ONLANGUAGE.html>; Jennifer Steinhauer, *Resistance on Method for Curbing Filibuster*, N.Y. TIMES, Nov. 28, 2012, <http://www.nytimes.com/2012/11/29/us/politics/method-for-curbing-filibuster-faces-resistance.html>.

98. See S. COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, R. XXII, available at <http://www.rules.senate.gov/public/index.cfm?p=RuleXXII>; see also Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803, 852 (characterizing the cloture requirement to eliminate the filibuster as a catch-22).

99. See Safire, *supra* note 97 (noting that using the nuclear option could

eliminating partisanship and polarization would not necessarily ameliorate the dysfunction; it would shift the battles to other terrain.

Even if the Senate majority managed somehow to eliminate all dilatory tactics of the Senate, and the Senate tyranny of the majority looked more like the House, the result would be even more of the same: loggerheads during periods of divided government, followed by fits of controversial legislation rammed through during periods of united government.

While some blame internal rules (as opposed to constitutional structure) for the dysfunction, others blame outside election rules such as closed primaries and partisan gerrymandering. The theory is that closed primaries and gerrymandering lead to more extreme candidates who are unwilling to compromise in Congress.<sup>100</sup>

There is no endogeneity problem with these rules; most of them were not put in place by Congress and therefore are not properly viewed as a manifestation of current dysfunction. Nonetheless, here, too, evidence that changing the rules can change the underlying dysfunctional dynamic of Congress is relatively weak. Eric McGhee, Seth Masket, Boris Shor, Steven Rogers, and Nolan McCarty studied variations in state primary systems over two decades and found little evidence that more open primaries produced moderation by legislators.<sup>101</sup> Moving even from blanket primaries to more closed primary nomination processes did not produce much more party stridency among legislators.<sup>102</sup> This is not a surprise, as primary voters—regardless of the form of primary—tend to be the most partisan, motivated voters. These voters will vote for more partisan candidates who will then not act moderately in the legislature. Further, party elites tend to

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create “turmoil,” “hell,” and a “legislative wasteland” in the Senate (internal quotation marks omitted)).

100. See Eric McGhee et al., *A Primary Cause of Partisanship? Nomination Systems and Legislator Ideology* 5 (May 1, 2013) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1674091](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1674091); John Sides, *Gerrymandering is Not What's Wrong with American Politics*, WASH. POST: WONKBLOG (Feb. 3, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/03/gerrymandering-is-not-whats-wrong-with-american-politics/>.

101. McGhee et al., *supra* note 100, at 18.

102. Seth Masket, *Polarization Interrupted? California's Experiment with the Top-Two Primary* 9, Presentation to Politics to the Extreme Conference (Oct. 17, 2012) available at [http://mysite.du.edu/~smasket/CA\\_top\\_two\\_CSUCI.pdf](http://mysite.du.edu/~smasket/CA_top_two_CSUCI.pdf); McGhee et al., *supra* note 100, at 26; Seth Masket, *The Case Against Mandatory Open Primaries*, MISCHIEFS OF FACTION (June 25, 2012), <http://mischiefsoffaction.blogspot.com/2012/06/case-against-mandatory-open-primaries.html>.

fund more extreme candidates, making it easier for those candidates to succeed.

Partisan gerrymandering, too, seems to be exaggerated as a source of extreme partisanship,<sup>103</sup> and district lines do nothing to explain increasing partisanship in the Senate, where all Senators are elected in statewide elections. Further, as Nolan McCarty explains about the House,

research suggests that the main cause of political division is the behavior of Democratic and Republican legislators representing similar districts, not how the lines are drawn. In other words, polarization has grown because Democrats and Republicans are representing moderate districts in increasingly extreme ways. So even if the number of safe conservative and liberal seats had not risen, the U.S. House and state legislatures would have become nearly as polarized.<sup>104</sup>

In short, tinkering with internal rules of the Congress or external rules of election are likely to make only modest inroads at best in the polarization and dysfunction currently afflicting our national politics. Internal rules themselves seem as much a consequence, rather than a cause, of dysfunction. Something else will have to change the dynamic.

#### V. THE (TEA) PARTY'S OVER?

The final response on political dysfunction and the need for parliamentary change is the most convincing: drastic constitutional change is ill-advised given the possibility that current dysfunction is transitory. As Jack Balkin writes, “[W]e may be confusing political *dysfunction* with political *transition*.”<sup>105</sup> He explains:

I am increasingly convinced that the 2012 election was a watershed event. The Reagan regime now seems to be over. A new political regime has begun.

