

Finding the Common Good in an Era of Dysfunctional Governance

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Abstract: The framers designed a constitutional system in which the government would play a vigorous role in securing the liberty and well-being of a large and diverse population. They built a political system around a number of key elements, including debate and deliberation, divided powers competing with one another, regular order in the legislative process, and avenues to limit and punish corruption. America in recent years has struggled to adhere to each of these principles, leading to a crisis of governability and legitimacy. The roots of this problem are twofold. The first is a serious mismatch between our political parties, which have become as polarized and vehemently adversarial as parliamentary parties, and a separation-of-powers governing system that makes it extremely difficult for majorities to act. The second is the asymmetric character of the polarization. The Republican Party has become a radical insurgency – ideologically extreme, scornful of facts and compromise, and dismissive of the legitimacy of its political opposition. Securing the common good in the face of these developments will require structural changes but also an informed and strategically focused citizenry.

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From Federalist No. 1 on, the framers of the American political system showed a deep concern about the role of government as a trustee of the people, grappling with questions about the power, structural stability, and credibility of government. In that first Federalist paper, Alexander Hamilton defended a vigorous role for government: “[It] will be equally forgotten that the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interests can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of government.”¹

In Federalist No. 46, James Madison wrote, “The federal and state governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different

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purposes.”² And in Federalist No. 62, Madison, outlining and defending the special role of the Senate, reflected at length on the need for stable government and the danger of mutable policy: “[G]reat injury results from an unstable government. The want of confidence in the public councils damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements.”³

Stable government, to Madison, included an underlying and enduring legitimacy in the legislative process. This meant both a disciplined government that did not spew out a plethora of unnecessary and careless laws, and a government that did not produce contradictory laws or reversals of laws so frequently that citizens questioned the content and legitimacy of the standing policies affecting their lives. Madison wrote in Federalist No. 62 of mutable policy: “It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.”⁴

Madison ended Federalist No. 62 with a warning that resonates today: “But the most deplorable effect of all is that diminution of attachment and reverence which steals into the hearts of the people, toward a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable without possessing a certain portion of order and stability.”⁵

The actions and functions of government, a vibrant political process and sys-

tem, were thus essential for the common good of a society. The framers saw several challenges peculiar to the new American country. It was, as they wrote, an “extended republic,” a huge geographic expanse and a society containing dramatically diverse populations, including people living in rural areas so remote that they literally might not see other human beings for months, and others living in urban areas far more densely packed than today’s Manhattan. How could the new government build consensus and legitimacy around policies that would affect all citizens, in light of their different interests, lifestyles, and backgrounds? The demands of the American political system differed from those in Britain, a much smaller and far more homogeneous culture and society. Instead of a parliamentary system, the framers carefully constructed a system that would be practicable and desirable for their nation, built around the following elements:

Debate and deliberation. The legislative branch was called Congress – not parliament. This was not simply a different word, but reflective of a different approach to governance. The word *congress* comes from the Latin word *congrēdi*, meaning to come together; *parliament* comes from the French word *parler*, meaning to talk. In a parliament, the legislators vote on a program devised by the government; the majority members reflexively vote for it, the minority members reflexively vote against. Citizens accept the legitimacy of the actions, even if they do not like them, because within four or five years, they have the opportunity to hold the government accountable at the polls. The minority expresses its power by publicly questioning government actions and intentions during regular periods of “Question Time.”

In contrast, the American framers wanted a system in which representa-

tives of citizens from disparate regions would come together and meet face to face, going through extended periods of debate and deliberation across factional and partisan lines. This model would enable the representatives to understand each other's viewpoints and ultimately reach some form of consensus in policy-making. Those who lost out in the deliberative process would be satisfied that they had been given ample time to make their case, adding to the likelihood that they would accept the legitimacy of the decisions made, and communicate that acceptance back to their constituents. Of course, in contrast to a parliament, it was a process that made swift action extremely difficult. But the trade-off was that government power would be constrained and that Americans would be more likely to accept the decisions and implement them fairly and smoothly.

Debate and deliberation could not be limited to governmental actors. For the system to work and be perceived as legitimate, there had to be debate and deliberation among citizens, via local and national "public squares," and in campaigns, where candidates and their partisans could press their cases and voters could weigh the viewpoints and preferences of their alternatives for representation.

