

Wesleyan University

Partisan Fragmentation in the American Polity:  
Policymaking and Democratic Accountability in a Two Party System

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Introduction

It is hardly a controversial assertion that America's constitutional order is highly fractured. The system of checks and balances implicit in the design of the United States Constitution has a critical consequence: the design and implementation of policy is a responsibility shared by an array of separate institutions sharing powers. Congress, the President and his administrators, the individual states, and often times the Supreme Court all have a hand in ensuring the success—or the failure—of specific policies.

Also well studied is the fact that America's party system is deeply divided between two factions. Our first-past-the-post party system, which has evolved causally from our constitution,<sup>1</sup> has devolved into a zero-sum competition between Republicans and Democrats. Barring significant reform prompted by economic, cultural, or social change, this dynamic is likely to continue.

The resulting structure is one where partisan alignments are controlling in inter-institutional cooperation and competition. Individuals who have little incentive to see the president, or the federal government more generally, succeed, are given significant control over the outcomes of federal policymaking and implementation. This gives officials a tool to deflect responsibility for failed policies, but it also gives opposition actors opportunities to sabotage

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<sup>1</sup> Duverger, Maurice. 1954. *Political Parties, Their Organization and Activity in the Modern State*. London: Methuen.

federal initiatives. These facts call into question the ability of voters to hold elected officials accountable for their policy decisions.

Due to the intensely interconnected system of shared authority among institutions within the American government, the system is markedly less effective when partisan affiliation compels actors to compete rather than cooperate; it becomes a daunting task to fairly allocate blame and responsibility for public policy when partisan motivations inhibit cooperation. Consider that not only is there a two-way channel for state and federal actors to influence and distort both federal and state policy outcomes, but there are multiple potentially divided branches *within* each level of the federated and separated powers of the American polity. More specifically, shared institutional power makes it difficult for voters to hold a single party accountable for something when both parties are, for different reasons and to different degrees, responsible for a specific policy outcome.

Partisanship has infiltrated all American political institutions and significantly warped actors' incentives. The Supreme Court, once held as a steward of constitutional interpretation, is often split or dominated by party votes. When the president's opposition party controls Congress, it has very little incentive to pass legislation that might then be attributed to the president's party. And, to make the system even more complex, state governments increasingly eschew their own institutional interests in favor of partisan ones.

This partisan fragmentation has had calamitous results in public policy. The American public enjoys markedly less prosperity today than it did when polarization was less pronounced: individuals have assumed far more economic risk today than they have in the past century, income inequality is on the rise, and economic crises are far more difficult to avoid. In today's system, partisan behavior begets little policy change, and policy change is badly needed if the

nation hopes to address increasing income inequality and preempt calamitous economic crises. Were the American system designed so that each party could be given a working majority to carry out its policy agenda, and then held properly accountable for that agenda, the public would see the true policy preferences of each party. Voters today most readily identify by party, and to reflect this, our democratic system should allow them to operationalize this identity into their voting behavior.

Part I presents a brief history of partisanship and federalism, and illustrates how the co-evolution of those two forces has led to the breakdown of Madisonian visions of institutional political motivations. Part II visits the existing literature on partisan behavior within and across the federal branches of government, in particular examining how federal actors have grown to ignore their institutional obligations. Part III presents and builds on a model of partisan federalism, where state actors eschew the interests of their states as sovereign entities to pursue partisan goals. Part IV explores the consequences of the breakdown of the Madisonian vision in the context of policy outcomes and accountability through a case study of the Affordable Care Act. Part V concludes by mapping the trajectory of America's fragmentation should polarization continue to grow, and offers some possible solutions.

### Part I: A Brief History of Partisanship and Federalism in the 20<sup>th</sup> Century

To frame an understanding of how federalism and partisanship intersect in the contemporary United States, it is important that we construct a basic narrative of the recent history of both of these institutions. First, I intend to tell the story of the shift from a cooperative federalism regime, where the federal government addressed policy concerns by allocating grants-in-aid to states that were then expected to carry out those policy goals, to an opportunistic one,

where political actors act in the most parochial and self-interested terms. Further, explaining the centralization of intra-party political control and the declining reliance on federated party structures, in addition to the growth of ideological cohesiveness within each major party relative to the other, is also critical. These trends, which can be seen in both the U.S. federated and party systems, are deeply interrelated, and tracing their simultaneous evolution will provide a solid foundation to build upon in explicating how partisanship is deeply problematic in the context of federalism.

In the post-World War II administrative, legal, and political landscape, cooperative federalism, usually defined as the expansion of grant-in-aid programs distributed from the federal government that emerged in the post-New Deal era, emerged as the dominant model used to understand intergovernmental relations.<sup>2</sup> The goal of this model was social equity; it was used as a policy response to the challenges of market failure, racism, urban poverty, environmental goals, and individual rights.<sup>3</sup> The execution of such goals can be seen in the proliferation of grants in the context of liberal spending programs. As Tim Conlan writes: "Throughout the 1950s, the country saw the continued expansion of public health, agriculture, and urban renewal grants. By 1960, there were 132 separate grant-in-aid programs, up from 30 in 1939 and 60 in 1950."<sup>4</sup>

As the grants-in-aid that were part of the cooperative regime continued to grow in size, number, and complexity, attempts by more centralized forces to manage them frayed intergovernmental relations, and this fraying led to the deterioration of the cooperative regime.<sup>5</sup>

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<sup>2</sup> Kincaid, J. 1990. "From Cooperative to Coercive Federalism." *The Annals of the American Academy of Political and Social Science* 509, no. 1: 13.

<sup>3</sup> *Ibid.*, 13

<sup>4</sup> Conlan, Tim. 2006. "From Cooperative to Opportunistic Federalism: Reflections on the Half-Century Anniversary of the Commission on Intergovernmental Relations." *Public Administration Review* 66, no. 5: 666.

<sup>5</sup> *Ibid.*, 666.

The causes of this fraying were manifold, but the most important ones were related to the American party system, namely, the centralization of party control and the growth of ideological cohesion within parties.

For a time, the decentralized, federated system of electoral politics in the United States was widely heralded as a structural mechanism that guaranteed states their sovereignty. It was deemed an adaptation that would help maintain the normative constitutional goals of a federalist system: that states should act as a check on the federal government by advocating for their interests as states. Larry Kramer has noted that the assumption preceding the role of electoral politics in a federated system, that constitutional safeguards protect decentralized policy decisions, was actually replaced by one where states carry out their interests through a decentralized party system. He argues, “This failed original understanding [of constitutional protections for states’ rights] was replaced by the new politics, a politics that preserved the states’ voice in national councils by linking the political fortunes of state and federal officials through their mutual dependence on decentralized political parties.”<sup>6</sup>

That electoral link still exists today; however, it has changed dramatically. Due to a number of factors, party structure has grown increasingly centralized since the period of cooperative federalism, and this centralization has manifested itself as the erosion of state and local electoral power. Conlan writes:

Mayors and governors have lost much of the influence they once had in presidential and congressional nominations-influence that led Morton Grodzins (1968) to argue that “[s]tates and localities, working through the parties . . . are more influential in federal affairs than the federal government is in theirs.”<sup>7</sup>

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<sup>6</sup> Kramer, Larry D. 2000. "Putting the Politics Back into the Political Safeguards of Federalism." *Columbia Law Review* 100, no. 1: 219.

