

The Failure of Modern American Institutions to Constrain Political Ambition

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Abstract

The partisan polarization currently dominating American public life constitutes a serious threat to the long-term political health of the United States. We argue that a broad range of formal and informal institutions have been reshaped, distorting the electorate's capacity to assess political accountability and inhibiting the Madisonian system's capacity to check both individual and institutional political ambition.

We consider four institutional developments that have facilitated unrestrained political ambition. First, in the Senate, a silent Constitutional amendment has seemingly been effected, requiring a three-fifths Senate vote to pass legislation. In effect, new practices and minority filibusters have granted individual senators the right of veto. As a consequence, new and politically unproductive behavioral norms have been established in the Senate. Second, party politics and primary nominations have come to play a larger role in the shaping of federal policies, and have engendered a significant rise in the importance of individual and localized interests and passions. Third, changes to the news media and campaign technology have justified Madison's fears about the "vicious arts" and their pernicious effects on elections. Finally, in an extended jurisdictional landgrab over the constitutionality of electoral law, the Supreme Court has begun to wield disproportionate power over the basic political processes of the United States, undermining the constitutional system of checks and balances. We conclude our argument by making a predictive claim regarding the most far-reaching contemporary policy issue, the regulation of health care.

The authors of *The Federalist*, James Madison in particular, were of the mind that human ambition was the root motivation of politics. Now, however, poisoned by the systemic toxicity of the extra-Constitutional structural changes we describe, the new system sabotages Madison's hope that social diversity, the virtue of officials, and the necessity of compromise would overcome the ills of individual ambition and the clash of institutions. Unchecked, political ambition weakens democratic accountability and effective government while promoting unfettered ideological conflict and personal aggrandizement.

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America is in Trouble

The partisan polarization currently dominating American public life constitutes a serious threat to the long-term political health of the United States. America is no stranger to partisan polarization, but the modern variety is different, not just in degree, but also in kind. Driven by a series of underlying institutional changes, this polarization has been both the cause and the effect of significant changes in the formal prescriptions by which we govern ourselves, as well as the informal customs and traditions with which we police elite political behavior. As these formal and informal institutions become reshaped and distorted, so, too, does the electorate's capacity to assess political accountability and the Madisonian system's capacity to check both individual and institutional political ambition. Unchecked, political ambition weakens democratic control while promoting unfettered ideological and personal aggrandizement. And therein lies the problem.

We consider four institutional developments that have facilitated unrestrained political ambition. First, in the Senate, a silent Constitutional amendment has seemingly been effected. Minority filibusters have granted individual senators the right of veto, as effective as the presidential veto; as a consequence, new and politically unproductive behavioral norms have been established in the Senate. Second, party politics and primary nominations have come to play a larger role in the shaping of federal policies, and have engendered a significant rise in the importance of individual and localized interests and passions. Third, changes to modern news media and campaign technology have justified Madison's fears about the "vicious arts" and their effects on elections. Finally, the Supreme Court has begun to wield power over the political processes of the United States, going so far as to select a President and enhance the political power of wealthy voters. We conclude our argument by making a predictive claim regarding the most far-reaching contemporary policy issue, the regulation of health care.

Misreading the Federalist Papers: Madison Agonistes

We begin with a glimpse at our foundational theory. Perhaps the current political ills of the United States may be found in a simple mistake in literacy. Perhaps American politicians have been misreading *The Federalist Papers*. Perhaps ambition, one of the root motivations of a political life, has merely been misunderstood.

The impressive arguments of *The Federalist Papers* offer two major but distinct guides to future political practice under the Constitution. *Federalist #10* offers a slow yet efficacious collaborative model that promotes the common welfare, while *Federalist #51* provides the template for a political deadlock that stems from the narrow ambitions of politicians seeking to maximize their personal power.¹ These two papers—both authored by Madison—as well as the Constitution, are rooted in a realist, even cynical, view of human nature.² As Madison wrote in *Federalist #10*, "The latent sources of faction are thus sown in the nature of man...we know that neither moral nor religious motives can be relied on as an adequate control." Later, in *Federalist #51*, he more directly warned against political naiveté: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."

That said, the thrusts of these two papers are quite different. In *Federalist #10*, Madison finds “a republican remedy for the diseases most incident to republican government.” Representation will “refine and enlarge the public views,” so that virtuous leaders are more likely to be recruited to office while it will be “difficult for unworthy candidates to practise with success the vicious arts.” By establishing a large republic, factions inimical to the public good will either be outvoted if a minority, or fragmented if a majority and will be “unable to concert and carry into effect schemes of oppression.” In essence, Madison relies on a sociological solution: the plurality of groups will prevent domination by any one group advancing any one interest. In *Federalist #10*, he leaves institutional regulations aside, optimistically relying on the diversity of a large nation to provide protection for the liberty of its citizens. When, however, he considers the detailed structure of the Constitution a few months later in *Federalist #51*, Madison’s tone and prescriptions are darker, and he focuses increasingly on the power urges of office-holders. While a constitution “must first enable the government to control the governed,” he stresses the need to “oblige it to control itself.” Here he enlists, even elevates, the self-interest of politicians into a prime merit: “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.” Consequently, Madison champions a “policy of supplying by opposite and rival interests, the defect of better motives... [so] that the private interest of every individual may be a centinel over the public rights.”

To prevent the “tyranny” they so feared, the founders erected institutional barriers against anything other than slow, incremental policy development and change. They also, though, expected the federal government to be strong and active, guided by “representatives, whose enlightened views and virtuous sentiments render them superior to local prejudices, and to schemes of injustice.” *Federalist #51* expresses a certain pessimism regarding this prospect, as it urges “giving to those who administer each department the necessary constitutional means, and personal motives, to resist encroachments of the others.”

Just as Madison apparently gave up on them between November of 1787 and February of 1788, we no longer rely on the virtue of representatives in today’s political culture. Instead, we *expect* representatives to be self-interested; we watch as they enthusiastically promote themselves, and we possibly console ourselves with Madison’s realism. But this consolation does not last long today, as we see the problems of modern political ambition exacerbated by newly minted institutional agents of polarization. We see interest groups that are no longer prevented from promoting their self-interest by majoritarian doctrine. We see the rages of local politics violently elevated to national prominence. We see politicians deploying modern technology in the service of those “vicious arts by which elections are too often carried.” We see the U.S. Supreme Court extensively involved in the thickets of politics. And, as a result, we see the development of institutional clogs in the arteries of American government.

We write in the first months of the 112th Congress, a Congress which bears witness to the pains of an ailing government – most obviously in the deadlock over the national debt limit. As a consequence of recent elections, we have seen increased formal political separations along party lines throughout the branches of government, as well as ideological struggles within each party. Moreover, we have seen the Supreme Court emerge as an active political contender for conservative causes. Undergirding these divisions is a firm realignment of the electorate along

ideological lines, and ambition has come to dominate disinterested virtue. The Senate minority leader has recently stated this explicitly; his party's priority is apparently not any specific legislative agenda, but is instead solely the defeat of the Barack Obama for President in 2012: "The single most important thing we want to achieve is for President Obama to be a one-term president."³

How did American politics change so radically? We begin an explanation with transformations in both the rules and the behavior of the U.S. Senate.

The Silent Amendment

The Constitution established majority rule as the basic operating procedure for the government of the United States. That principle was a major change from the Articles of Confederation, which had required a supermajority of nine of thirteen states to pass any legislation.⁴ Even with all of the checks and balances, and even with some unusual counting rules, majorities would inevitably prevail under the new Constitution. Majorities would elect the members of Congress, they would pass legislation in both chambers (although the Senate might not reflect a majority of the nation's voters), they would elect the president (although through a unique and occasionally out-of-step Electoral College), and the Senate would confirm appointments by majority vote. Only treaties, impeachments, and constitutional amendments would require extraordinary support from the relevant authority.