Divided powers competing with one another. America's unusual system of the separation of powers did not offer a clean and pure division between the executive, legislative, and judicial branches, nor between the House of Representatives and Senate. Instead, as constitutional scholar Edward Corwin put it, it was an "invitation to struggle" among the branches and chambers. But that invitation to struggle, which anticipated vibrant, assertive, and proud branches, also was infused with *the spirit of compromise*, as eloquently analyzed by Amy Gutmann and Dennis Thompson in this volume and in their recent book on the

subject.⁶ A political system with separation of powers and separate elections for House, Senate, and president could easily have institutions at loggerheads. The system, and the culture supporting it, required safeguards to enable the government to act when necessary and desirable, without getting caught in stalemate or gridlock.

Regular order. To make the processes work and to foster legitimacy, legislative and executive procedures had to be regularized and followed. This would in turn enable real debate by all lawmakers, opportunity for amendments, openness and reasonable transparency, and some measure of timeliness. Executive actions, including crafting and implementing regulations to carry out policy, would also require elements of transparency, responsiveness to public concerns, and articulated purpose. Similarly, judicial actions would have to allow for fairness, access to legal representation, opportunities for appeal, and a parallel lack of arbitrariness.

Avenues to limit and punish corruption. Public confidence in the actions of government – a sense that the processes and decisions reflect fairness and enhance the common good – demands that the cancer of corruption be avoided or at least constrained. If small groups of special interests or wealthy individuals can skew decisions in their favor, it will breed cynicism and destroy governmental legitimacy. Thus, it is necessary to find ways to constrain the role of money in campaigns, to build transparency around campaign finance and lobbying, to discourage "old boy networks" and revolving doors, to investigate and prosecute bribery, and to impeach and remove government officials who commit high crimes and misdemeanors, which include corrupt behavior.

On all these fronts, there is ample reason to be concerned about the health and

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function of America's current political institutions. Of course, no political system operates exactly as intended. Politics and policy-making are inherently messy, occurring at the intersection of power, money, and ambition, and leading to temptations and imperfections. We have been immersed in these processes in Washington for more than forty-three years, and we have observed frequent governmental failures, deep tensions, and challenges to the political system – from profound societal divisions over wars like Vietnam to the impeachment proceedings against two presidents. But those challenges were modest compared to what we see today: a level of political dysfunction clearly greater than at any point in our lifetimes.

Fundamentally, the problem stems from a mismatch between America's political parties and its constitutional system. For a variety of reasons, all recounted in our book *It's Even Worse Than It Looks: How the American Constitutional System Collided With the New Politics of Extremism*, the two major political parties in recent decades have become increasingly homogeneous and have moved toward ideological poles.⁷ Combined with the phenomenon of the permanent campaign, whereby political actors focus relentlessly on election concerns and not on problem-solving, the parties now behave more like parliamentary parties than traditional, big-tent, and pragmatic American parties.

Parliamentary parties are oppositional and vehemently adversarial, a formula that cannot easily work in the American political system. The parliamentary mindset has been particularly striking in recent years with the Republican Party, which has become, in its legislative incarnation especially, a radical insurgent, dismissive of the legitimacy of its political opposition. Of course, substantial majorities in the House and Senate, along with the presi-

dency, can give a majority party the opportunity to behave like a parliamentary majority. But that phenomenon, which occurred for Democrats in the first two years of the Obama administration, resulted in major policy enactments but not a smoothly functioning political system. It featured neither a widespread sense of legitimacy nor deep public satisfaction.

Why? The processes of debate and deliberation were disrupted first by the Republicans' unprecedented use of the filibuster and the threat of filibuster as purely obstructionist tools. This deluge was designed to use precious floor time without any serious discussion of the reasons behind the filibusters, or any real debate on differences in philosophy or policy. Second, when Democrats were able to pass legislation, it was against the united and acrimonious opposition of the minority. America's political culture does not easily accept the legitimacy of policies enacted by one party over the opposition of the other – much less the continued, bitter unwillingness of the minority party to accept the need to implement the policies after lawful enactment. But this dynamic, which accompanied the economic stimulus package in 2009, the health care reform law of 2010, and the financial regulation bill in 2010, among others, resulted in greater divisions and public cynicism, not less.