<sup>7</sup> Conlan, 671.

Because of the rise of the primary system, and the individualization of political campaigns, national party committees replaced this federated structure as the locus of electoral control.<sup>89</sup>

This nationalization of party conflict, rising in tandem with the increasing ideological divide between parties, has fundamentally changed the way local and state actors behave relative to the federal government.

The decline of the cooperative doctrine led to the growth of what many have termed coercive federalism, defined as the growth of costly and intrusive federal mandates, or the movement from federal fiscal incentives towards an increased federal accumulation of regulatory and administrative authority. As John Kincaid writes:

The federal government reduced its reliance on fiscal tools to stimulate intergovernmental policy cooperation and increased its reliance on regulatory tools to ensure the supremacy of federal policy.... The erosion of federal fiscal power and of constitutional and political limits on federal regulatory power in the 1970s and 1980s has produced a more coercive system of federal preemptions of state and local authority and unfunded mandates on state and local governments.<sup>10</sup>

These mandates, in addition to strict systems of accountability and performance measurement, have become a trademark of the coercive federalism model. These programs expanded in the '60s, '70s, and '80s: the number of major federal mandates increased from two to 60 from 1955 to 1993, and the number of preemptions of state authority by the federal government doubled.<sup>11</sup> Further, at this juncture, the federal government began to break down the strict separation between federal and state authority, known as dual federalism. The erosion of this separation is evident in the Supreme Court's quixotic and often manic attempts to define Congress' Commerce Clause powers, from *Wickard v. Filburn* to *Gonzales v. Raich*. State and federal

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<sup>8</sup> Sabato, Larry, and Bruce A. Larson. 2002. *The Party's Just Begun: Shaping Political Parties for America's Future*. New York: Longman.

<sup>9</sup> Beck, Paul Allen., and Marjorie Randon Hershey. 2000. *Party Politics in America*. New York: Longman.

<sup>10</sup> Kincaid, 139.

<sup>11</sup> Conlan, 667.

jurisdictions today overlap far more than they used to, and this co-regulatory apparatus often forces states and localities meet policy goals dictated by the federal government.<sup>12</sup>

However, the coercive model, while still relevant, hardly encapsulates the entirety of the American federalist system as it exists today. There are aspects of contemporary federalism that are more seductive than they are coercive; cooperative and coercive federalism both operate simultaneously. While there has been a significant cooptation of state authority by the federal government, there are still federal grants-in-aid that assume state and local agents are loyal servants to principal actor goals. Ultimately, the model that makes the most sense in the context of this contradiction is one of opportunistic federalism, “a system that allows—and often encourages—actors in the system to pursue their immediate interests with little regard for the institutional or collective consequences.”<sup>13</sup> The proliferation of opportunistic federalism explains why partisanship has become such a powerful motivation among political actors in the contemporary federalism landscape. As cooperative federalism has continued to deteriorate (though not disappear entirely), actors have assumed tactics that place “political and jurisdictional” interests, or self interest, above shared goals.<sup>14</sup>

The literature on what motivates political actors, and members of Congress in particular, is quite robust. How we define “self interest” is central to how we understand the operative dynamics of intergovernmental actors. First and foremost, members of Congress, and elected officials in general, seek re-election.<sup>15</sup> This model is closely related to public choice theory, which, by imposing the assumption of instrumental rationality on political actors, dictates that

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<sup>12</sup> Schapiro, Robert A. *Polyphonic Federalism: Toward the Protection of Fundamental Rights*. Chicago: U of Chicago, 2009. Print.

<sup>13</sup> *Ibid.*, 667.

<sup>14</sup> *Ibid.*, 667.

<sup>15</sup> Mayhew, David R. 1974. *Congress: The Electoral Connection*. New Haven: Yale UP.



politicians are vote maximizing.<sup>16</sup> Secondly, elected officials seek influence within institutions, and opportunities to enact good public policy.<sup>17</sup> Finally, Gary Cox and Mathew McCubbins add, in what they call the procedural cartel theory, that elected officials have strong motivations to protect their own party's majority control of political institutions.<sup>18</sup> This last motivator, in addition to re-election, is particularly useful in explaining how intergovernmental actors behave in extremely polarized environments. Before I examine what federalism looks like in such an environment, I first want to explore how and why polarization has taken shape in the United States.

The unambiguous trend in America of ideological polarization between the two political parties has exploded since the 1970s. There are many competing explanations for the cause of this trend, and in fact, it seems probable that all have contributed to gradual increase in DW NOMINATE scores, a measure of partisan votes among members of Congress. One of the most important of these causes is that of southern realignment; the Southern electorate that used to be a part of the Democratic coalition joined the Republican Party when Democrats legislated the Civil Rights Act.<sup>19</sup> These Southern Democrats, who had previously supported the redistributive policies of the New Deal in exchange for policies that upheld their racial hegemony, retaliated when Democrats eradicated significant portions of institutionalized racism. Moreover, this Southern sorting created geographic concentrations of party electorates, where Democrats live with Democrats and Republicans with Republicans. This became a self-reinforcing dynamic, as

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<sup>16</sup> Buchanan, James M., and Robert D. Tollison. 1984. *The Theory of Public Choice: II*. Ann Arbor, Mi: U of Michigan.

<sup>17</sup> Fenno, Richard F. 1973. *Congressmen in Committees*. Boston: Little, Brown.

<sup>18</sup> Cox, Gary W., and Mathew D. McCubbins. 2005. *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives*. Cambridge: Cambridge UP.

<sup>19</sup> Barber, Michael, and Nolan McCarty. 2015. "Causes and Consequences of Polarization." American Political Science Association. Apsanet.org.

people who live with others who confirm their ideological beliefs tend to become more extreme. This, along with partisan media consumption (which has similar reinforcing self-selectivity) and the imposition of the primary system, have all contributed to polarization.<sup>20</sup> However, the most important structural explanation for the growth of polarization that has emerged in the literature is the increasing income gap between the rich and the poor.