Today, in reality, the Constitution has been amended—silently, without the required formal action by Congress or the states—to require a three-fifths Senate supermajority vote of the Senate to make law. In practice, because of the current rules informing the use of the filibuster, the Senate will neither pass nor even consider bills unless sixty senators support cloture on debate. This stricture comes not from the Constitution, but from the filibuster, as established by the Senate's rules governing debate. Nonetheless, it has become as binding as any of the explicit provisions of the Constitution itself, and effectively operates as a mute addition to Article I of the nation's founding document. As a leading analyst declares, "Over the last fifty years, there has been a quiet revolution in American politics. A major hurdle has been added to the legislative process....It just happened, and it happened so quietly we barely notice."⁵

Unlimited debate existed in practice in the Senate in the early 20th century, even after it had expired in the House in the late 19th century. The first formal restriction on filibusters came in 1917 at the urging of President Woodrow Wilson, and the new strictures required a two-thirds vote to end debate. The new cloture rule was first invoked in 1919, to force votes on the Versailles Treaty. In 1975, the required vote was further lowered to three-fifths of the entire Senate, the now-famous 60 votes. Although the cloture rule still could prevent a majority from acting, it was used sparingly, a technique reserved for matters that aroused passionate opposition from minority factions. As Madison had confidently asserted, the republican principle of majority rule would ultimately prevail. The most common—but rare—use of filibusters (setting aside Jimmy Stewart's speech in *Mr. Smith Goes to Washington*) was by Southern segregationist Democrats opposing civil rights legislation. But these passionate opponents could still be outvoted, and integration bills were passed, most notably the Civil Rights Act of 1964.

In the past two decades, however, the filibuster—or even the mere threat of a filibuster—has become standard practice. In the 54 years (1917-71) since the first cloture rule was enacted, there typically was only a single cloture motion filed each year. Now, there are about 70 attempts a year—usually futile—to achieve action in the Senate,⁶ a number that rose still further to two a week in the 111th Congress of 2009-10.⁷ The sharp increase in filibusters has made the Senate a roadblock for legislation. Barbara Sinclair has argued that the Senate fails to meet the two major criteria for legislative effectiveness, “deliberation and decisiveness.” Instead, the Senate has accomplished only delay. Before 1993, 6 percent of bills passed the House but not the Senate, and 5 percent passed the Senate but not the House. Since then, only 1 percent of bills have passed the Senate but not the House, and a whopping 20 percent have passed the House but not the Senate.⁸

Several political developments led to the vastly increased impact of the filibuster and the new three-fifths rule. First, filibusters are no longer true contests. Traditionally, a filibuster required one or more senators to hold the Senate floor in order to stall roll calls. Dissenting senators (or Jimmy Stewart) could eventually be worn down, even if they had enormous physical capacity. Now, perhaps because of empathy for aging senators, the mere threat of a filibuster will throw a bill off the legislative calendar without any cost to the minority opposition. This outcome results not from the minority’s will to obstruct, but from the “unwillingness of majorities of less than sixty senators to engage in wars of attrition and incur the attendant costs.”⁹ What had been, in fact, a calculated and costly tool of government is now threatened with a casualness that undermines the fundamental seriousness of the filibuster. It is, in essence, a nuclear weapon that is routinely used for muggings.

Second, the filibuster is no longer limited to legislation that inspires fierce debate regarding the very nature of government and the American way of life, as was the case with southern Democratic segregationists; in fact, the filibuster is today used to threaten most legislation that contains significant party-aligned policy differences. For example, as Norman Ornstein noted, the filibuster was employed in 2009 to delay unemployment benefits in the midst of the nation’s economic collapse, even though the bill was eventually passed on a 98-0 vote.¹⁰

Three landmark health and welfare laws pointedly demonstrate the scope and nature of the change in the use of the filibuster. When Social Security was passed in 1935, it was decried as merely the first step toward socialist tyranny, yet there was no filibuster. When the next major social program, Medicare, was adopted in 1965, it was denounced as another step toward socialist tyranny, yet again, no filibuster. But in 2009, as the Obama health care program was debated, it too was condemned as a step toward socialist tyranny—but this time there was a filibuster.

The shifts in both the nature and frequency of the use of the filibuster are due, at least partly, to a change in the political environment marked most prominently by a steep increase in intense partisanship. There is more competition within states, so senatorial tenure is considerably less certain than in previous years, and there is also more intensity to the nature of competition within the Senate. Previously, a requirement for 60 votes to achieve cloture might be met by alliances across party lines. Now, to enact its legislation, a party must look for all of the necessary 60 votes within its own ranks, as party-line votes have come to predominate. But it is

difficult to achieve a three-fifths votes from only one side of the aisle. No party has held 60 seats in the Senate in over four decades, other than the brief and tenuous 18-month interregnum of 2009-2010. Over a longer span, either party has held a filibuster-proof minimum in only eight years of the past seven decades.

We now have more filibusters, easier filibusters, more extensive filibusters, and more partisan filibusters. The result of the silent amendment is inaction, or action that is dependent on unsavory deals such as the “Cornhusker Kickback” or the “Louisiana Purchase,” both part of the Patient Protection and Affordable Care Act. The Senate’s recent inactivity regarding the debt limit and long-term deficits led conservative Republican senator Tom Coburn to declare the virtual disappearance of the Senate: “Our epitaph will read: Never before in the field of legislating was so much ignored by so many for so long.”¹¹ Alexander Hamilton foresaw the consequences of a supermajority requirement: “But its real operation is to embarrass the administration, to destroy the energy of government, and to substitute the pleasure, caprice or artifices of an insignificant, turbulent or corrupt junto, to the regular deliberations and decisions of a respectable majority.”¹²

There is yet another development in the Senate hindering American government: blockages to the confirmation of presidential appointees. The number of positions subject to Senate confirmation has increased vastly from the Constitution’s specifications; these positions now include not merely justices, ambassadors and military officers, but also at least 1,200 civilian nominees. Put another way, one of every six presidential appointments, including heads of independent agencies and sub-cabinet officials, require Senate confirmation.¹³ Not only does the Senate vet more appointees, it also is more demanding in its procedures and less supportive of the President. Fewer circuit court judges, for example, are approved: less than 50% now pass muster, compared to 90% in the 1970s. The confirmation process also takes longer: George H.W. Bush had four-fifths of his nominees approved within his first presidential year, while President Obama had fewer than two-thirds approved in the same period.¹⁴ The combined effect is seen in a brief comparison of Presidents Reagan and Obama, both of whom came to power during episodes of marked party turnover: Reagan needed confirmation of 295 key appointees, Obama 422. Reagan had to wait an average of 114 days for confirmation of his subcabinet appointees, while Obama has had to wait an average of 195 days.¹⁵

Yet even this slow process can be delayed further by the Senate practice of allowing individual legislators to decree a “hold” on a nomination until they win a particular goal. Such “holds” are not restricted to (and are often entirely unrelated to) the nominee’s fitness for office. They include demands for other patronage, for a favored local project, or other unrelated concessions. Furthermore, the “holds” may not even be publicly announced, as a secret hold is as valid as an open fight. In a recent notorious instance, Alabama Senator Richard Shelby put a “hold” on *every* Obama nominee in an effort to acquire new Air Force and FBI facilities for his state. “Senators like doing anything that magnifies their power, and there’s an awful lot of self-interest in maintaining holds,” writes Bill Allison of the Sunlight Foundation.¹⁶ Madison’s expectation of the workings of ambition has been more than fulfilled.

In the opening days of the new 112th Congress, there seemed some possibility that these restrictions might be eased, and all of the returning Democrats, still a majority in the Senate,

supported change. But then fear of their possible loss of control after 2012 and fear of the unknown overcame their reformist urges. Instead, minor changes were made. Anonymous holds on legislation were ended, the number of presidential nominees needing confirmation was slashed by about 200 positions (none of them a major office), and over a thousand are still subject to confirmation, and the use of the filibuster to require oral reading of legislation was ended. Harry Reid and Mitch McConnell also informally agreed that they would not employ the filibuster to prevent the consideration of a bill. That agreement notwithstanding, Senate Republicans reversed their stance by threatening judicial nominees with the filibuster; the first casualty was the confirmation of Professor Goodwin Liu to the court of appeals.