The approach of the minority party for the first two years of the Obama administration was antithetical to the ethos of compromise to solve pressing national problems. The American Recovery and Reinvestment Act of 2009, a plan which included \$288 billion in tax relief, garnered not one vote from Republicans in the House. The Affordable Care Act, essentially a carbon copy of the Republican alternative to the Clinton administration's health reform plan in 1994, was uniformly opposed by Republican parti-

sans in both houses. A bipartisan plan to create a meaningful, congressionally mandated commission to deal with the nation's debt problem, the Gregg/Conrad plan, was killed on a filibuster in the Senate; once President Obama endorsed the plan, seven original Republican co-sponsors, along with Senate Republican Leader Mitch McConnell, joined the filibuster to kill it. McConnell's widely reported comment that his primary goal was to make Barack Obama a one-term president – a classic case of the permanent campaign trumping problem-solving – typified the political dynamic.

The succeeding midterm election brought a backlash against the status quo – which meant divided government once Republicans captured a majority in the House of Representatives. As a result, the 112th Congress had the least productive set of sessions in our lifetimes, enacting fewer than 250 laws, more than 40 of which were concerned with naming post offices or other commemoratives.⁸ The major “accomplishment” of the 112th Congress was the debt limit debacle, which marked the first time the debt limit had been used as a hostage to make other political demands. The result was not just the first ever downgrade in America's credit, but another blow to the public's assessment of its government's capacity to act on behalf of the common good.

The 2012 elections were in most respects a clear expression of public will. President Obama earned reelection with a majority of popular votes, as did Democrats in elections for the House and in the thirty-three contests for the Senate. But in the House, a concentration of Democratic voters in high-density urban areas, contributing to a more efficient allocation of Republican voters across congressional districts, and a successful partisan gerrymander in the redistricting process left Republicans with a majority of seats, and

hence control. Despite the election, the dysfunction in the policy process continued in the succeeding lame duck session of Congress, as efforts to resolve America's fiscal problems before a January 1, 2013, deadline were thwarted until after the deadline had passed. House Speaker John Boehner was himself undermined by members of his own party when he tried to devise an alternative to the president's plan. In this case, a substantial share of safe House Republican seats were immune to broader public opinion and to their own Speaker, but were more sensitive to threats from well-financed challenges in their next primaries – from the Club for Growth and other ideological organizations – and to incendiary comments from radio talk show hosts and cable television commentators popular among Republican voters in their districts.

Tribal politics and vehement adversarialism has also led to deterioration of the regular order. In recent years, there have been more and more closed rules in the House, denying opportunities for amendments from the minority, and more uses of a majority tactic in the Senate called “filling the amendment tree,” in which the majority leader precludes amendments, usually as a way to forestall or limit the impact of filibusters. There have been more omnibus bills, pooling action across areas because of the increased difficulty in getting legislation enacted; and fewer real conference committees to iron out differences between bills passed by each house of Congress. There have been fewer budget resolutions adopted and appropriations bills passed; fewer authorizations of programs and agencies; and less oversight of executive action. Fewer treaties have gained the two-thirds vote needed for ratification in the Senate, leading to more executive actions. There have been more holds and delays in the Senate in executive nominations. All of

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these pathologies lead to more acrimony inside Congress and between Congress and the executive, and a diminished sense of confidence by Americans in their political and policy institutions.

At the same time, the administration of elections has been politicized. Partisan legislatures have passed stringent voter ID laws to narrow the vote; several of these laws have been thrown out by courts for targeting or unfairly affecting minorities. In other cases, shortened voting hours and restrictions on early voting, in states such as Florida and Ohio, were also aimed at constraining minority voters. Fortunately, the 2012 election was not close; had it been more like the 2000 election, it is very likely that it would have further reduced public trust in the fundamentals of democratic elections.

The world of money and politics has also taken an alarming turn toward at least the appearance of corruption, of democracy driven by big money and large interests. A combination of factors – the Supreme Court’s *Citizens United* decision, an appeals court decision called *SpeechNow*, a Federal Election Commission that is unable or unwilling to enforce campaign finance laws, and an Internal Revenue Service that allows the operation of faux social-welfare organizations set up to influence elections but not required to disclose donors – has given wealthy individuals, corporations, and other entities an overweening influence on elections and on the policy process. If super PACs did not determine the outcome of the presidential election, their impact did expand as one moved down through Senate and House elections and on to state, local, and judicial elections. In states like Kansas, North Carolina, and Arkansas, large donations from a handful of individuals and groups targeted moderate Republicans and replaced them with reactionary conservatives, creating more

division and polarization, not to mention politicians beholden to those whose money put them in power.