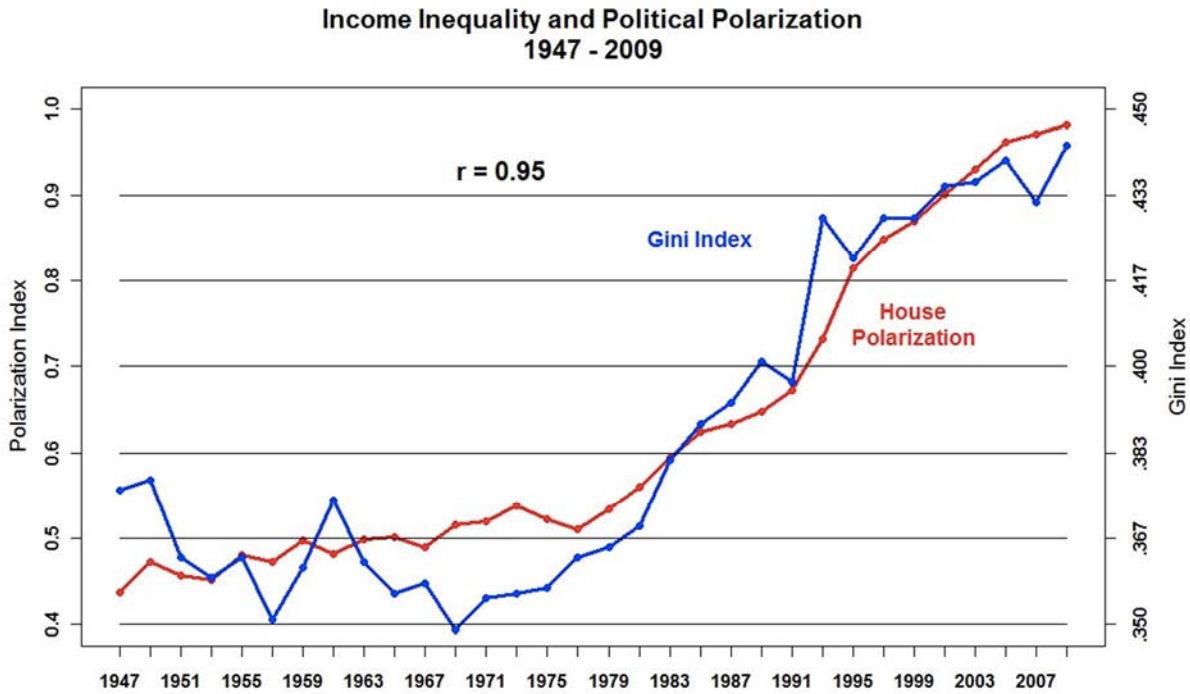


Figure 1. Source: McCarty, Nolan M., Keith T. Poole, and Howard Rosenthal. *Polarized America: The Dance of Ideology and Unequal Riches*. Cambridge, MA: MIT, 2006. Print.;

Figure 1.1

As illustrated in Figure 1, there is an almost perfect correlative link between DW NOMINATE scores and income inequality, measured by the Gini coefficient, in the United

<sup>20</sup> *ibid*

States.<sup>21</sup> While this is hardly causal proof of a relationship between the two trends, arguments linking income inequality and polarization are quite persuasive as they explain the radical decline in polarization that occurred at the beginning of the 20<sup>th</sup> century concurrently with a decline in income inequality. Scholars seem to agree that inequality and polarization are linked; there is a compelling narrative that each variable self-reflexively influences the other. Rising incomes among the top 1% shifts Republicans to the right to protect those earnings, and the further to the right Republicans are ideologically, the more polarization there is among political elites.<sup>22</sup> Moreover, the more polarization there is, the greater reductions in redistributive policies, and the more the income gap grows. Therein is the cycle between the two forces, and the explanation for why both trends have continued together.

Part of why polarization has had such a retarding effect on the growth of the American redistributive state is the fragmented nature of the American system. This fragmentation is most apparent among the states, but it also occurs between federal branches. As has already been discussed briefly, the United States Constitution creates a great many veto points through which public policy has to travel; America's political structure involves many separate institutions sharing powers.<sup>23</sup> These many institutions make it incredibly easy for competitive, often partisan, actors to sabotage and co-opt policy. Moreover, polarization often compels actors to act against their own institutional interests, as I will define them, to achieve their opportunistic and distinctly partisan objectives.

## Part II: The Federal Branches as Partisan Institutions

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<sup>21</sup> McCarty, Nolan M., Keith ,T. Poole and Howard Rosenthal. 2006. *Polarized America: The Dance of Ideology and Unequal Riches*. Cambridge, MA: MIT.

<sup>22</sup> Ibid.

<sup>23</sup> Neustadt, Richard E. 1990. *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*. New York: Free.

In designing the separate branches of the federal government, James Madison shaped the Constitution to, first and foremost, counteract ambition with ambition, with individual political actors working to expand their institutional authority relative to one another.<sup>24</sup> This was the motivation behind the creation of a number of institutions all sharing control over the policymaking process. However, in the context of political parties, this vision has become remarkably anachronistic; political actors now rarely prioritize the expansion of their institutional interests, but instead act to ensure their party's success.

The influence of partisanship in America's fragmented system has been thoroughly documented at the federal level. Concerns over the inability of our constitutional structure to allow for an effective and efficient government have existed for a long time. Woodrow Wilson was deeply critical of our national government's inability to pass meaningful legislation. As Daryl Levinson writes:

Wilson argued that Madisonian government was dramatically ineffective and vulnerable to paralysis and stalemate because significant policymaking could not be accomplished without somehow inducing cooperation between the inherently competitive political branches. He also argued that because voters had no single government institution on which to focus political credit or blame, the constitutional separation of powers sacrificed democratic accountability.<sup>25</sup>

These two fundamental problems have become increasingly relevant in today's era of divided government. The paralysis and stalemate witnessed by Wilson have limited the ability of the federal government to address fundamental problems of inequality, which further exacerbates polarization. As this cycle continues, it has become more and more difficult for Congress and the

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<sup>24</sup> Hamilton, Alexander, and Clinton Rossiter. 1961. *The Federalist Papers; Alexander Hamilton, James Madison, John Jay*. New York: New American Library. Print. Federalist 51

<sup>25</sup> Levinson, Daryl J. 2006. "Separation of Parties, Not Powers." *Harvard Law Review* 119.8: 2311-386. *JSTOR*. Web. 15 May 2015. 2326.

president to execute relatively simple and necessary administrative tasks such as raising the debt ceiling.

But the paralysis involved in a system of divided government with shared powers is only half the problem; in any democratic system, elected officials have to be held accountable for their achievements, and their failures. Levinson has outlined the mechanisms problematizing blame allocation among the political parties in reference to federal institutions:

....the executive and legislative branches will jockey to claim credit and shift blame, leaving the voters with no clear target for retribution or reward. Moreover, voters have no hope of apportioning responsibility for major national decisions among hundreds of [members of Congress].... In practices this has left virtually all responsibility for important issues—and therefore motivation to do something about them—on the President...<sup>26</sup>

And, with most voters holding the president's party accountable for what they see as his performance, "members of the president's own party generally have a strong incentive to rally around their party leader, just as members of the out party have an incentive to limit presidential successes."<sup>27</sup> With this in mind, Mitch McConnell's comments that his number one priority is to oppose President Obama, and ensure he would be a one-term president, appear to be a perfectly rational calculus.<sup>28</sup>

Even still, the breakdown of federal branches as political identities as such has not been carried out to completion; members of Congress of the president's party often oppose presidential overreach. And, to be sure, the president will occasionally buck his party. But, we must face the fact that this dynamic has become increasingly rare with growing partisan division.

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<sup>26</sup> Ibid., 2342.

<sup>27</sup> Levinson, Sanford. 2012. *Framed: America's Fifty-one Constitutions and the Crisis of Governance*. Oxford: Oxford UP.

<sup>28</sup> "GOP Leader's Top Goal: Make Obama 1-term President." Msnbc.com. 04 Nov. 2010. Web. 13 May 2015.