The major blockages, however—the 60-vote cloture requirement and allowance of “silent” filibusters—remain; both leaderships have promised that they will not attempt to further change the rules after 2012. Stasis remains, perpetuating, as Ezra Klein has characterized it, “A world in which you can’t enact your ideas or govern effectively and so the voters end up thinking you as feckless as the folks across the aisle.... That’s a world in which the rules of the Senate, and not the policies of the parties, drive outcomes, and thus drive elections. That’s a world where voters never know whose ideas are best because neither side can ever enact their agendas. But that’s the world the Senate apparently prefers to inhabit.”¹⁷

Ambition in the New Political Environment

Contemporary senators are probably not very different from politicians throughout American history. That they seek power is an expected characteristic of the species. Individual psychology has not changed, but ambition is rewarded differently in the modern political climate, particularly, again, in the Senate. A reader now interested in the informal institutional rules of the Senate would likely be shocked by Matthews’ classic description of the Senate’s “folkways”: apprenticeship, an emphasis on legislative work, specialization, courtesy, reciprocity, and institutional patriotism.¹⁸ While Sinclair is certainly right that the Senate has been transformed, it is more doubtful that it or the nation has benefited.¹⁹

The Senate’s inability to act can be explained, at first glance, by the absence of moderates who can achieve cross-party alliances. For example, former Senator David Boren, an Oklahoma Democratic moderate, has noted a significant decline in cross-party cooperation: “The scarcity of moderates in today’s Congress is ‘absolutely destroying the functionality of our system of government. It is so severe, I don’t think it’s sustainable’.... Boren recalled that when he first arrived in the Senate decades ago there were probably 30 moderates in the chamber who worked across the aisle, sought each other out, and socialized together. ‘Now that number has probably shrunk to maybe six or eight in both parties,’ he said.”²⁰

The flight from moderation can be measured by party-line voting in Congress. Instead of forging cross-party alliances, Republican and Democratic legislators have become entrenched in their deeply opposed camps. In 2009, 72% of Senate votes and 51% of House votes divided majorities in the two parties. Democrats and Republicans in the Senate voted on average 91% and 85% of the time with their party colleagues; those figures were matched in the House by 91% and 87%, respectively. These numbers were at or very near record levels over the six

decades of studies by *Congressional Quarterly*: By contrast, in 1970, a partisan low point, party unity votes constituted only a third of all roll calls, and average party unity was only 70.²¹

Another indicator of this intense and increased partisan attitude can be found in individual legislative behavior. In 2010, as measured in terms of the spatial crossing of party lines by one ranking, there were *no* moderates in the Senate. None. Every Republican stood on the conservative side of the aisle, and every Democrat on the liberal side. For highlight and contrast, compare that mapping to the erstwhile Senate of 1982, where 58 Senators could be located in the large space between the most liberal Republican and the most conservative Democrat. In the House, the merging of partisanship and ideology is even more evident and more strident. As recently as 1999, a majority of the House could be located between the party dissidents; by 2010, there were only nine mavericks—from a majority to 0.46% in ten years. The modal Republican supported conservative positions and the modal Democrat supported liberal positions on over 80% of the roll calls. The infrequent dissenters “now face pressures from their colleagues; a cold shoulder from the leadership; blistering criticism from the overtly partisan media aligned with each side; and, with growing frequency, primary challenges bankrolled by powerful party interest groups.”²²

Against those numbers, we ask “whither the moderates?” The short answer is that they fell victim to the demands of ambition. Aside from the accomplishment of their policy goals, legislators have two pathways to success: by achieving prominence in their chamber and by re-election.²³ Both paths now lead them to ideological purity. Within the halls of Congress, party loyalty is rewarded; moderation and compromise are disdained. Those who defect from the party are likely to be punished by unfavorable committee assignments, denial of election funds, and social ostracism. The fierce debate over the Obama health bill evidenced these pressures. Among Democrats, New York’s Chuck Schumer put it gently: “Every Democrat, from the most liberal to the most conservative, realizes that it serves America’s interest and our own interest to pass a bill.”²⁴ The partisan process was even uglier for Republican moderates, such as Maine’s Olympia Snowe, who voted for the Obama bill in committee, then turned against it in the face of Republican attacks. Iowa’s Charles Grassley denounced the bill after the President’s team had agreed to *all* of his proposed amendments. According to one inside report:

Obama asked Grassley... “With every concession he wanted, could he support the bill?”
“Probably not.”
“Why not?” asked an exasperated Obama.
*“Because I’d have to have a number of Republicans,” said Grassley. “I’m not going to be the third of three Republicans. I’ve defined a bipartisan bill as broad-based support.”*²⁵

As partisan divisions within the electorate itself have become more pronounced, partisan divisions within Congress have become doubly problematic: the enactment of legislation very always nearly has electoral consequences. This meshing of legislative and election interest is fostered by the parties’ campaign committees, which now turn floor debates into campaign forums. As Dana Milbank writes,

Years ago, members of Congress, playing by unwritten rules, would never go to colleagues' districts or states to campaign against them. That unraveled in the '90s and fell apart completely in 2004, when Senate Majority Leader Bill Frist went to South Dakota to campaign against his Democratic counterpart, Tom Daschle. Fueling the antagonism are the lawmakers whose party-committee jobs are to unseat colleagues. The resulting bitterness leaves both sides in no mood to make the necessary, but politically difficult, compromises on health care, entitlements and the budget.²⁶

This rejection of previous norms became even more pronounced in 2010, when Republicans made the Democratic leadership itself their top target; the campaign strikes against Harry Reid had as much to do with destabilizing the Democratic Party as it did with attempting to elect a better politician.

The process of securing primary nominations has also increased the intensity of partisan divisions. Primary elections favor more ideological candidates who are concerned less with success of legislative agendas than with the message itself; they are, then, less likely to seek the compromises that inevitably must accompany effective action. The penalty for moderation was evident in the 2010 primaries. Democratic Senator Blanche Lincoln and party convert Arlen Specter faced primary challenges from liberal interest groups. Although Lincoln survived the primary process, both seats were ultimately taken by Republicans, neither likely to be champions of legislative compromise, least of all liberal legislative agendas. The effect was more widespread among Republicans, routinely beset by accusations of allegedly moderate views by Tea Party advocates and legislative colleagues such as Senator James DeMint of South Carolina. Despite their actual conservative positions, incumbent Senators Robert Bennett and Lisa Murkowski were defeated in their party primaries, and likely but more moderate winners were rejected in Delaware, Nevada, and Colorado, resulting in the loss of the Senate for the Republicans.

The foundation for these results is a marked ideological shift in the mass bases of the parties. Through most of American history, the parties could be described as "umbrellas" or "big tents," comprising a considerable ideological range. As recently as 1992, Republican liberals and moderates were as numerous as Republican conservatives, while Democratic liberals were outnumbered 2-1 by their party's conservatives and moderates. By 2008, the character of the parties' mass bases had changed considerably. Republican conservatives dominated by 2-1 over other factions. The pace was slower among Democrats, but liberals had increased their share to 3 of every 8 identifiers.²⁷ If moderates are excluded, the contrasting ideological dominance is still more striking. By 2010, Republican conservatives outnumbered liberals 11-1 (65% to 6%), while Democratic liberals predominated over conservatives by 7-4 (42% to 24%).²⁸ These endpoints are part of a more general trend toward ideological cohesion and separation in the electorate.²⁹

Ideological differentiation and party differentiation have become virtually synonymous. "An array of economic, racial and new social and religious values issues have become aligned more visibly to partisanship and to liberal-conservative labels and cues, producing an increasingly issue-based and ideologically based partisan alignment."³⁰ This "new partisan voter" both encourages political leaders to appeal to issue extremes within their parties and limits their ability to move toward moderate positions in policymaking.

Polarization is self-reinforcing. Although overall the nation remains politically moderate, “Americans view the party that they identify with as very close to their own ideological position and the opposing party as very far away from their own ideological position.... Americans are very satisfied with their own party’s position and very dissatisfied with the opposing party’s position. And the intensity of these ideological preferences has been increasing over time.” Using a 7-point ideology scale from ANES data (1= extreme liberal, 7=extreme conservative), Alan Abramowitz shows the close relationship: “On average, Democratic identifiers and Democratic-leaning independents placed themselves at 3.3, the Democratic Party at 3.4 and the Republican Party at 5.1 on the scale while Republican identifiers and Republican-leaning independents placed themselves at 5.3, the Republican Party at 5.2 and the Democratic Party at 2.4 on the scale.”³¹

Party polarization is particularly evident among elite voters, those who pay the most attention to politics, contribute to campaigns, write letters, and shape the legislative environment.³² As David Mayhew suggests, “ideological activist groups and campaign funding networks have nested within each of the two parties in an unprecedented way recently, infusing special oomph and loyalty into the core of each of the congressional parties. Now, a minority party senator may face trouble back home by *not* joining a party filibuster on a divisive issue.”³³

The impact of these trends is even more relevant in party primaries. These smaller electorates may not reflect even the limited ideological span of the total party base. The presidential caucuses in Iowa in 2008—the first event of the nominating contests—were illustrative. Of those attending the caucuses, 85% characterized themselves as conservatives, while 50% of Democrats characterized themselves as liberals, proportions far greater than in the total party bases.³⁴ The limited scholarship on the subject, however, does not show such bias. The more common view is that primary voters do reflect the overall policy positions of their fellow partisans. However, even accepting that suggestion, when the bases become as distinct as they now are, relatively extreme candidates are more likely to prevail among the more-extreme nominating primary electorates.³⁵