Organizations such as the American Legislative Exchange Council (ALEC) have used large and often anonymous contributions from corporations and individuals to write laws, including the voter ID laws and laws favoring the corporate sector, that many state legislatures have simply enacted as written, obviating their independent role. And inside Congress, many lawmakers have told us about the intimidating effect that occurs when a lobbyist tells them that if they do not support a bill or amendment, they might face a multimillion dollar independent attack days or weeks before the election, which they will be unable to counter due to a lack of time or fundraising limitations. Such threats can result in the passage of bills or amendments without any money even being spent. By any reasonable standard, this is corruption.

All of this exhibits a level of dysfunction in American political institutions and processes that is dangerous to the fundamental legitimacy of decisions made by policy-makers, not to mention the ability of those policy-makers to act at all. Tribal politics at the national level has metastasized to many states and localities, and has affected the broader public as well. The glue that binds Americans together is in danger of eroding. What can be done about these problems?

There is no easy answer, no panacea. The problems are as much cultural as structural. But if structural change inside and outside Washington cannot solve the problems, it can ameliorate them, and perhaps also begin to change the culture.

One strategy for structural change is to accept the emergence of parliamentary-style polarized parties and try to adapt our political institutions to operate more

effectively in that context. This is easier said than done. Eliminating or constraining the Senate filibuster would give unified party governments a better shot at putting their campaign promises into law.⁹ But separate elections for the presidency and Congress, as well as the mid-term congressional elections, often conspire to produce divided party government, which has become more a basis of parliamentary opposition and obstruction than consensus-building and compromise. Shifting more power to the presidency, which is already under way, may produce more timely and coherent policies but at a considerable cost to deliberation, representation, and democratic accountability. A president is, of course, elected by the entire nation. Especially on national security issues, Americans are willing to tolerate and even embrace many unilateral presidential actions; think Grenada and Abbottabad. But America's political culture has ingrained in the public a sense that legitimate policies more often call for some form of broad leadership consensus and institutional buy-in. A series of unilateral actions by the president would not necessarily result in public acceptance of the decisions as being made for the common good. The same can be said for other forms of delegation, from Congress to fed-like independent agencies, or boards that encourage more expert and evidence-based decision-making that is at least somewhat removed from the clash of polarized parties. Each of these ideas has some limited promise, but none can be the basis of constructively reconciling a fundamental mismatch between parliamentary-like political parties and the American constitutional system.

Another approach emphasizes trying to bring the warring parties together: by reaching for consensus through increased social interaction (the House experiment with civility retreats); encouragement of

or pressure on politicians to come together to make a deal (Fix the Debt); the mobilization of centrists in the citizenry to create political space for more collegial and collaborative policy-making (No Labels); the use of outside bipartisan groups to map policy solutions that split the differences between the polarized parties (Committee for a Responsible Federal Budget); and the support of independent presidential candidates or third parties to lay claim to the allegedly abandoned political "center" (Americans Elect). These efforts by and large seek to create a spirit of compromise, an atmosphere of civility and mutual respect, and a focus on problem-solving – outcomes which are indeed commendable.

But we believe that these well-intentioned efforts are limited by the strength and reach of party polarization, which is buttressed not only by genuine ideological differences among elected officials, but also by like-minded citizens clustered in safe districts, committed activists, a partisan media, a tribal culture, interest groups increasingly segregated by party, a party-based campaign funding system that now encompasses allegedly independent groups, and a degree of parity in party strength that turns legislating into strategic political campaigning. Most of these efforts also suffer from an unwillingness to acknowledge the striking asymmetry between today's political parties, which in the process gives a pass to obstructionist and dysfunctional behavior.

A more promising strategy of reform is to bring the Republican Party back into the mainstream of American politics and policy as the conservative, not radical, force. Ultimately, this is the responsibility of the citizenry. Nothing is as persuasive to a wayward party as a clear message from the voters. The 2012 election results and the widespread speculation of the diminishing prospects of the Republican

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coalition in presidential elections may be the start of that process. But it can be boosted and accelerated by the groups discussed above speaking clearly and forthrightly about the damage caused to constructive public policy by tax pledges, debt limit hostage-taking, the abuse of the filibuster, climate change denial, the demonization of government, and ideological zealotry. The mainstream press could also do its part by shedding its convention of balancing the conflicting arguments between the two parties at the cost of obscuring the reality. Voters cannot do their job holding parties and representatives accountable if they do not have the necessary information. Some in the media think it is biased or unprofessional to discuss the many manifestations of our asymmetric polarization. We think it is simply a matter of collecting the evidence and telling the truth.