Congressional actors, and the president, now more than ever hold allegiance to their party identities before their institutional ones.

### The Supreme Court

Justice Frankfurter quoted the Court's decision in *United States v. Mine Workers* (1947) in his concurring opinion in *Cooper v. Aaron* (1958), writing that the founders "set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be 'as free, impartial, and independent as the lot of humanity will admit.'"<sup>29</sup> To those who have long ascribed to the founders' vision of a "free, impartial, and independent" judiciary, the Court's decision in *Bush v. Gore* (2000) undoubtedly caused a great deal of dismay. The five most conservative justices, who had typically argued in defense of federalism and states' rights, voted for a decision that relied on a novel use of the Equal Protection Clause of the Fourteenth Amendment to supersede the state of Florida's authority. As Jeffrey A. Segal and Harold J. Spaeth write: "Unbroken precedent had held that such violation requires purposeful discrimination, but clearly this pattern did not preclude the majority from reaching its preferred outcome."<sup>30</sup>

*Bush v. Gore* was a shamelessly partisan decision, but it is hardly the only example of such behavior. It has long been apparent, since the Warren Court's liberal activism, and the Rehnquist Court's conservative activism, that the Court is hardly impartial. Justices are, quite simply, policymakers with their own biases and preferences, often partisan in nature, that inhabit one of the many veto-points in the American polity.<sup>31</sup> To be sure, justices still make decisions

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<sup>29</sup> *Cooper v. Aaron*, 358 U.S. 1 (1958).

<sup>30</sup> Segal, Jeffrey Allan., and Harold J. Spaeth. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge, UK: Cambridge UP, 2002. Print. 2

<sup>31</sup> *Ibid.*

using a legal model—they simply use the law to justify their policy preferences.<sup>32</sup> Of course, sometimes, justices’ preferences are not partisan, or they must vote against their partisan position to avoid accusations of partisan motivations. Moreover, it would be overzealous to argue that justices never make decisions on a legal, objective basis. But still, one cannot ignore the number of Supreme Court decisions illustrating that judges are partisan actors, and few scholars could conclude that the behavior of the court is completely devoid of partisan motivations.

### Part III: The Partisan Federalism Model

The implosion of the Madison’s vision of counteracting institutional ambition with ambition is well studied among the federal branches, between Congress and the president in particular. But less attention has been given to the individual states. With that in mind, I will share and fill out an understanding of states acting as nodes for partisan competition. With this, one hopes that we can develop a working model of the entire U.S. system, examining not just the controlling nature of partisan vectors among the federal branches, or just among the states, but across vertical and horizontal planes, covering all the institutions that make up the American polity.

There are two central assumptions that guide the partisan federalist model. The first of these is that the US system of federalism is currently an opportunistic one, meaning that actors are primarily motivated by self-interest. The second is that almost all elected officials have deeply partisan motivations that moderate their interests. By extension of these two assumptions, intergovernmental actors are going to be guided by partisan goals.

Recent scholarship has applied the breakdown in Madisonian institutional incentives among the federal branches to state sovereignties. In her article, “Partisan Federalism,” Jessica

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<sup>32</sup>Ibid.

Bulman-Pozen renders a comprehensive understanding of how a federalist structure interacts with highly partisan regimes. As has already been discussed, due to a number of demographic shifts in the electorate, income inequality, and various other causes, parties have consolidated into cohesive and polar units.<sup>33</sup> Moreover, as has also been noted, states and the federal government have also come to share more regulatory authority rather than operate in separate jurisdictions.<sup>34</sup> As a result, an examination of partisan relationships lends itself to a clear and informative picture of federal-state conflict and competition. Bulman-Pozen argues that parties, not federal and state organizations, constitute voters' political identities. States check federal power because federalism serves as an institutional framework for partisan competition. As she writes:

Republican-led states challenge the federal government when it is controlled by Democrats, while Democratic-led states challenge the federal government when it is controlled by Republicans. States oppose federal policy because they are governed by individuals who affiliate with a different political party than do those in charge at the national level, not because they are states as such.<sup>35</sup>

Indeed, it has been often noted that partisan actors have been particularly malleable in their willingness to support or oppose federalism. While liberals, typically ascribed as the party of federal supremacy, have embraced a more progressive federalist program, conservatives have also readily embraced national power to carry out their policies. As Conlan writes:

...liberals can rediscover the virtues of state policy activism when they are out of power in Washington. Increasingly, conservative Republicans have also lost interest in both decentralization and intergovernmental

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<sup>33</sup> Though it's clear that parties are constituted, to some degree, by diffuse intraparty interest groups and mobilized activists (consider: large contributors like the Koch brothers and the Democratic Alliance, which are made up of a coalition of activist donors, as well as media organizations like Media Matters and *RedState*, which all hold a great deal of power in legislative outcomes), the party officials themselves, and large portions of the party electorate, are ideologically cohesive. If anything, parties are cohesive and polar *relative to one another*.

<sup>34</sup> Bulman-Pozen, Jessica. 2014. "Partisan Federalism." *Harvard Law Review*, Vol. 127; Columbia Public Law Research Paper WP 13-363.

<sup>35</sup> *Ibid.*, 1080.



reform, becoming more and more enamored of national policy activism.<sup>36</sup>

To be sure, partisanship still compels separate institutions to compete. The states' role of providing an institutional check on the federal government is widely heralded, yet mostly explained as a product of state actors fighting to consolidate the power of their own administrative regimes. Bulman-Pozen presents a counter-explanation to this understanding, arguing that states challenge the federal government when their partisan alignment opposes those in power, not when they seek to expand state authority generally. Her explanatory model maintains that "[p]arty politics means that state opposition need not be based on something essentially 'state' rather than 'national.'"<sup>37</sup> States provide a natural check on federal expansion as operationalized by their partisan affiliations. The partisan model of federalism carries significant explanatory weight. Indeed, American political actors have been navigating the federalist system with partisan agendas since the nation's founding; the Virginia and Kentucky Resolutions were, at least partly, products of attempts by federal actors to wage a partisan war through the states.

The partisan federalism framework is, in a way, just the product of national party competition carried out to its natural conclusion. As parties have co-opted federal branches, it makes sense that the next step would be the similar co-optation of state institutions. As Bulman-Pozen writes, "Federalism offers more opportunities for each party to affirmatively advance its objectives than does the separation of powers, which has received attention as a framework for partisan competition."<sup>38</sup>

There is a two-way channel that allows actors to influence policies at different levels; less central institutions can influence federal policy, while centralized actors can also impose their

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<sup>36</sup> Conlan, 667.

<sup>37</sup> Bulman-Pozen (2015 a), 1090.

<sup>38</sup> *Ibid.*, 1092.

authority on local institutions. How this competition and influence takes place in a formal context illustrates the constitutional, and structural, problems with partisan federalism. In general, there are three central ways in which actors engage in the policy disruption process: litigation, administration, and legislation.<sup>39</sup>

Those looking to change or oppose a specific policy can engage litigation through the judicial process, challenging policies and actions in court. This can be true for policies as small as an executive agency's rulemaking proposal, or as global as a piece of congressional legislation. Moreover, federal courts can impose their authority on localities by either striking down laws or upholding ones that co-opt and undermine local powers.