In nominations, self-interested ambition will swing Republican aspirants to the right and Democratic contenders to the left. Candidates must follow their party bases to get nominated even if this results in taking more extreme positions than the median voter and perhaps losing support in the general election. This effect was clearly evident in the 2008 presidential nominations, and likely even more significant in primaries for other subpresidential offices.³⁶ Additional evidence for party extremism is found in House campaign fundraising. Moderate candidates in both parties get financial support when their party is a minority, and therefore willing to concede bits and pieces of ideology in search of seats. But in a trend evident since 1994, if the party does achieve control, “moderates have become considerably marginalized by their own party....When their party is in the majority, funds dry up, and races become more competitive.”³⁷

In an early, but customarily trenchant, analysis of primary nominations, V.O. Key observed, “So few votes determine the primary nomination that aspirants for office need only command the loyalties of a relatively small following to win a place on the party ticket” and

“primary participants are often by no means representative of the party.” The consequences, Key speculated, may be that “the miniscule and unrepresentative primary constituency may...handicap the party in polling the maximum party strength in the general election...[or] may lead to general election victories embarrassing to the responsible elements of the party as well as impairing the usefulness of the party in the larger cause of the government of the state.”³⁸

Decades later, Key’s warnings were clearly relevant to the elections of 2010. In the contest for Delaware’s U.S. senator, for example, Republicans seemed certain to take a Democratic seat. But in a mobilization of the small conservative faction, Christine O’Donnell, who famously assured voters she was “not a witch,” won the Republican nomination by only 3,500 votes in a primary turnout of 57,500. Her primary vote was less than a fourth of the votes she would eventually receive as the Republican nominee. Even with the advantage of the official party label and large outside funding, however, she lost the general election, garnering only 40% in the much larger and much more representative general electorate, a total turnout of 307,000. O’Donnell didn’t simply create a “handicap” for the party; her successful election would surely have been “embarrassing.”

The problem is not one strange candidate; rather, it is an institutional problem. When ideological factions dominate primary nominations, E.J. Dionne warns, “conservatives and liberals alike will continue to insist on nominating unadulterated candidates and will become more successful in doing so. And those candidates are likely to distrust their own establishments as much as they ideologically oppose the people at the other end of the political spectrum. In such an environment, the parties will be useful to help raise money, set the presidential nominating calendar and organize conventions, but that’s about it.”³⁹

Madison, if he had foreseen primary nominations, would likely not have been worried; his confidence lay in a view that local fires would be cooled in a temperate continental pool: “The influence of factious leaders may kindle a flame within their particular states, but will be unable to spread a general conflagration through the other states... A rage...for any other improper or wicked project will be less apt to pervade the whole body of the union, than a particular member of it.”⁴⁰ But Madison wrote before the modern age of national politics, bearing consequences the founders could certainly not anticipate.

The Vicious Arts of Little Politics

No modern campaigner could replicate Hamilton’s summary, immodest but plausible, of his brief in support of the Constitution: “I have addressed myself purely to your judgments, and have studiously avoided those asperities which are too apt to disgrace political disputants of all parties.”⁴¹ Today’s candidates instead validate Hamilton’s pessimistic forecast of local and state elections: “Talents for low intrigue and the little arts of popularity may alone suffice to elevate a man to the first honors in a single state.”⁴²

Petty politics may well be encouraged by the extremism of candidates, who then become extremist legislators. An illuminating study of the Congresses elected in 2006 and 2008 indicates that almost all House members are more extreme in their policy views than both the median voter and the median member of the same party in their state.⁴³ Overall, this extremism is

evident among 91% to 96% of Representatives, and almost all Senators. The result is a distortion of representation: voters' opinions tend to cluster toward the middle of a bell-shaped curve, while representatives evidence a sheer bimodal distribution. It is also significant that voter extremism is more evident among campaign contributors, so that the personal extremism of candidates is encouraged by their more engaged constituents. The systemic effect is what Bafumi and Herron cleverly term "leapfrog representation," as extreme Republicans (or Democrats) are eventually defeated by extreme Democrats (or Republicans). In the process, the mass of moderate voters is neglected, public policy veers from one pole to the other, and confusion and discontent with the entire system of representation grows.

That discontent is likely furthered by the conduct of the electoral process. The election of 2010, surpassing recent trends, set one dismal record: a leading academic study found it was "the most negative campaign in recent history by both sides," a conclusion reached even before the campaigns' final two weeks brought "a marked increase in negativity as the general election season has heated up and drawn close to Election Day." Three out of four Republican advertisements, and only slightly fewer Democratic appeals, were negative; these negative ads were either direct attacks on their opponents or self-serving "contrast" presentations. These strategies demonstrated a marked increase from the congressional elections of 2000, when a majority of both parties' advertisements were positive promotions of the candidates.⁴⁴

We do not argue that negative campaigning is either always effective or always inappropriate.⁴⁵ We do, however, observe that its new role as a permanent institutional feature of American political culture has unavoidably dire effects. Negative campaigning has become more prevalent because of a widespread belief among political professionals that it "works," a denigration of the electorate but possibly a self-fulfilling description. To modify a telling prediction: "If the people can only choose among [candidates identified as] rascals, they are certain to choose a [representative known as a] rascal."⁴⁶

Moreover, negativity in campaigns inevitably undermines cordiality and collegiality among elected officials, who can hardly be expected to cooperate with opposing partisans whom they have recently condemned—with malice aforethought—as feckless knaves or fools. Cool-headed policymaking withers in the heated fires set by those who are committed to "principle" and are disdainful of compromisers. Instead of honorable bargaining, we see, as in Wisconsin and Texas, legislators fleeing their states to avoid debate and the manipulation of rules to pass extreme laws or, in Congress, a ritual of budget-cutting that avoids the fundamental issues of national ends and means. These developments are not random eddies in the political tides; they result from changes in the larger currents. We now swim in different political waters, broader, deeper, and less productive than the more stable environment of the past. This ecological change is most evident in another institution: the mass media.

The Belittling Effect of Bigger Media

News about politics is now constant, repetitive, virtually inescapable and largely trivial. The spread of cable television and 24/7 news reports and other indicators of "more" news does not mean greater or even increased public understanding. The new media generally neglect interpretative journalism, but instead provide short pieces, which are repeated but not elaborated.

The conditions of cable 24/7 competition emphasize reports which are “breaking news” that can draw immediate attention from the audience, such as scandal, sex, and personal attacks, rather than the intricacies of policy deliberation.

These conditions affect politicians’ behavior. Because “news” is immediately transmitted, politicians can draw immediate attention through a provocative assertion or personal attack. But because all statements are permanently recorded, they cannot show irresolution or change their position; they must always be wary of questioners and they must expect constant investigation and intrusions on personal privacy. Every candidate must live in fear—sometimes justifiably so—of a “Macaca Moment” that will permanently damage his or her career.⁴⁷

A still greater change in the media environment has come through the Internet and its birthing of blogs, social networks, individual commentary, and wide, often anonymous, discourse. The Internet is often commended for its asserted egalitarian effects. Every computer user now can access unlimited data sources and can participate in political discussion with a single click. Isolated individuals can form communities of interest.⁴⁸ Political interests can be rapidly mobilized, and may even achieve revolutionary change, as in the epochal transformations this year in the Middle East.

These opportunities are epitomized by the spreading “blogosphere.” There are now over 118 million blogs. An earlier study found astonishing activity: 100,000 new sources each day and 1.3 million postings daily.⁴⁹ The Pew Institute testifies to their popularity: one in ten internet users contribute to a blog; one in three internet users read blogs.⁵⁰ These include many thousands of explicitly political blogs and millions of political commentaries: in 2010, two out of nine persons online used Facebook, MySpace or Twitter “for politics.”⁵¹ Partisan debate among electronic citizens might be fostered in this environment. There is no evident party bias in blog readership; Republican and Democrats participate in similar proportions. A similar parity is found in political blogs. According to an excellent tracker, our colleague David Karpf, the fifty most prominent sources are equally divided between progressive and conservative authors, but seven of the top ten are liberal.⁵²

Politics as a process, however, is not necessarily the same as democratic politics as a goal. The world of the Internet is far from the standards of democratic discourse, which include accurate information, elaboration of arguments, two-sided discussion, identifiable sources, and sufficient time for discussion within the political community.⁵³ Blogs and much Internet traffic fall far short of these standards. Most bloggers “are focused on describing their personal experiences to a relatively small audience of readers and only a small proportion focus their coverage on politics, media, government, or technology.”⁵⁴ Similarly, the largest share of social network communication deals with personal and usually trivial matters—the most important identification, for example, being “relationship status,” rather than partisanship. Editing, much less considered argument, is largely absent even in the Internet’s “political” content, surpassed by opinionated postings. Sources are commonly anonymous, making open exchange impossible while fomenting personal nastiness. The lightning speed of electronic communication favors immediate responses, not considered judgment.