During periods of transition things often seem entirely hopeless. For example, in the last years of the New Deal/Civil Rights regime in the

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103. Nolan McCarty, Op-Ed., *Hate Our Polarized Politics? Why You Can't Blame Gerrymandering*, WASH. POST (Oct. 26, 2012), [http://www.washingtonpost.com/opinions/hate-our-polarized-politics-why-you-cant-blame-gerrymandering/2012/10/26/c2794552-1d80-11e2-9cd5-b55c38388962\\_story.html](http://www.washingtonpost.com/opinions/hate-our-polarized-politics-why-you-cant-blame-gerrymandering/2012/10/26/c2794552-1d80-11e2-9cd5-b55c38388962_story.html); Eric McGhee & Boris Shor, *For Congressional Candidates, Party Trumps Constituency*, MONKEY CAGE (Nov. 4, 2012), <http://themonkeycage.org/blog/2012/11/04/more-on-house-races-and-polarization/>.

104. McCarty, *supra* note 103.

105. Balkin, *supra* note 88.

late 1970s, government seemed completely dysfunctional, and many commentators argued that the Presidency was too big for any one person. But by the middle of the 1980s, nobody thought that anymore. The reason is that Jimmy Carter was the last president in an old political regime, dominated by the Democratic Party, that could no longer keep itself together. The next president, Ronald Reagan, was a transformative president who began a new political regime that would dominate politics for the next thirty years.

It is my belief that George W. Bush was, like Carter, a disjunctive president who presided over the dissolution of the political regime with which he was affiliated. The new, emerging regime will be dominated by the Democrats. It may not be liberal in precisely the same way as the New Deal/Civil Rights regime was, but it will be more liberal than the current Republican Party, which, like the Democratic Party of the late 1970s, is increasingly unable to hold itself together and to govern effectively.

If we are in a period of political transition, it is no wonder that things seem difficult. And that may be why, at this particular period of time, people are casting about for solutions to dysfunction, and calling for constitutional amendments. But within five years or so, all that will change, and it will change without the need for new constitutional amendments, much less a new constitutional convention. To be sure, I do not oppose the idea of new constitutional amendments; I simply think that the current dissatisfaction and urge for profound change is symptomatic of something else.<sup>106</sup>

Balkin wrote these words just before the emergence of all kinds of signs of internal struggle and realignment within the Republican Party. Republican Speaker of the House Boehner is increasingly allowing measures to pass through the House—even when those measures are not supported by a majority of House Republicans, thereby breaking the “Hastert Rule.”<sup>107</sup> The “Tea Party” Caucus seems to be losing power in the

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106. *Id.*

107. *See, e.g.*, Jeremy W. Peters, *For Democrats in G.O.P.-Led House, a New Congress Means Some Muscle*, N.Y. TIMES, Feb. 7, 2013, <http://www.nytimes.com/2013/02/08/us/politics/house-democrats-have-more-power-in-new-congress.html> (discussing how the fiscal cliff deal and Hurricane Sandy relief bill bypassed the Hastert Rule); Sarah Binder, *Are the Days of the Hastert Rule Numbered? Some Caution in Reading the House*, MONKEY CAGE (Mar. 1, 2013), <http://themonkeycage.org/2013/03/01/are-the-days-of-the-hastert-rule-numbered-some-caution-in-reading-the-house/> (discussing the consideration and passage of the

House.<sup>108</sup> Karl Rove is organizing his political forces to support moderates in Senate races so that Republicans nationally do not follow the same pattern as Republicans in California: nominating strong conservatives in primaries who cannot get elected in a general election populace with more young voters and minority voters tending to vote Democratic.<sup>109</sup> Tea Party forces are now organizing against him.<sup>110</sup>

The Republican National Committee issued a harsh “self-autopsy” on the 2012 elections, blaming the party for being out of touch on issues that young and minority voters have different views on than the official Republican Party position—issues such as immigration and same sex marriage.<sup>111</sup> Prominent Republicans have begun endorsing the right to same-sex marriage, even as others fight against it.<sup>112</sup> Republican opposition to a path to legal citizenship for undocumented residents seems to be crumbling.<sup>113</sup>

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Violence Against Women Act reauthorization in violation of the Hastert Rule).