Actors can also engage in administrative sabotage. Executive agencies and bureaucrats hold significant amount of responsibility in ensuring the successful implementation of federal law. This dynamic is known in the literature as "un-cooperative federalism;" states use the authority granted to them by the federal government to oppose or undermine federal authority and intention.<sup>40</sup> State-level agencies clash with federal agencies at the administrative level, and executive officials are given a great deal of power over how to interpret and implement laws. This provides just one more channel for conflict.

Finally, individuals seeking to ensure or prevent a particular policy outcome can turn to the legislative process to do so. Localities, state legislatures, and Congress can all experiment with innovative or entrepreneurial public policies. Those policies can then diffuse horizontally across states and upwards into federal circles, and naturally, federal policies are imposed vertically on states and localities.

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<sup>39</sup> Ibid., 1092

<sup>40</sup> Ibid.

Moreover, examples of state governments, and even federal institutions, eschewing their roles as independent political units are abundant. With greater and greater frequency, as polarization and income inequality continue to grow, political actors pursue their partisan, opportunistic goals. This would seem to support Bulman-Pozen's theory that state level institutions have been coopted as platforms for national partisan conflict. Voters today most readily identify by their national political party, not by their local, or state, governments.

This approach admittedly raises problematic questions about what truly lies in a state's or political institution's "interests." Can we think of a state interests as the aggregate preferences of its electorate? Many may take issue with my attempts at delineating between institutional and partisan interests, if they are in fact different. The Bush administration's expansion of executive authority would likely be understood as being in the *institutional* interests of his presidency, and by extension, in the *partisan* interest of Republican state officials, and members of Congress, who might have endorsed the expansion. However, this expansion might not have been in the *institutional* interests of the individual states as such. In short, one would expect state and federal actors to expand their institutional power relative to the other, but as we can see, partisan motivations often undermine that expectation.

To resolve this dilemma, I will define the institutional interests of a specific state as follows: the acquisition of federal funding or otherwise procured fiscal power, and the expansion of the state government's regulatory authority relative to the federal government.

Using the Patient Protection Affordable Care Act (ACA) as a case study, I intend to illustrate how partisan motivations are controlling in the decentralized institutions that make up the American polity. In the less common instances where this isn't true, I intend to show how the contradictory behavior of state entities makes it difficult, if not impossible, for voters to hold

their officials democratically accountable. Throughout the ACA's existence, from its legislation in Congress, to the litigation behind the law's Supreme Court challenge, and even continuing today in its implementation, all three of the tools used by actors to re-purpose and affect public policy across institutions were wielded by partisan actors to obstruct the law's success.

Moreover, state actors used these tools to pursue outcomes that were in direct conflict with their institutional goals as I have defined them. According to Larry Kramer, "Federalism is meant to preserve the regulatory authority of state and local 'institutions to legislate policy choices.'"<sup>41</sup> However, if partisan motivations are driving states to turn down fiscal and regulatory expansions of power, it becomes increasingly difficult to justify the existence of a federated, decentralized system.

While I have chosen the ACA, a case where Republicans have been the principle partisan actors, as a illustrative example, Democrats are also guilty of such behavior. For example, during the Bush presidency, many Democrat-controlled states refused sexual education funding on grounds that it was required to fund abstinence-only education.<sup>42</sup> That said, Republicans have played a key role in the polarizing mechanism, and I have chosen a case that focuses on Republicans to reflect that. I will expand on the differences between Republicans and Democrats in relation to partisan fragmentation in the final chapter.

It should be noted that I hardly expect such a model to be without flaws. There are, undoubtedly, examples of state behavior that confound the underlying assumptions about the nature and incentives of federal and state actors. Democratic and Republican governors do band together at times to oppose federal action, and federal officials often act against state officials of their own party. In the same fashion, however, it is difficult to deny that partisan identification

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<sup>41</sup> Kramer, 222.

<sup>42</sup> Doan, Alesha E. 2012. "Saying No to Abstinence-Only Education: An Analysis of State Decision-Making." *Publius* 42.4: 613-35. JSTOR. Web. 09 Apr. 2015.

has warped the behavior of state officials in ways that are likely to endure and grow in magnitude.

#### Part IV: The Affordable Care Act: A Case Study in Partisan Co-Optation

The passage and implementation of the Affordable Care Act has been one of the most heavily partisan contests in recent memory. In examining how relevant actors engaged with the law, the framework of partisan federalism is well suited to explain how state actors behaved. Most significantly, as the ACA has drawn opposition from Republicans, there are examples aplenty of state actors acting against their own fiscal and regulatory interests. By declining to expand Medicaid programs, governors have chosen to turn down billions in federal funds, and by refusing to set up state-based exchanges, states have relinquished significant regulatory autonomy to the federal government.

To be sure, it is not clear if governors are opposing expansion because they want to see Democrats fail electorally, or because they are philosophically opposed to the law itself. In the end, this distinction seems relatively meaningless; either way Republican governors are given institutional access to a policy that is inextricably linked to the electoral fate of the Democratic Party. This influence over the law is problematic in and of itself, as each party should have the opportunity to execute its policy agenda without interference so as to facilitate both efficient governance and the allocation of credit and blame. State behavior as a response to the ACA should compel us to question the notion that state actors act as Madisonian agents serving the administrative interests of their institution. And, while it would be a stretch to claim that state actors never act with institutional interests in mind, it seems that political self-interest is becoming increasingly partisan as polarization continues to grow.

Polarization over the ACA has been most commonly observed in Congress. During the congressional debate over the ACA, the bill faced intractable opposition from Republicans. The law was passed with 60 Democratic votes; not one Republican voted for the bill.<sup>43</sup> This opposition has continued as the Republican House has voted to repeal the law 56 times,<sup>44</sup> with congressional Republicans even going as far as to shut down the government in an attempt to demand the law's "defunding."<sup>45</sup>

While this fact is certainly concerning in the greater context of a fractured, partisan polity, the legislative process behind the ACA actually illustrated the opposite dynamic for states: individual states represented themselves as wards of their institutional interests, not as partisan actors, by lobbying Congress through the National Governors Association. States were allowed a seat at the table during the legislation of the ACA not because of their partisan affiliation, but because of their institutional political capital.<sup>46</sup> More specifically, because state governments were considered to be critical to the successful implementation of the healthcare law, they were allowed some control over the legislative product. As Michael Sparer adds: "[S]tate governments were among the most important and most successful interest groups in the entire health reform process, often acting as a relatively unified and influential bloc, ably assisted by the National Governors Association and similar lobbying organizations."<sup>47</sup>

While many of these states have been complicit in undermining the law during implementation, this observation threatens our understanding of states as partisan actors. And

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<sup>43</sup> Murray, Shailagh, and Lori Montgomery. March 22, 2010. "House Passes Health-care Reform Bill without Republican Votes." *The Washington Post*. Web. 14 May 2015.

<sup>44</sup> Berman, Russell. February 3, 2015. "Why Republicans Are Voting to Repeal Obamacare—Again." *The Atlantic*. Atlantic Media Company. Web. 14 May 2015.