For both political content production and consumption, users of the blogosphere operate in sole-source mode by confining themselves to their own particular ideological stances. Bloggers of the left and right pursue different agendas, cite different sources, cover different topics, and evaluate different political figures. In a classic study of 5,000 political blogs in 2004, the authors found almost no overlap in these blogs ideologically. Liberals drew from liberal news sources, conservatives from conservative sources: “91% of the links originating within either the conservative or liberal community stay within that community.”⁵⁵ Although a seventh of the public clicks onto political blogs, “94% of political blog readers consume only blogs from one side of the ideological spectrum.”

Similar conclusions came after an extensive study of blogs in the 2006 congressional elections, which located over 5,000 blog readers (34% of the sample), including over 2,000 readers of political blogs (14% of the sample). These readers were not only politically polarized, but even more polarized than persons of similar ideological beliefs in the mass public. In fact, they are as polarized as the U.S. Senate - reinforcing the divisions in that institution. These ideologically-sealed readers do participate actively in politics, but they do so from “largely cloistered cocoons of cognitive consonance, thereby creating little opportunity for a substantive exchange across partisan or ideological lines.”⁵⁶

As another observer put it: “Like the Tower of Babel, there is noise, but little communication. Protest buttons once read ‘Question Authority’. With the ubiquity of forums and proliferation of nominal ‘experts’ we are unsure where, or to whom, we should address our questions.”⁵⁷ Although some blogs do foster activism among communities of interest, the ties among participants are weak⁵⁸ or are no more than collections of anonymous e-mail typing pals. Rather than a “market place of ideas,” the Internet more closely resembles a vast wasteland where scattered pushcart peddlers hawk their shoddy wares to unseen buyers during a thunderstorm.

Still, as politicians adapt to the new media environment there is a great impact. One effect results simply from the increased diversity of the media. There are fewer authoritative and presumed objective voices, in contrast to the past eminence of a Walter Cronkite or *The New York Times*. Candidates and officials must be prepared to respond to examination and criticisms from diverse, unconstrained, and often biased, outlets such as Fox News, Keith Olberman, the Drudge Report, *The Huntington Post*, and biggovernment.com.

Another effect is that politicians are pushed to more extreme and less flexible positions. Their support now comes from a mass base within their own parties that is more ideological and more coherent in its ideology, and restricts its political learning to one-sided communications from one-sided bloggers. This environment leaves candidates with less flexibility in their appeals, while increasing opportunities for more extreme aspirants. Campaign strategy shifts toward mobilizing this mass base rather than in cross-party appeals. Once elected, from whatever party, the prospects dim for cooperative action across party lines, leading to judgments like that of Norman Ornstein, evaluating current politicians as the “Worst Congress. Ever.”⁵⁹

Civility is likely to decline in these conditions, as we have certainly witnessed in recent American politics. When politicians must play to voters who are divided into cohesive but

opposed camps, they will be more likely to characterize their opponents as not only wrong but reprehensible. Negative campaigning is one manifestation; governmental deadlock is another. And the decline of citizen trust in government, whoever is in control, is a third (well-documented) effect.⁶⁰

The rise in incivility has been widely noted, and deplored. To combat it, members of Congress promised to be more polite in their manners and even to sit together with the other party's representatives during the State of the Union address in 2011. But the problem is not bad manners, but fierce real differences. Personal antagonisms sometimes add an acrid odor to the fire of legislative debate, but the basic fuel is the conscientious policy differences between the members of Congress. Incivility is only the verbal representation of the changed institutions of American politics.

This environment would foster Madison's fear that a faction within the new institutions will be ready "to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens." What is far less likely is his hope, that the world of politics will attract a virtuous elite, "citizens whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations."⁶¹

The Institutional Effects of Supreme Court Decisions on Elections: A Judicial Landgrab

In September of 2000, in the early autumn of a presidential campaign that would culminate in one of the most unpredictable Supreme Court decisions ever, historian David K. Ryden published an important collection of essays. He addressed "the largely overlooked reality that the decisions of the United States Supreme Court in the realm of elections, politics, and representation have a tangible and formative effect on how the electoral process works and how effectively it satisfies its democratic objectives." Ryden observed – 90 days before *Bush v. Gore* (2000) was decided – the "underappreciated significance of the Supreme Court as primary shaper of the electoral system."⁶²

Because election law regulates the process of democratic accountability, it is the law from which all other law comes. It is the first law corrupted when politics goes dark; efforts to appear legitimate by totalitarian regimes almost always involve manipulation of election law.⁶³ *Bush v. Gore* and *Citizens United vs. Federal Election Commission* (2010) have left the door open to unbounded judicial branch authority over election law. Judicial review of the administration of politics – because it goes directly to democratic accountability, directly to the legitimacy of our elected officeholders, and because it is so rife with the potential for election outcome mischief – generates heightened concern. While *Bush v. Gore* is critically grounds that framework, we are more concerned with the impact of *Citizens United*, which is "transformative" in the sense that it "struck down decades-old limits on corporate and union spending in elections (including judicial elections) and opened up our political system to a money free-for-all."⁶⁴

Electoral democracy requires fairness in the political process. While fairness surely includes integrity in the rudimentary aspects of election process such as counting votes – the

empirical issue at the heart of *Bush v. Gore* – it also includes higher-order normative considerations, such as the role of money in politics. In terms of the case-outcome of *Citizens United*, the issue of how to regulate money in politics in a way consistent with the public interest is theoretically reduced to a balancing of First Amendment rights (of the political contributor, whether individual or corporate, and of the political recipient) with the democratic obligation to assure an accessible political conversation and a fair political process. The Court balanced those various rights and came up with a deeply-divided decision that left the political conversation in a lightly-regulated free market framework.

The more important structural implication of *Citizens United*, however, is the issue of *who* answers the question of how to regulate money in politics; this is a question of balancing political jurisdiction and, in turn, institutional powers between Congress and the Court. At one level, it is a relatively simple equation: *Citizens United* invalidated a portion of a federal statute, the Bipartisan Campaign Reform Act. Invalidating duly enacted acts of legislatures is the textbook indicator of judicial activism. Here, the Court did so under the claim that the ban on activities by corporate entities (including unions and special organized groups) violated the free speech provisions of the First Amendment to the federal Constitution. Albeit it with a conservative bent, this is naked judicial activism.⁶⁵

This particular judicial activism, however, is an extension of the Court's jurisdictional self-promotion in *Bush v. Gore*: it offends the basic premises of participatory democracy not only through the case outcome, but through the jurisdictional implication as well. In the ten years between *Bush v. Gore* and *Citizens United*, the Court has expanded its jurisdiction in election law in unprecedented ways. In the Preface to his second edition, published just after *Bush v. Gore* and eight years before *Citizens United*, Ryden wrote that “[a]lthough *Bush v. Gore* dominated the headlines... it was only one piece of the story surrounding the Court and the electoral area. In other less-heralded cases – involving campaign finance regulations, primary election voting requirements, and racial redistricting – the Court was compiling a record of unprecedented involvement in the electoral process. Th[is] flurry of cases...⁶⁶ made it clearer than ever that the electoral process was now fully constitutionalized. The Court had proven willing to weigh in on virtually any aspect of election law, often with dramatic consequences.”⁶⁷

Bush v. Gore diluted the rule that the Court should be more jurisdictionally circumspect in election law cases than in cases that do not affect the processes and substantive outcomes of the political branches. Quite to the contrary, the Rehnquist Court signaled that under the right circumstances, anything goes – indeed, the United States Court is completely without jurisdictional self-limit. We learn from *Bush v. Gore* that if you petition the Court at just the right time with just the right outcome in mind, it can substitute its will for the will of the legislature[s] involved, and then simply brand the case “limited to the present circumstances” (531 U.S. 98, 109 (2000)). Knowing that the Court can do this has created a new normal in electoral jurisprudence,⁶⁸ perfectly setting the stage for *Citizens United*, “a major upheaval in First Amendment law,”⁶⁹ which “profoundly affected the nation’s political landscape,”⁷⁰ and “dramatically accelerate[d] the corruptive force of money in U.S. politics.”⁷¹ Laurence Tribe put it most bluntly: *Citizens United* “signals the end of whatever legitimate claim could otherwise have been made by the Roberts Court to an incremental and minimalist approach to constitutional adjudication, to a modest view of the judicial role vis-à-vis the political branches,

or to a genuine concern with adherence to precedent.”⁷² In *Citizens United* we see the Court substituting its judgment for the will of the legislature in election law and producing a corrupt outcome, just as it did in *Bush v. Gore*. The difference, however, is that *Citizens United* is not “limited to the present circumstances;” rather – short of a Constitutional amendment⁷³ – *Citizens United* defines the fiscal parameters of the national political conversation for generations to come. If, however, power is to remain adequately balanced so that separating the political and nonpolitical branches matters for the purposes the founders intended, then we should have seen a coherent Congressional response to protecting the integrity of election law and the democratic accountability it is designed to facilitate. We did not.