108. See David Weigel, *The Tea Party Caucus is Dead and That's OK*, SLATE: WEIGEL (Mar. 20, 2013), [http://www.slate.com/blogs/weigel/2013/03/20/the\\_tea\\_party\\_caucus\\_is\\_dead\\_and\\_that\\_s\\_okay.html](http://www.slate.com/blogs/weigel/2013/03/20/the_tea_party_caucus_is_dead_and_that_s_okay.html) (explaining that the Tea Party Caucus has been virtually inactive since mid-2012).

109. See Matt Williams, *Moderate Republicans Push Back Against Tea Party with Campaign Fund*, GUARDIAN (Feb. 3, 2013), <http://www.guardian.co.uk/world/2013/feb/03/republicans-push-tea-party-campaign-fund>.

110. Matt Williams, *Tea Party Group Counters Karl Rove's Fund for Moderate Republicans*, GUARDIAN (Feb. 9, 2013), <http://www.guardian.co.uk/world/2013/feb/09/tea-party-counters-karl-rove>.

111. Sarah Wheaton & Michael D. Shear, *Blunt Report Says G.O.P. Needs to Regroup for '16*, N.Y. TIMES, Mar. 18, 2013, <http://www.nytimes.com/2013/03/19/us/politics/republicans-plan-overhaul-for-2016-primary-season.html>. For a discussion on the idea that parties regroup when their ideas are too outside mainstream public opinion, see generally JOHN G. GEER, *FROM TEA LEAVES TO OPINION POLLS: A THEORY OF DEMOCRATIC LEADERSHIP* 142–60 (1996). Jonathan Bernstein contends that the problem is not that the Republican Party is too extreme ideologically, but that the party's tactics when out of power are obstructionist and extreme. Jonathan Bernstein, *The Republican Party is Officially Broken*, SALON (Apr. 6, 2013), [http://www.salon.com/2013/04/06/the\\_republican\\_party\\_is\\_officially\\_broken/](http://www.salon.com/2013/04/06/the_republican_party_is_officially_broken/). Even if Bernstein is correct, this is not a long-term tenable position for one party in a two-party system, and it seems likely that if Republicans continue along this path they could be replaced as the second party in our two-party system.

112. Sheryl Gay Stolberg, *Republicans Sign Brief in Support of Gay Marriage*, N.Y. TIMES, Feb. 25, 2013, <http://www.nytimes.com/2013/02/26/us/politics/prominent-republicans-sign-brief-in-support-of-gay-marriage.html>.

113. Ashley Parker & Michael D. Shear, *G.O.P. Opposition to Immigration Law is Falling Away*, N.Y. TIMES, Mar. 19, 2013, <http://www.nytimes.com/2013/03/20/us/politics/gop-opposition-to-immigration-law-is-falling-away.html?pagewanted=all>.

In the population, the share of the electorate identifying with Republicans may be shrinking to some extent, but those who remain in the party have staunchly conservative views.<sup>114</sup> Echoing Jack Balkin's look back to the Democrats in the 1970s as the last transformative moment, public opinion expert Andrew Kohut sees a major shift occurring with the Republican Party:

In my decades of polling, I recall only one moment when a party had been driven as far from the center as the Republican Party has been today.

The outsize[d] influence of hard-line elements in the party base is doing to the GOP what supporters of Gene McCarthy and George McGovern did to the Democratic Party in the late 1960s and early 1970s—radicalizing its image and standing in the way of its revitalization.<sup>115</sup>

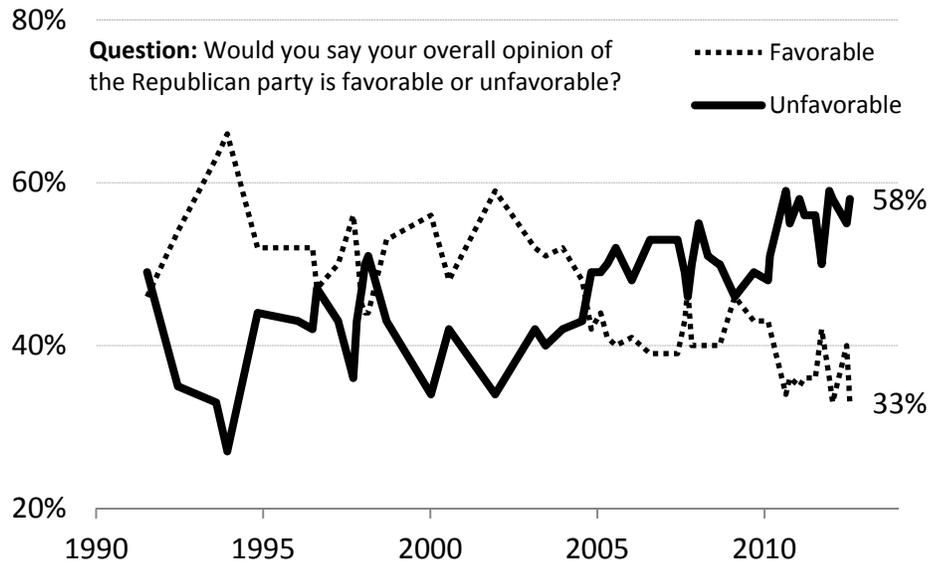
Figure 8, data compiled from the Pew Research Center that Kohut used in his article, shows the unfavorability ratings of the Republican Party brand among American voters.<sup>116</sup>