<sup>45</sup> Silverleib, Alan. September 18, 2013. "GOP Ties Obamacare to Government Shutdown - CNNPolitics.com." *CNN*. Cable News Network. Web. 14 May 2015 2013.

<sup>46</sup> Doonan, Michael. 2013. *American Federalism in Practice: The Formulation and Implementation of Contemporary Health Policy*. Washington D.C.: Brookings Institution Press.

<sup>47</sup> Sparer, 463.

certainly, we know that states don't *always* follow partisan motivations; states do occasionally advocate for their sovereignty in relation to the federal government. What is less clear is whether or not this is an acceptable contradiction. If states can selectively represent themselves as wards of their administrative interests, and then turn around and act as partisan actors, this provides cover for state administrators and executive officials looking to deflect accusations of partisan behavior, thus making it even more difficult for voters to accurately evaluate their elected officials.

In spite of the behavior of states during the legislative process that suggests their roles as self-advocates, state behavior in the post-legislative implementation landscape has resembled much more closely a system of partisan federalism. In choosing not to set up a state exchange, 34 individual states have relinquished significant regulatory authority over their respective health insurance markets.<sup>48</sup> The state of Mississippi best illustrates this phenomenon: the state's elected insurance commissioner, Michael Chaney, has garnered some attention for picking a fight with Republican Governor Phil Bryant over his decision not to create an exchange. Chaney, a Republican, contended that the creation of a state-run exchange would allow Mississippi to keep its regulatory authority over "plan pricing, selection, and distribution."<sup>49</sup> The ACA gave states the option of opting out of setting up a state exchange in the spirit of preserving state autonomy. However, states that chose not to set up exchanges conceded significant amounts of their authority to the federal government. Ackerman writes, "By accident or by design, a provision that purports to preserve a role for state regulation has stripped states of a significant portion of their traditional prerogative to regulate health insurance within their borders."<sup>50</sup>

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<sup>48</sup> Ackerman, Joshua P., "The Unintended Federalism Consequences of the Affordable Care Act's Insurance Market Reforms 23 *Pace L. Rev* (2014, Forthcoming).

<sup>49</sup> *Ibid.*, 1.

<sup>50</sup> *Ibid.*, 3.

In addition to the regulatory conciliations of states, the ability of state regimes to resist Medicaid expansion has resulted in a remarkable instance of state actors shunning financial supports in favor of partisan goals. The ACA is designed, by a compromise with health care industry interests, to reduce federal spending on Medicare benefits while expanding coverage through Medicaid and the individual mandate, thus providing revenues to hospitals with new patients instead of inflated Medicare prices.<sup>51</sup> In refusing to expand Medicaid, states are not only aggravating healthcare providers in their state, which still have to treat the uninsured who would have been covered by Medicaid, but they are also indirectly subsidizing Medicaid expansion in other states. Michael Doonan predicts that “eventually, due to the power of the hospitals and the lure of federal money...nearly all the states will participate and end up expanding Medicaid eligibility.”<sup>52</sup> As of now, only 30 states have chosen to expand.

In many cases, the federal grants available to states have been quite large, and the requisite matching funds required to procure those funds relatively small. The state of Texas, for example, which still has not expanded Medicaid, stood to capture \$952 billion dollars of federal funding over 10 years for only \$3.9 billion in expenditures, a 3.5 percent spending increase for the state.<sup>53</sup> Furthermore, state administrations have had to resist significant lobbying efforts on the parts of traditionally Republican-affiliated, and quite powerful, business constituencies such as “trade associations, business groups, and insurance companies” who were all “openly campaigning for state exchanges in virtually every state.”<sup>54</sup> It seems that governors and state officials were overwhelmed by right wing advocacy and media organizations, including the Tea

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<sup>51</sup> Doonan., 123.

<sup>52</sup> Ibid., 123.

<sup>53</sup> Ibid., 123.

<sup>54</sup> Haeder, Simon F., and David L. Weimer. 2013, S40. "You Can't Make Me Do It: State Implementation of Insurance Exchanges under the Affordable Care Act." *Public Administration Review* *Public Admin Rev* 73.S1: S40.



Party, the Cato Institute, the Heritage Foundation, Americans for Prosperity, *RedState*, and the American Legislative Exchange Council.<sup>55</sup>

Further, state opposition to the health law has not occurred in an institutional vacuum. When the Supreme Court heard arguments for and against the individual mandate of the Affordable Care Act in *National Independent Business v. Sebelius* (2012), 26 states signed amicus briefs opposing the law. The outcome of that case, which gave states the option to opt out of expanding Medicaid, on grounds that that fiscal coercion violated state sovereignty,<sup>56</sup> has deprived millions of uninsured individuals access to health care. While one might argue that in signing amicus briefs, these states were actually advocating for their own sovereignty, and this was certainly true to some degree, the exercising of that authority to eschew their fiscal and regulatory interests was remarkably partisan.

The conflict over the ACA's implementation is still happening today. States continue to hold out on Medicaid expansion and on installing their own insurance exchanges, and the law recently faced another challenge in the Supreme Court in *King v. Burwell* (2015). Again, many conservative states that have opted out of expansion and setting up an exchange signed amicus briefs arguing against the law, though this time fewer than in *National Independent Business*.<sup>57</sup>

In *King*, the Court considered whether or not the 34 states that hadn't set up their own state exchanges were eligible for the federal subsidies that make the law's individual mandate possible. By the health law's design, uninsured individuals are required to purchase insurance, and then are given federal subsidies so that they can afford it. If these healthy, uninsured individuals could not get these subsidies, they presumably could not buy insurance. These

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<sup>55</sup> *Ibid.*, S39.

<sup>56</sup> Rosenbaum, Sara. 2013. "National Federation of Independent Business v. Sebelius and the Medicaid Aftermath." *Public Administration Review* 73.S1.

<sup>57</sup> Seven states: Oklahoma, Alabama, Georgia, Indiana, Nebraska, South Carolina, and West Virginia.

individuals' presence in the market is intended to counterbalance the inclusion of sick patients with pre-existing conditions, who can no longer be denied coverage by insurance companies due to a provision in the law. Without this counterbalance, insurance premiums would rise in order to pay for the high costs of insuring individuals with high health costs. Some estimate that the effects of a negative decision in *King* would have been a 256% increase in premiums for Healthcare.gov users.<sup>58</sup> This increase in premiums would have driven more people out of the market, leaving a greater proportion of individuals with pre-existing conditions, creating a vicious cycle called an insurance death spiral. Neither the White House nor congressional Republicans seem to have had much of a public plan in place to adjust should the Supreme Court strike down these subsidies in 34 states.<sup>59</sup><sup>60</sup> Both Republicans and Democrats were, presumably, hoping to pin the blame for the very real economic pain of death spirals on the other party. Leaving a solution up to the states would have been a significant test of how committed they were to their partisan agendas; in still refusing to set up a state exchange in order to receive funds, they would not only be refusing Medicaid grants, but also federal subsidies. Most significantly, they would be voluntarily throwing their state's insurance marketplace into a death spiral, which would lead to prohibitively costly insurance plans for their constituencies.