The Institutional Response to Citizens United: Congressional Impotence

In the aftershocks of *Citizens United*, what Congress did not do, and, more pointedly, what Congress *failed* to do was to formally acknowledge the problem of the judiciary’s encroachment onto legislative law-making jurisdiction. In a constant position of almost studied ignorance, the legislative records of the 111th and 112th Congresses bear no real recognition of the violation of the separation of powers that *Citizens United* wrought. The flurry of legislation in response to *Citizens United* spoke to the consequences of the decision without addressing the deeply problematic cause, the absence of any major legislation – indeed, very little legislation at all – addressing the Supreme Court’s forcible theft of Congressional institutional power.

Even the few minimal legislative attempts to address the Court’s power came from dusty corners, borne by those with old axes to grind: Ron Paul introduced legislation that would effectively provide states with near-autonomy from the federal judiciary and the federal government at large, and Islamophobic Tea party caucusers continued to insist that “foreign law” must be irrelevant within the context of the United States legal system.⁷⁴ The title of a bill submitted by Rep. John Yarmuth (D-KY) some months after *Citizens United* sums up the studied ignorance of the institutional issues, and a weak, if not limp, response to the case outcome itself. H.Res.1275, introduced 4/20/10, is entitled: “*Expressing disapproval of the decision issued by the Supreme Court in Citizens United v. Federal Election Commission.*”⁷⁵

In the spring of 2011, a report from the Center for Responsive Politics showed the following effects of the Court decision: the percentage of spending from groups that do not disclose donors is up from 1% in the 2006 mid-term elections to 47%; 501c non-profit spending increased from 0% to total spending by outside groups to 42% in 2010, which is roughly \$61.3 million dollars; for the first time in at least two decades, outside interest groups spent more money on election season political advertising than party committees (by about \$105 million); overall, since 2006, the amount of independent expenditure and electioneering communication spending by outside groups has quadrupled; and, 72% of the political advertising spending by outside groups in 2010 is traced back to sources that were prohibited from spending that money for that purpose in 2006.⁷⁶

Shifting to the larger picture, we see a lack of recognition by Congress for *Citizens United* as anything other than a case about money in politics; and even to that, we see a grossly impotent response. The Congressional response to *Citizens United* largely centered on the ways by which the substantive outcome of the decision might be circumvented. In fact, the

Congressional Research Service generated three formal reports in response to *Citizens United*, all focusing on the subject matter of the case outcome while all but completely ignoring the jurisdictional landgrab. In the second of those reports, issued just 46 days following the decision, the Congressional Research Service identified eight primary legislative options, (1) increase disclaimer requirements; (2) disclosure of Sect.501 (c) regulation of organizations; (3) shareholder notification and approval; (4) restrictions on foreign-owned corporations; (5) conditioning government contracts or grants on forgoing the right to political speech; (6) taxation of corporate campaign-related expenditures; (7) public financing for Congressional campaigns; (8) Constitutional Amendment (Whitaker 2010). The ultimately unsuccessful DISCLOSE Act, the bill jointly sponsored by Sen. Charles Schumer (D-NY) and Rep. Chris Van Hollen (D-MD), attempted to mitigate some of the case-outcome damage by proposing stringent donation barriers for foreign corporations, barring government contractors from making political donations, and enforcing additional disclosure requirements. Yet like nearly all of the legislative responses to *Citizens United*, Schumer, Van Hollen, and the rest of Congress effectively validated the decision as a case-normal outcome of a healthy government. (As an aside, in what is one of the most dreadful illustrations of legislative acronym naming yet, DISCLOSE stands for *Democracy Is Strengthened by Casting Light On Spending in Elections*.)

Of the extra-constitutional institutional changes we've noted, we end with the Supreme Court because it seems that now, under the new normal of American politics, that's where all legislation ends.

Conclusion: The Health of American Democracy

The authors of *The Federalist*, most notably James Madison, were of the mind that human ambition was the root motivation of politics. Now, however, metastasized by the systemic toxicity of the extra-Constitutional structural changes we describe, the system itself sabotages Madison's hope that social diversity, the virtue of officials, and the necessity of compromise would overcome the ills of individual ambition and the clash of institutions.

Sabotage is evident in the silent amendment to the Constitution requiring a three-fifths majority of passage of legislation in the Senate. Sabotage is evident in the intense and unproductive polarization of the political parties, reinforced by nominations through party primaries inviting ideological extremism. Further damage has come through change in the mass media and the utterly unconstrained Internet, undermining the process of democratic discussion and deliberation. Undermining the constitutional system of checks and balances, the Supreme Court has conducted an extended landgrab of power over the electoral process.

To conclude our protest against "a long train of abuses and usurpations," we turn briefly to a different topic, President Obama's Affordable Care Act. Whatever its merits and defects, the health law is surely the most significant domestic legislation of our time. In a well-functioning Madisonian republic, "a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good."⁷⁷ The health law hardly met this ideal.

The act was passed in strict party votes, all Republicans opposed. When some Republicans sought—or pretended to seek—compromise, inaction and delay inevitably resulted from filibuster threats. When Senator Snowe voted for the bill in committee and invoked its historic impact, she was disciplined by her party in the Senate, retreated into opposition but still targeted for defeat in the next state primary contest. Backroom deals and tricky legislative tactics of budget reconciliation replaced open debate and majoritarian deliberation. Condemnation of the bill was widespread, along with some support in the mass media, but public understanding was quite limited: majorities both opposed the legislation and supported almost all of its major provisions.⁷⁸

Yet, even these limited involvements did constitute elements of a democratic process. The public was aroused, and public meetings with representatives evidenced high involvement, even to the point of raucous opposition. The subject was discussed in newspapers and broadcast opinion programs and blogs, even if often misleadingly. The bill was passed in the House and Senate in open sessions, although sometimes through mysterious sausage-making procedures, and an act was finally enacted. The noise, the rallies in protest and support, the legislative maneuvering did represent a democratic process, with all the messiness and confusions inherent in popular politics. But now that democratic process is suspended as the nation awaits the judgment of an unelected and unrepresentative oligarchy, the Supreme Court.

Twenty-six state attorneys general have challenged the health care law. Their major argument rejects the law's mandate that every individual either have health insurance or pay a tax penalty up to 2.5% of their annual income. The controversy turns on the constitutional power of Congress to regulate interstate commerce. Opponents of the law argue that the federal government has no power to penalize the "inactivity" of abstaining from health insurance while proponents argue that, since all individuals need health care at some time in their lives, the law simply regulates the manner of their involvement in this interstate business and, furthermore, that the law is also constitutional under Congress's broad taxing powers.

Because it is outside of the scope of this paper, we will not elaborate the reasons we believe the law is constitutional. More importantly, we agree with David Cole that the dispute is essentially not one of public law, but of politics: "The objections to health care reform are ultimately founded not on a genuine concern about preserving state prerogative, but on a libertarian opposition to compelling individuals to act for the collective good, no matter who imposes the obligation. The Constitution recognizes no such right, however, so the opponents have opportunistically invoked "states' rights." But their arguments fail under either heading."⁷⁹

Dozens of challenges to the health law have been made in federal courts. Judicial determinations of these lawsuits have shown a clear partisan pattern. Two Republican district judges have declared the health law unconstitutional (one ruling only against the individual mandate, one throwing out the entire law); four Democratic judges have upheld the law. Although many of the cases have been dismissed, five suits have reached the appellate level: one three-judge appellate bench has upheld the law, and decisions are expected soon from three-judge appellate benches in Richmond, Virginia and Atlanta, Georgia. Their rulings may provide another test of partisanship in the judiciary: the Virginia panel comprises three judges appointed

by Democratic presidents; that in Georgia is split among appointees of George W. Bush, Bill Clinton and both Clinton and Ronald Reagan.⁸⁰

But ultimately, the cases will be referred to and decided by the Supreme Court, probably in its next term before a recurring 5-4 majority of Republican-appointed judges. And that is the ultimate illustration of our distress over the structural sources of political deadlock in the American democracy.