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114. See Andrew Kohut, Op-Ed., *The Numbers Prove It: The GOP is Estranged from America*, WASH. POST (Mar. 22, 2013), [http://www.washingtonpost.com/opinions/the-numbers-prove-it-the-republican-party-is-estranged-from-america/2013/03/22/3050734c-900a-11e2-9abd-e4c5c9dc5e90\\_story.html](http://www.washingtonpost.com/opinions/the-numbers-prove-it-the-republican-party-is-estranged-from-america/2013/03/22/3050734c-900a-11e2-9abd-e4c5c9dc5e90_story.html).

115. *Id.*

116. See *infra* Figure 8.

**FIGURE 8.**<sup>117</sup>

Republican House candidates who need to run for reelection every two years cater to their primary voters during election season but then have trouble moving to the center to govern.<sup>118</sup> Republican Senate candidates also must move far right to get nominated.<sup>119</sup> The radicalization of the Republican electorate<sup>120</sup> has led to a marked rise in conservatism

117. *Republican Party Favorability*, PEW RESEARCH CTR., <http://www.pewresearch.org/data-trend/political-attitudes/republican-party-favorability/> (last visited Sept. 26, 2013).

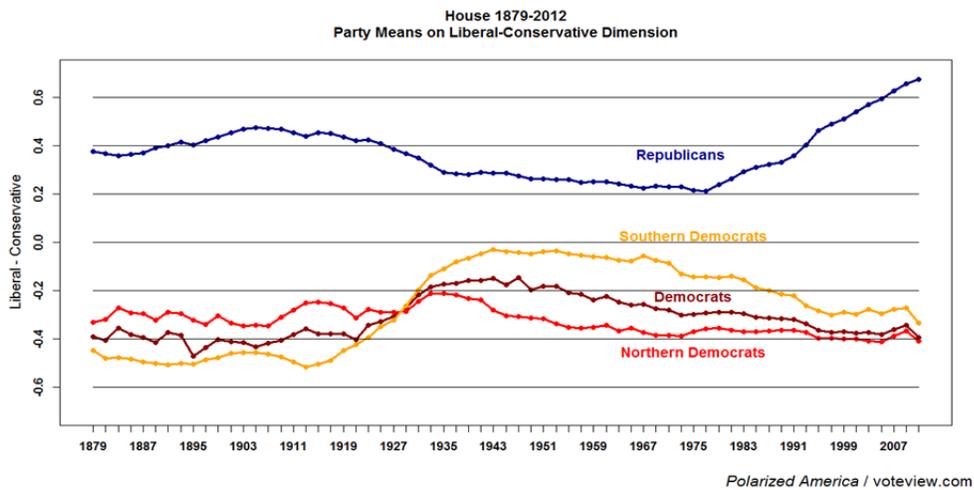
118. Kohut, *supra* note 114; see, e.g., Ezra Klein, *This is Why Obama Can't Make a Deal with Republicans*, WASH. POST: WONKBLOG (Mar. 2, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/03/02/this-is-why-obama-cant-make-a-deal-with-republicans/> (describing Republican legislators' unwillingness to compromise on tax increases in order to avoid sequestration).

119. See Kohut, *supra* note 114.

120. This point is somewhat contested, as some prominent political scientists, such as Morris Fiorina, reject the argument that the electorate itself is polarized. See generally MORRIS P. FIORINA, *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (2d ed. 2006) (arguing that the deep ideological divide among political figures has created a misrepresentation that the American public is deeply polarized as well).

among legislators in both the House and Senate.<sup>121</sup> Figure 9, from the Poole and Rosenthal Voteview data, shows the increasingly strong conservatism of Republicans in the House.<sup>122</sup> Figure 10 shows the data for the Senate.<sup>123</sup> Some of this division is ideology; the rest of the division likely reflects increased party unity in roll-call votes, even on non-ideological issues.<sup>124</sup> Further, there is more pressure on legislators to stick with their party on roll-call votes because the media and interest groups now pay great attention to these votes.