Overall, it seems clear that the roles state governments played as sovereign actors with state-specific agendas during the legislative process of the ACA raises questions about their identity as they have shifted towards partisan obstructionism during implementation. Some might point to the decision in *National Federation* in which Justice John Roberts, a noted conservative

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<sup>58</sup> Klein, Ezra. 2015. "Obamacare Enrollees' Premiums Go Up 256 Percent If Subsidies Go Away." Vox.com. 03 Mar. Web. 13 May 2015.

<sup>59</sup> Kliff, Sarah. 2015. "The White House Has No Back-up Plan If SCOTUS Rules against Obamacare." Vox.com. 24 Feb. Web. 13 May 2015.

<sup>60</sup> Klein, Ezra. February 24, 2015. "If SCOTUS Kills Obamacare Subsidies, Republicans Don't Have an Exit Strategy." Vox.com. Web. 13 May 2015.

and George W. Bush appointee, upheld significant portions of the law as evidence that partisan motivations are not completely controlling in the contemporary United States. Moreover, the Court recently sided on the side of the government in *King* in a 6-3 decision, with Justices Anthony Kennedy and John Roberts joining the majority opinion. Many have also pointed to this decision as evidence that the Court still holds a great deal of institutional legitimacy as Justice Frankfurter's vision of a "free, impartial and independent" Court, or at least more institutional legitimacy than I thought when I began writing this paper. And while some have pointed to the very decision to accept *King* from the docket in the first place as evidence of the Court's biases,<sup>61</sup> that "the Court has permitted itself to be recruited into the front lines of a partisan war" by accepting a case of statutory interpretation, I have to concede that Roberts and Kennedy have mounted a formidable defense against accusations of legislating from the bench. The process by which justices come to their decisions will be debated for as long as the flag waves, but the decision in *King* gives me great hope that the court may endure and preserve the integrity of the fair rule of law. With that said, many conservatives expected Roberts to side with his fellow conservatives on the Court against the law, and felt "betrayed" by his decision.<sup>62</sup> Moreover, there will undoubtedly be cases in the future decided on a more partisan basis, and John Roberts' decision does not change the fact that the Court was just another access point for the disruption of the potentially legitimate policymaking agenda of an individual party. While Roberts did save great portions of the law in *National Federation*, he also cut out a large chunk of it in allowing states to refuse Medicaid expansion. Further like the Court, Republican governors who *have* agreed to expand Medicaid also provide a challenge to the partisan federalism model. I will only

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<sup>61</sup> Greenhouse, Linda. "The Supreme Court at Stake." The New York Times. February 04, 2015.

<sup>62</sup> Gerstein, Josh. "Conservatives Steamed at Chief Justice Roberts' Betrayal." POLITICO. June 25, 2015

say that while these notable examples are significant, the vast majority of Republican governors acted to obstruct and impede the law.

But still, this contradiction is itself deeply problematic. If political actors are going to pursue partisan goals, they should have as few opportunities as possible to cloak those goals under the guise of institutional stewardship. When states behave as partisan nodes their occasional decision to protect their own interests only undermines the democratic process. Voters, who operationalize their votes by party heuristics,<sup>63</sup> cannot allocate blame when they hold two political allegiances: one to their state, or another less central institution, and one to their national party.

#### Part V: Conclusion

One of the great founding premises of our Constitution was that it was designed to counteract ambition with ambition.<sup>64</sup> However, individual “ambitions” have changed dramatically since the founding. As Sanford Levinson notes, Madison designed the constitution “with separate institutions, such that persons elected to serve within any given structure will develop the requisite ‘personal motives’ to defend particular institutional interests against others within the American government who would encroach on them.”<sup>65</sup> With our present insight into what these “personal motives” are, and how they’ve been changed by the country’s party system, it has become increasingly difficult to justify the extensive institutional fragmentation that so thoroughly defines our constitutional order. In any democracy, we should expect that the citizenry should be able to effectively evaluate its elected officials, and more importantly, their public policies. As the American polity has become increasingly fragmented, and in many ways,

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<sup>63</sup> Schaffner, Brian F., and Matthew J. Streb. 2002. "The Partisan Heuristic in Low-Information Elections." *Public Opinion Quarterly* 66.4: 559-81.

<sup>64</sup> Hamilton and Rossitier

<sup>65</sup> Levinson, S., 2012, 232.

blended in the growth of co-regulatory authority between states and the federal government, the ability of the electorate to hold its leaders accountable has been thrown into question.

In addition, partisanship has made it more difficult to impose institutional change, both at the policy and constitutional levels. As Sanford Levinson has noted, “Some argue that divided government is indeed an advantage inasmuch as it tends to make less likely the passage of sweeping legislation. If one believes the status quo is likely to be preferable to most suggested changes, then any system that promotes stasis is an advantage rather than a disadvantage.”<sup>66</sup> However, with the current spiral between polarization and income inequality in the United States, the status quo seems hardly acceptable.

Returning to the ACA, the reason the story of resistance to the ACA matters isn’t because of the policy implications. The ACA actually does *relatively* little to restructure the fundamental political economy of the U.S., though it is a step in the right direction. What becomes problematic is that the obfuscation of responsibility in the U.S. system of shared powers makes it impossible for voters to recognize and reward Democrats for what they might find desirable. In fact, the opposite is true, as people have been remarkably opposed to the ACA, especially when it is referred to as Obamacare, in spite of the fact that they support the individual aspects of the law.<sup>67</sup>

The current lack of accountability in the American system is hardly universal to western democracies. Many have pointed to the United Kingdom’s parliamentary system as a model for reform, arguing that “were Congress and the Executive unified by party—Westminster-style accountability could be recreated in Washington...American voters would be able to hold

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<sup>66</sup> Ibid., 235.

<sup>67</sup> Voters overwhelmingly support the individual components of the law, while support breaks down by party when it is identified as Obamacare. See "Kaiser Health Tracking Poll: March 2013." Kaiser Family Foundation. 20 Mar. 2013. Web. 15 May 2015.

politicians collectively responsible by focusing political rewards and punishments on political parties.”<sup>68</sup> This lack of accountability has made fiscal discipline particularly problematic. Levinson notes: “If one party was responsible for all three power centers and produced deficits of the magnitude in which they have been produced in recent years, there would be no question of the accountability and the responsibility of that party and its elected public officials for what had happened.”<sup>69</sup>

While the benefits of such a parliamentary program are apparent, the unification of party government does have some notable drawbacks. The chief virtue of the Madisonian fragmentation is supposed to be that it preserves negative liberty and prevents tyranny of the majority and factions. However, other parliamentary systems have come up with their own successful solutions to this problem. There are various solutions to the lack of intra-governmental checks in a unified governmental system. Significant investigational committees, or other “opposition rights” can be given to the opposition party, and which can also act as a check outside of any formal institutions.

While the focus of this paper has been on federalism and the states, it would be irresponsible of me to advocate for the abolition of state sovereignty. Vertical fragmentation makes much more sense than horizontal fragmentation for a number of reasons. States are well positioned to act as laboratories of democracy, even in a partisan regime; they can take innovative approaches to unique and particular policy problems, and those innovations can then spread to the national party stage.<sup>70</sup> Moreover, decentralized political institutions can act as participatory catalysts, as local institutions encourage popular democratic and political

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<sup>68</sup> D. Levinson, 2006, 2343.