If the law were deficient, both lower-case democrats and republicans should want it amended by the representative bodies that enacted it. One initial judgment of the electorate came in the congressional elections of 2010, when Republicans opposed to the act made striking gains. The presidential election of 2012 is already under way, and it is the obvious occasion for a true mandate; Obama's re-election would assure full implementation of the law and a Republican victory would result either in repeal or severe amendment. That judgment of the public may be erroneous, manipulated, inequitable or even ruinous, but it would be the public's decision. That is the way a democracy is intended to work.

The striking point of the judicial deliberations now under way is that the principal policy issue of our time is to be determined by the Court, not the political branches. That decision may or may not conform to the judgment of the public in the presidential election, and may well make the election outcome irrelevant. Moreover, this further jurisdictional landgrab of power is likely to be unchallenged. Congress and the President, even if Obama is re-elected, will probably do no more than seek half-measures to avoid the worst consequences of the Court decision, rather than defy or ignore an intrusive judicial branch.

How different from the reaction to a previous Court's involvement in the political process, the Dred Scott decision, when an aroused citizenry used legislation, political mobilization, the election of Lincoln, even civil war and constitutional amendment, to rebuff the Court. Lincoln himself understood that authority in a democracy must ultimately rest with the majority of the people and their representatives. Should we not remember his basic principle: "the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, ... the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."⁸¹

But now an immobilized citizenry awaits the decision of a body without experience in politics and without responsibility to popular wishes. The nation's passivity, no less than the Court's activism, is not only a derogation of separation of powers. It is a shameful testament to the new structural weaknesses of the American system.

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Notes

¹ We use the edition of *The Federalist* edited by J.R. Pole (Indianapolis: Hackett, 2005). Paper #10 is found on pp. 48-54, #51 on pp. 280-284.

² Richard Hofstadler, *The American Political Tradition* (Knopf, 1948), ch. 1.

³ Gerald F. Seib, “The Potential Pitfalls of Winning Big,” at: online.wsj.com/article/SB10001424052702304316404575580233341173578.html?mod=googlenews_wsj (October 29, 2010), quoting an interview with the *National Journal*

⁴ The point is made in an excellent book essay by Michael Tomasky, “The Specter Haunting the Senate,” *New York Review of Books* (September 10, 2010), at: nybooks.com/articles/archives/2010/sep/30/specter-haunting-senate/. Tomasky reviews two major new books: Sarah A. Binder and Steven S. Smith, *Politics or Principle?: Filibustering in the United States Senate* (Brookings Institution Press, 2010) and Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate* (University of Chicago Press, 2010).

⁵ Koger, p. 3.

⁶ Dana Milbank, “Byrd’s own memorial is caught in the Senate tangle,” washingtonpost.com, (July 4, 2010).

⁷ Norman Ornstein, “A Filibuster Fix,” nytimes.com/2010/08/28/opinion/28ornstein.html. (August 28, 2010),

⁸ Dylan Matthews, “The intent of both proposals is to make the Senate more like the Senate,” at: voices.washingtonpost.com/ezra-klein/2010/07/the_intent_of_both_proposals_i.html.

⁹ Gregory J. Wawro and Eric Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate* (Princeton University Press, 2006), p. 262.

¹⁰ Ornstein, “A Filibuster Fix”

¹¹ Tom Coburn, “Why is the Senate stalling on the debt debate?,” washingtonpost.com (May 18, 2011).

¹² *The Federalist*, #22, p. 119.

¹³ congress.org/news/2011/02/01/senate_may_vet_fewer_nominees

¹⁴ Thomas Mann, “The Negative Impact of Filibusters and Holds,” testimony to the Senate Committee on Rules and Administration, at:

brookings.edu/testimony/2010/0623_filibuster_mann.aspx (June 23, 2010)

¹⁵ hsgac.senate.gov/public/index.cfm?FuseAction=Press.MajorityNews&ContentRecord_id=78b6fa7d-5056-8059-7609-0e1add6f1f3e (June 23, 2010)

¹⁶ David Lightman, “Senate ‘holds’: Where just one senator makes a majority,” McClatchy Newspapers at: mcclatchydc.com/2010/02/19/86529/senate-custom-of-holds-puts-brakes.html. (February 13, 2010),

¹⁷ Ezra Klein, “Wonkbook: Filibuster reform dead,” washingtonpost.com (January 28, 2011).

- ¹⁸ Donald Matthews, "The Folkways of the United States Senate," *American Political Science Review*, 53 (December, 1959), 1065-73.
- ¹⁹ Barbara Sinclair, *The Transformation of the U.S. Senate* (Baltimore: Johns Hopkins University Press, 1989).
- ²⁰ Ezra Klein "After health care, we need Senate reform," washingtonpost.com (December 27, 2009).
- ²¹ "2009 Party Unity," *CQ Almanac*, at: library.cqpress.com/cqalmanac/search.php
- ²² Ronald Brownstein, "Pulling Apart," *National Journal*, 43 (February 26, 2011), p. 25. The statistics in this paragraph are from the "Vote ratings" in this issue.
- ²³ David Mayhew, *Congress: The Electoral Connection* (New Haven: Yale University Press, 1974).
- ²⁴ Ezra Klein, "Winning ugly, but winning", washingtonpost.com, (December 24, 2009).
- ²⁵ Greg Sargent , "In testy exchange, Chuck Grassley told Obama: No deal!" washingtonpost.com (November 17, 2010)
- ²⁶ Dana Milbank, "Abolish the Party Committees," washingtonpost.com (November 24, 2010).
- ²⁷ Gerald M. Pomper, *The Election of 1992* (Chatham House, 1993), Table 5.2, p. 138; "The Presidential Election," in Michael Nelson, ed., *The Elections of 2008* (CQ Press, 2009), Table 3.3, p. 53.
- ²⁸ Pew Research Center for the People & the Press, "Voters Rate the Parties' Ideologies," people-press.org/report/636 (July 16, 2010).
- ²⁹ Marc David Weiner, "Fifty Years On: The American Electorate's Evolving Participation in a Responsible Two-Party System," (Department of Political Science, Rutgers University, New Brunswick, NJ, 2005).
- ³⁰ Joseph Bafumi and Robert Y. Shapiro, "A New Partisan Voter," *Journal of Politics*, 71 (January, 2009), 1-24.
- ³¹ Alan I. Abramowitz, "Do Americans View Both Parties as Too Extreme?," centerforpolitics.org/crystalball/article.php?id=AIA2009070901 (July 9, 2009). Compare the classic but very different findings of Herbert McClosky *et. al*, "Issue Conflict and Consensus among Party Leaders and Followers," *American Political Science Review*, 54 (June, 1960), pp. 406-27.
- ³² Alan Abramowitz, *The Disappearing Center* (New Haven: Yale University Press, 2010: Moe P. Fiorina and Samuel J. Adams, *Disconnect* (Norman: University of Oklahoma Press, 2009),
- ³³ "Legislative Obstruction," Review Essay in *Perspectives on Politics*, 8 (December, 2010) , p. 1149f.
- ³⁴ David P. Redlawsk, et. al, *Why Iowa?*. (University of Chicago Press, 2011) ,Table 5.1, p. 90.
- ³⁵ Alan Abramowitz, "Don't Blame Primary Voters for Polarization," *The Forum* Vol. 5, No. 4 (2008); Barbara Norrander, "Ideological Representativeness of Presidential Primary Voters," *American Journal of Political Science*, 33 (1989), pp. 570-587.
- ³⁶ See the expert research of Stephen Jeesee, "Voter Ideology and Candidate Positioning in the 2008 Presidential Election, *American Politics Research*. 38 (2010), pp. 195-210.
- ³⁷ DeWayne L. Lucas and Iva E. Deutchman, "Electoral Challenges of Moderate Factions: Main Streeters and Blue dogs, 1994-2008," *The Forum*, 8:2 (2010).
- ³⁸ V.O. Key, jr., *American State Politics: An introduction* (Knopf, 1956),, Pp. 140-41, 145. 153-154.
- ³⁹ "Tuesday's tutorial: a GOP too far right," washingtonpost.com (August 26, 2010).

⁴⁰ *The Federalist No. 10*, p. 54.

⁴¹ *The Federalist No. 85*, p. 462.

⁴² *The Federalist No. 68*, p. 365.

⁴³ Joseph Bafumi and Michael C. Herron, "Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress," *American Political Science Review*, 104 (August, 2010), 519-542.

⁴⁴ Wesleyan Media Project, "An Uptick in Negativity," at: election-ad.research.wesleyan.edu/2010/11/01/an-uptick-in-negativity (November 1, 2010).