More significant, for both parties, would be to enlarge the electorate to dilute the overweening influence of narrow, ideologically driven partisan bases that dominate party primaries. As a result, these bases have an outsized role in choosing candidates, who often do not reflect the views of their broader constituencies; and as a means of heading off primary challenges, the bases can intimidate lawmakers searching for compromise or a common good into moving away from solutions. Meanwhile, the enlarged influence of party bases pushes campaign operatives and candidates away from broader appeals and toward strategies to turn out one's own base (often by scaring them to death), and to suppress the other side's base. The politics of division trump the politics of unity.

To counter this set of problems, we propose adoption of the Australian system of mandatory attendance at the polls, where voters who do not show up (they do not have to vote for specific candi-

dates, but can cast unmarked ballots) and do not have a written excuse are subject to modest fines, the equivalent of a parking ticket. This system moved Australian turnout from around 55 percent, similar to the United States, to over 90 percent.¹⁰ Most important, it changed Australian campaign discourse. Politicians of all stripes have told us that when they know that their own base will turn out en masse, and will be balanced by the other party's base, they shift their efforts to persuading voters in the middle. That means talking less about wedge issues, like abortion or guns, and more about larger issues like education and jobs; and it means using less of the fiery or divisive rhetoric that excites base voters but turns off those in the middle.

Another option is to expand the use of open primaries and combine them with preference voting. Several states, including California, now use open primaries, in which all candidates from all sides run together; the top two finishers go on the ballot for the general election. Add in preference voting, whereby voters rank their choices in order of preference (something also done in Australia), and it reduces the chances of an extreme candidate winning a top-two finish because multiple non-extreme candidates divide the votes of the more populous, moderate electorate. Another advantage of an open primary is that lawmakers who cast contentious votes would be less intimidated by threats of a primary challenge funded by ideological organizations if they knew the primary electorate would be expanded beyond a small fringe base. If we could combine these changes with redistricting reform, using impartial citizen commissions to draw district lines as we have seen operate in states like Iowa and California, we might get somewhere.

Of course, the enhanced leverage that smaller groups possess over the sentiments

of the larger populace has other roots, including especially the post-*Citizens United* campaign finance world. When groups like the Club for Growth, wealthy individuals, or “social welfare” organizations funded by anonymous sources threaten lawmakers with massive negative campaigns sprung in the final weeks of the election season, or threaten to finance primary opponents against them, it gives immense leverage to the well-heeled few against the viewpoints of the many. Absent a new Supreme Court, a multiple public match for contributions from small donors would give additional leverage to the broader population.

The pull toward tribal politics and away from a focus on the common good has also been shaped by the emergence of tribal media, via cable television and talk radio. The tribal media have established lucrative business models built on apocalyptic rhetoric and divisive messages that guarantee regular audiences within select demographics. These business models have emerged in large part because of the dramatic technological changes that have created hundreds or thousands of alternative information outlets, which are amplified by the emergence of social media. All of this has devastated the concept of a public square, where most Americans could get their information, share a common set of facts, and debate vigorously what to do about common problems. Having real debate and deliberation at the public level, much less the governmental level, depends on sharing a common set of facts and assumptions.

Re-creating a public square is a Herculean task given the contemporary media and technology landscape. But it must be attempted. Public media would be the best venue; finding a way to fund a public/private foundation that would focus on innovative ways to use public media for straightforward analysis and discourse,

including vigorous debate based on common understanding of the facts, should be a priority here. One way to do so would be to apply a rental fee to broadcasters and others for their use of the public airwaves, in return for erasure of the public-interest requirements that now have little impact.¹¹

Most of these changes will be hard to implement in the short run. The best we can hope for is a more tempered Republican Party willing to do business (that is, deliberate, negotiate, and compromise without hostage-taking or brinksmanship) with their Democratic counterparts. Over the long haul, both political parties in the United States need to depolarize to some degree. The parties may maintain clear differences in philosophy and policy, to be sure, but they must also cultivate enough agreement on major issues to permit the government to work as designed. The parties must also serve an electorate that shares a common vision and common facts, even with sharp differences in philosophy, lifestyles, and backgrounds. Despite the obstacles, we must think big about changing the structures and the culture of our partisan government and populace; the stakes are high.

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