**FIGURE 9.**<sup>125</sup>



Other prominent political scientists, including Alan Abramowitz, support the electorate polarization thesis. *See generally* ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* (2010) (arguing that polarization among the political elite particularly reflects deep polarization between the informed and politically engaged segment of the American people, and that moderation thrives among the least active and informed members of the public).

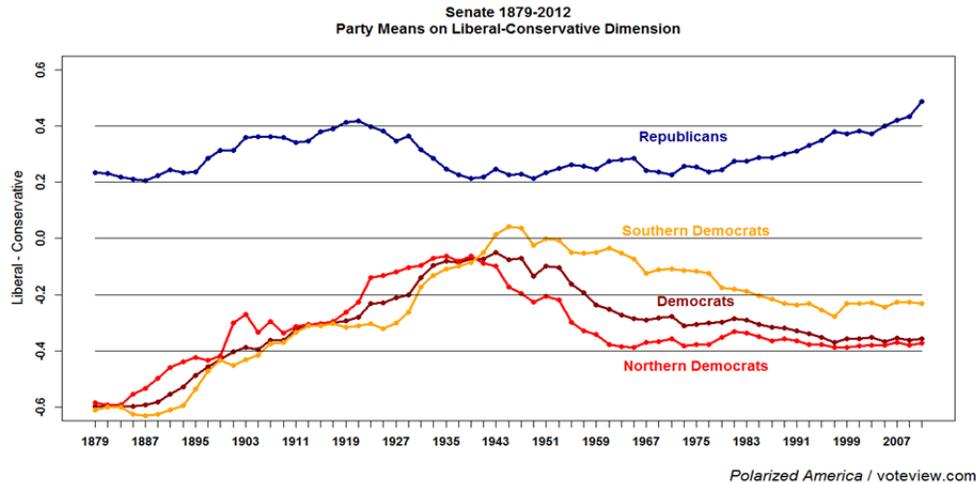
121. *See infra* Figures 9–10.

122. *See infra* Figure 9.

123. *See infra* Figure 10.

124. *See generally* FRANCES E. LEE, *BEYOND IDEOLOGY: POLITICS, PRINCIPLES AND PARTISANSHIP IN THE U.S. SENATE* (2009) (arguing that competing political interests, not just ideological differences, are to blame for “partisan bickering”).

125. *Update on Political Polarization, supra* note 83.

**FIGURE 10.**<sup>126</sup>

The right wing of the Republican Party will not go down without a fight, and it is hard to predict exactly where things will end up in the battle for party control and message. Change is not inevitable; an economic downturn (perhaps caused by an exogenous shock) could lead voters to move away from current leadership in the Democratic party and choose Republicans simply because they are not Democrats. The signal that such election victories will send to Republicans will be muffled, and some Republicans could take success as a signal that the party's ideological positioning is correct.

Without such a shock, however, Republicans may continue to lose national party vote share as the electorate becomes younger and less white. One can easily imagine the Republican Party moving closer to the center on a number of issues, leaving behind the Tea Party and religious conservatives—some of whom will continue to vote for Republicans (as the lesser of two evils) and others of whom will be less inclined to vote at all. As Republicans move closer to the center, Democrats will counter with their own moves closer to the center, creating political space for bipartisan compromise and lessening political polarization. This is a rosy picture for those who do not like dysfunction—one which would solve the problems

described in this Essay without eliminating the filibuster, moving to open primaries, or the more radical surgery of creating a parliamentary democracy in the United States.

#### VI. CONCLUSION

Someday political sclerosis may become so bad that we will need to change our system of government to include a national parliament. But that day likely has not yet arrived. I am not at all confident the new, less partisan era will emerge any time soon. But there is enough of a chance that it will to discount the possibility that it never will. We are too close to current events to have adequate perspective on the need for constitutional change. And this uncertainty merits caution.

Sixty years ago, over the dissent of political scientist Austin Ranney, the American Political Science Association issued a call for stronger, more ideological political parties to strengthen our democracy.<sup>127</sup> That call serves as a reminder that we should be careful what we wish for, because we just might get it.<sup>128</sup>

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127. MANN & ORNSTEIN, *supra* note 3, at xiii–xiv.

128. *See id.* at xiv (“Time has proven Ranney dead right—we now have the kinds of parties the report desired, and it is disastrous.”).