⁴⁵ See Richard J. Lau and Gerald M. Pomper, *Negative Campaigning* (Rowman & Littlefield, 2004); Richard P. Lau, Lee Sigelman and Ivy Brown Rover, "The Effects of Negative Political Campaigns: A Meta-Analytic Reassessment," *Journal of Politics*, 69 (November 2007), 1176-1209.

⁴⁶ Quoted, with apologies, from V.O. Key, Jr., *The Responsible Electorate* (Cambridge: Harvard University Press, 1966), p. 3.

⁴⁷ See David Karpf, "Macaca Moments Reconsidered: Electoral Panopticon or Netroots Mobilization?," *Journal of Information Technology & Politics*, 7 (May, 2010), 143-162.

⁴⁸ Dan Kennedy, "Political Blogs: Teaching Us Lessons About Community," *Nieman Reports*, at: nieman.harvard.edu/reportsitem.aspx?id=100022. (Summer 2008).

⁴⁹ sifry.com/alerts/archives/000443.html

⁵⁰ pewinternet.org/topics/Blogs.aspx

⁵¹ Aaron Smith, "Report, Politics, Social Networking," pewinternet.org/Reports/2011/Politics-and-social-media.aspx (2011).

⁵² David Karpf, "Understanding Blogspace," *Journal of Information Technology & Politics*, 5 (2008), 369-385. For his useful categorization of the electronic universe, see blogosphereauthorityindex.com.

⁵³ See Stanley Kelley, Jr., *Political Campaigning* (Washington: Brookings Institution, 1960), ch. 2.

⁵⁴ Amanda Lenhart and Susannah Fox, "Bloggers," pewinternet.org/Reports/2006/Bloggers.aspx (2006)

⁵⁵ Lada A. Adamic and Natalie Glance, "The Political Blogosphere and the 2004 U.S. Election: Divided They Blog," deepdyve.com/lp/acm/the-political-blogosphere-and-the-2004-u-s-election-divided-they-blog-u0QIwX6N74, p. 38.

⁵⁶ Eric Lawrence, John Sides and Henry Farrell, "Self-Segregation or Deliberation?: Blog Readership, Participation, and Polarization in American Politics," *Perspectives on Politics*, 8 (March 2010), 141-57.

⁵⁷ Marc S. Pomper, personal communication, June 4, 2011.

⁵⁸ Malcolm Gladwell, "Small Change: Why the revolution will not be tweeted," *New Yorker* (October 4, 2010), 42-49.

⁵⁹ foreignpolicy.com (July 19, 2011)

⁶⁰ Diana C. Mutz and Byron Reeves, "The New Videomalaise; Effects of Televised Incivility on Political Trust," *American Political Science Review*, 99 (February 2005), 1-14.

⁶¹ *The Federalist*, No. 10, p. 52.

⁶² Ryden, David K., ed. (2000). "The U.S. Supreme Court and the Electoral Process." (Georgetown: Georgetown Univ. Press). p.1-2. There was, however, no way for Ryden to know the election and trailing litigation would be so extraordinary; to his and his publisher's great

credit, in September 2002, within about 22 months, he published an excellent second revised edition, this time covering *Bush v. Gore* and the companion election.

⁶³ While we do not wish to use unnecessarily alarmist language, if we were studying other countries in a comparative context we would use “judicial interference with election law” as one variable by which to operationalize the degree to which that country’s governing institutional framework had totalitarian features; we see nothing alarmist about describing these two cases of intense judicial activism as facilitating the unbridled expansion of judicial power in the United States; after all, we have a Supreme Court that twice, within a decade, entered into and corrupted electoral politics, and did so in a way that signaled it respects no limits on its jurisdiction. *Bush v. Gore* and *Citizens United* are judicial landgrabs.

⁶⁴ <http://www.slate.com/id/2242209/> [accessed 5/28/11].

⁶⁵ For an excellent treatment of conservative judicial activism, see Keck, Thomas M. (2004). *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism*. (Chicago: Univ. of Chicago Press).

⁶⁶ While *Bush v. Gore*, as an utterly naked exercise of power and usurpation of legislative authority, is the theoretical break-point it is not the typical case. Rather, the flurry of cases to which Ryden refers (his through 2002, supplemented with all those from then to 2011) cover eight election subject matter areas: (1) the interaction between money and free/political speech (*Citizens United v. FEC*; *Davis v. FEC*; *FEC v. Wisconsin Right to Life*; *Davenport v. Washington*; *Randall v. Sorrell*; *McConnell v. FEC*; *FEC v. Beaumont*; *FEC v. Colorado Republican Federal Campaign Committee*); (2) redistricting and apportionment (*Lance v. Coffman*; *League of United Latin American Citizens v. Perry*; *Lance v. Dennis*; *Vieth v. Jubelirer*; *Georgia v. Ashcroft*; *Branch v. Smith*; *Utah v. Evans*; *Easley/Hunt v. Cromartie*); (3) the processes of initiative and referendum (*Doe v. Reed*; *Cuyahoga Falls v. Buckeye Community Hope Foundation*); (4) poll photo-identification and proof-of-citizenship requirements (*Crawford v. Marion*; *Purcell v. Gonzalez*); (5) states’ primary systems (*Clingman v. Beaver*); (6) extensions of the preclearance provisions of the Voting Rights Act of 1965, i.e., keeping historically-corrupt election districts in federal receivership (*Northwest v. Holder*); (7) voter registration process (*Brunner v. Ohio Rep. Party*); and (8) unbiased election administration (*Cook v. Gralike*).

⁶⁷ Ryden, 2nd. ed. 2002: xv.

⁶⁸ It is not unusual to find systemically-reordering breakpoints in the structural framework of American institutions: the most notable is Richard Neustadt’s delimitation of the pre-modern and modern presidents (Neustadt. *Presidential Power*. [1960, 1980] 1990), but we also see the effect of the Pendleton Civil Service Reform Act (1883) on the civil service, and the effect on desegregating the military of Truman’s 1948 Executive Order 9981 (and Eisenhower’s continuing efforts to realize the intent of that Order). We call these examples systemically-reordering because although the institution sustains, everything in and about it is different in some empirical way that ultimately causes permanent structural changes in the institutional framework. For one example, the size, scope, and relative expense of the Executive Branch from and after FDR is clearly, as Neustadt observes, a different and larger institution and must be described in different theoretical terms. A thorough understanding of the institutional phenomenon, though, recognizes changes in the environment in which the institution is nested; the world changes. As do individuals, institutions age, mature, and ultimately resist change; and,

similarly, as the world changes, for example technologically, institutions keep up, just as individuals do.

⁶⁹ <http://www.law.harvard.edu/news/spotlight/constitutional-law/related/tribe.on.citizens.united.html> [accessed 5/28/11].

⁷⁰ <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html> [accessed 5/28/11]/

⁷¹ http://www.huffingtonpost.com/gideon-rosenblatt/citizens-united-v-united-_b_809262.html [accessed 5/28/11].

⁷² <http://www.law.harvard.edu/news/spotlight/constitutional-law/related/tribe.on.citizens.united.html> [accessed 5/28/11].

⁷³ Because of the enormous effort and unanimity involved, this doesn't happen often; so far, despite many efforts and threats, from the laudable Equal Rights Amendment to the less-laudable Flag Burning Amendment, it's only happened four times: The 11th Amendment overturned *Chisholm v. Georgia* (1793) (federal court jurisdiction); the 14th Amendment overturned *Scott v. Sandford* (1857) (equal protection); the 16th Amendment overturned *Pollock v. Farmers' Loan and Trust Co.* (1895) (income tax); and the 26th Amendment overturned *Oregon v. Mitchell* (1970) (18 year old vote).

⁷⁴ To amend title 28, United States Code, to prevent the misuse of foreign law in Federal courts, and for other purposes, H.R. 973, 112th Cong., 1st Sess. (2011).

⁷⁵ Expressing disapproval of the decision issued by the Supreme Court in *Citizens United v. Federal Election Commission*, H.RES.1275.IH, 11th Cong., 2nd Sess. (2010).

⁷⁶ <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html> [accessed 5/28/11].

⁷⁷ *The Federalist*, #51, p. 284.

⁷⁸ Brad Shannon, "No Clear Mandate for Health Care Bill Repeal," huffingtonpost.com (November 24, 2010).

⁷⁹ David Cole, "Is Health Care Unconstitutional?," *New York Review of Books* (February 24, 2011), at: nybooks.com/articles/archives/2011/feb/24/health-care-reform-unconstitutional.

⁸⁰ N.C. Aizenman, "Legal battle over Obama's health-care law moves to Atlanta courtroom," washingtonpost.com (June 8, 2011).

⁸¹ bartleby.com/124/pres31.html