<sup>69</sup> Ibid., 2343.

<sup>70</sup> Gerken, Heather K. April 1, 2012. "A New Progressive Federalism." Democracy Journal.

engagement.<sup>71</sup> And, with the American doctrine of constitutional and federal supremacy, the prospect of partisan federalism is less problematic than partisanship within the federal branches. To be sure, a careful and considered evaluation of whether or not there should be states in the American polity is worth investigating in depth, but is a complex normative claim that is beyond the scope of this article. While there are certainly arguments in support of such a position—many related to the accountability and efficiency problems outlined in this essay, others focus more on the states' history of violating individual rights, and some outline why the prospect of participatory democracy is a lost cause in America—to fairly consider both sides of this debate would require more space, and empirical foundation, than is available here. Moreover, while other successful nations are less federated than our own, the United States is one of the largest, and one of the most diverse countries in the world. Because of this, I suspect that while it is very possible that states have been allocated too much power, their role in such a complex pluralist society as our own is invaluable, and it should not be abandoned lightly.

Many have proposed various solutions to the problems of electoral accountability in a two-party regime: the creation of parliamentary system, changing terms of House members to four years to coincide with presidential terms to reflect more partisan preferences, and giving presidents the ability to appoint a certain number of members of Congress to have a working majority.<sup>72</sup> Whatever the solution, it seems probable that it would require a constitutional convention. As Sandy Levinson has noted, Article V of the Constitution, which dictates the legal methods by which a constitutional convention may be convened, calls for extraordinary unity for

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<sup>71</sup> Amar, Akhil Reed. 1994. "Five Views of Federalism: Converse-1983 in Context." Faculty Scholarship Series. Paper 979.

<sup>72</sup> S. Levinson, 2012, 237

a successful amendment process.<sup>73</sup> The prospects of this occurring seem slimmer every day as the country becomes further divided.

While this would seem to leave things on a rather nihilistic note, it seems likely that change is imminent. While I have operationalized the systemic consequences of polarization in a fragmented system without differentiating too much between the two political parties, there are some substantive differences between Republicans and Democrats and their relationship to the dynamics of partisan fragmentation. Most importantly, a primary policy agenda of the Republican Party, to shrink the size of government and otherwise do nothing, lends itself particularly well to a system of policy stasis. Moreover, the lack of accountability in the current system also favors conservatives; it allows them to be blatantly obstructionist without suffering the electoral costs of doing so. They can actively impede Democratic agendas, which often involve positive intervention, and then blame Democrats when those policies fail.

This structural advantage for Republicans has important implications for future change. While both parties, Republicans and Democrats, have been responsible for polarized, partisan behavior, it would be inaccurate to say they have played equal roles in the process. As already established, polarization has evolved largely as a product of income inequality. The dynamic by which this occurs, briefly outlined early in this paper, is that as the top 1% of income earners gain a greater share of national wealth, they seek to protect that wealth with public policy, which then manifests itself in the Republican party agenda. And while Democrats have had their fair share being complicit to policies that exacerbate income inequality, this dynamic has not only been reflected in the overwhelming number of top earners who identify as Republicans, but also in the Republican platform, record, and rhetoric. Republicans, and Democrats, should be given

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<sup>73</sup> Levinson, Sanford. 2006. *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*. Oxford: Oxford UP. Print.



the opportunity to act on their agenda as a unified block and let the consequences unfold.

However, in meantime, as this looks unlikely to come to fruition, the continued trend of income inequality, mostly perpetrated by Republicans and conservatives, will most likely end in some kind of reform.

Given the unlikelihood of significant constitutional reform in the near future, the coupled problems of polarization and inequality are likely to continue until a radical focusing event can disrupt the cycle. With the nation in fiscal crisis and with high levels in income inequality, these pressure systems cannot continue indefinitely. Indeed, the growing rate of income inequality has already begotten its own focusing event: the recent financial crisis of 2007. While the causes of the crisis are contentious and multilayered, there is clear evidence that income inequality was one of its fundamental drivers. From the 1970s onward, incomes have stagnated for the working class for a number of reasons.<sup>74</sup> Moreover, those in lower income brackets haven't had the social safety net to compensate because polarization, and the conservative ascendancy of the 1980s, have halted the growth in redistributive policies. Jacob Hacker describes this dynamic, writing that during the 20<sup>th</sup> century most "proposals to close the growing gap between social risks and benefits ended up in the political graveyard, stymied by fiscal constraints, actual or threatened filibusters and vetoes, and formidable conservative resistance."<sup>75</sup> As a result, lower income earners were forced to turn to debt markets in the years leading up to the crisis, mortgages in particular, to pay their bills. Mortgage markets then predictably collapsed because these individuals had insufficient income to pay their mortgages. Fred Block outlines this narrative: "...the fact that the bottom 90% of households were left with only about a half of all income

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<sup>74</sup> Summers, Larry and Ed Balls. January 1, 2015. Report of the Commission on Inclusive Prosperity. Rep. Center for American Progress. Web. 15 May 2015.

<sup>75</sup> Hacker, Jacob S. 2004. "Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States." *American Political Science Review* 98.02: Print. 256.

meant that consumer demand was heavily dependent on increased rates of borrowing. Once the downturn began, consumer credit dried up, pushing the economy steadily downward.”<sup>76</sup> Seven years after the crisis, income inequality and polarization continue to grow.<sup>778</sup> And moreover, large-scale, focusing event economic crises await us in the not-too-distant future. Social Security is growing insolvent, and in the country’s fiscal state, the nation will have to make hard economic choices, almost all of which will inevitably hurt the working poor.<sup>7980</sup>

There are two potential foreseeable outcomes to this seemingly unstoppable force of inequality and polarization. One is that within the system of polarization, a coalition successfully forms around the goal of reducing income inequality, likely as a response to a significant economic crisis. The other is that inequality and polarization spiral continually until the nation faces a *constitutional* crisis; a group of states attempts to secede from the union, or other actors otherwise violate the basic immutable structural aspects of the established constitutional order. Either one of these crises, economic or constitutional, could result in amendments to the Constitution, though the second is more likely to result in more drastic changes along the lines that might resolve the problems of democratic accountability outlined in this paper. While there seems to be little we can do now, the current trajectory of our political economy cannot continue forever. Change is unavoidable, the question is simply how it will come, and when.

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<sup>76</sup> Block, Fred. 2010. "Crisis and Renewal: The Outlines of a Twenty-first Century New Deal." *Socio-Economic Review* 9.1: 31-57. 36

<sup>77</sup> Summers and Balls.

<sup>78</sup> Barber.

<sup>79</sup> Social Security and Medicare Board of Trustees. 2014. "A Summary of the 2014 Annual Reports." Trustees Report Summary. Social Security Administration,

<sup>80</sup> Walker, David M. 2007. "Long Term Budget Outlook: Saving Our Future Requires Tough Choices for Today." Rep. Washington D.C.: Government Accountability Office.

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