We live in a society that is increasingly characterized by a rhetorically and substantially intransigent approach to civic life. Polarization is the word used most frequently to characterize public discourse. To constitutional lawyers, there is something very disquieting about the distinct dissonance between a rhetoric and a substance of polarization, on the one hand, and the other the history and required practice under the Constitution of the United States.

Those who have studied the history of the 1787 Constitutional Convention invariably point out that, in James Madison’s view, the most significant issue to be resolved at the convention was the question of representation in Congress. Would it be allocated on a state-by-state or a population basis? How would representation take into consideration the difference in interests between the slave states and free states? In the end, the terms of congressional representation were established in what is frequently called a “Great Compromise”: the states would be equally represented in the Senate; population would be the basis for representation in the House; and the so-called three-fifths clause would account for the institution of slavery, a provision that did not survive the Fourteenth Amendment. The point that lawyers, scholars, and historians of the Constitution always turn back to, as Jack Rakove puts it in his book *Original Meanings*, is that the compromise was not the sufficient, but the necessary condition for the resolution of the substantial issues at hand. It allowed the convention to propose a Constitution that was ultimately adopted. Thus, the American polity is, in fact, governed by an instrument whose most signal feature is the compromise that made it possible.

But constitutional compromise did not stop there. We all are intuitively aware that exercise of the powers granted to the national government—or, for that matter, reserved to the states—in the structural part of the Constitution can clash with the rights guaranteed to individuals by the Bill of Rights, including the Fourteenth Amendment. These clashes are not resolved by any text in the Constitution itself. And they cannot be resolved if either the powers of the government or the civil rights of individuals are viewed as absolutes. Federal authority and individual rights must be regarded as derivatives of competing principles, each good in itself, but neither of which can be exercised to the limit all the time. There is a constant process of adjustment, a constant drawing and shifting of lines, over time and over changes of circumstance. The Constitution simply cannot operate without this kind of compromise. Which is why constitutional lawyers find it disquieting when the American polity seems to speak most loudly in terms of anti-compromise: that is, in terms of a rigid absolutism of principle on the part of one speaker or another, or indeed, on the part of one major political party or another.

How long can we expect the American people to support a Constitution that is demonstrably inconsistent with the daily practice of politics in American life? We do not have an answer to that question and we do not want to find out what it may be. Instead of waiting to see, a better alternative is to try to look at some of those influences that seem to contribute to the intransigent rhetoric and the reality behind it, and to consider what can be done to mitigate the force of those influences that propel so much of American rhetoric and practice today in the direction of anti-compromise.
direction of anti-compromise. That is the subject my colleagues will address this morning.

We cannot canvas the entire landscape at this symposium. (We will not, for example, discuss the influence of Internet news sources that offer cherry-picking by those who do not want to hear any viewpoint likely to oppose their own, although that practice may feed an inclination toward anti-compromise.) But we will assess how three major features of the political system relate to a culture of intransigence and will consider what can be done about them – if, indeed, they turn out to be culprits. First, Heather Gerken will look at the effects of congressional districting in creating an uncompromising politics. This topic includes the Supreme Court’s acquiescence in districting decisions that protect incumbents when district lines are redrawn, producing “safe seats,” or positions in which political competition is reduced. Next, Geoffrey Stone will address the extent to which current limitations on regulating political campaign finance contribute to extremism. He will also discuss the significance of the popular primary in producing this phenomenon. Finally, Mickey Edwards will examine the political primary issue, offering some practical thoughts on what can be done, from the standpoint of someone who has served in the political arena. There is no non-porous border dividing the subject matter that each member of the panel will discuss, so there will be a certain give-and-take in the flow of the presentations.

The truth is that our Constitution and our democratic arrangements have never been compatible. Unlike most other constitutions, ours did not contemplate the rise of party politics and the infrastructure that would be necessary to regulate them. At the federal and even the state level, we typically lack the mediating institutions that are an essential part of democratic arrangements elsewhere. As a result, it has fallen to the courts to do much of that regulating. Over the years, as legal scholar Rick Pildes has pointed out, our democratic arrangements have become constitutionalized. Bush v. Gore is just the tip of the iceberg: in many areas, the courts set the terms of political engagement and do much of the regulatory work, including in campaign finance, election administration, and redistricting.

Precisely for that reason, many of us now look to the courts – particularly the Supreme Court – to save us from our polarized politics. If the Constitution can be invoked to force the entire country to apportion in keeping with the one person, one vote principle; if it can be invoked to invalidate majority/minority districts that Congress itself mandated; if it can be invoked to influence the outcome of a presidential election, then surely the courts can do something now. The argument seems so easy. Most observers think that polarization is rooted in redistricting – that is, in the blatant effort of self-interested politicians to draw districts that are easy for them to win. These “safe districts,” so the argument goes, cater to extreme voters, not moderates. They elect candidates from the edges of the political spectrum, candidates who bring their extreme views to Washington. According to this story, all we need to do is end these egregious gerrymanders and the parties will return to the center, where Duverger tells us they belong in a first-past-the-post system like our own.
The temptation to tell this story is even greater for anyone who is familiar with the Supreme Court’s work in addressing partisan gerrymandering because it is the one area in which the Court has been shy, even deferential, in regulating politics. The Court has confidently entered many parts of the political thicket, but here it has been more circumspect. Its initial foray involved adopting standards so high that no gerrymander could possibly meet them. When the Supreme Court looked to the question again a few years ago, it split so badly that we were left with four justices who believed that the Court could not adjudicate partisan gerrymandering claims; four, including Justice Souter, who believed that it could adjudicate them; and one justice playing Hamlet, saying that maybe the Court could adjudicate them, but not at that time.

As a result, party hacks are well aware that this is the one area of partisan politics where they can act without the Constitution affecting them. Worse, to the extent that the ugliness of partisan gerrymandering has entered into the Court’s sights, its instinct has often been to bless it, or at least to tolerate it. Unlike other cases, where the Court has used its considerable muscle to force politicians to do the right thing, the Court has been very willing to tolerate the self-interest that is at the heart of redistricting. It has held as legitimate the practice whereby parties draw districts to protect incumbents and create safe districts. If only, we think, the Court would censor this self-dealing; if only it would eliminate incumbency protection as a legitimate interest; if only it would mandate that some of these districts be competitive, then, perhaps, the moderates would finally have their say.

This is the tale we tell ourselves about the relationship between the Constitution and politics, and I want to offer a skeptical view. I want to tell you that the tale is too simple; we have been too confident in our diagnosis and too quick to think that there is a cure, let alone a cure that the courts can administer.

So let me start with a diagnosis. It seems entirely plausible that gerrymandering is responsible for the current levels of polarization because safe districts mean uncompetitive districts, populated with lots of voters from one side or the other. It would not be surprising if these districts elected candidates from the extremes as well. There is just one problem with this story: there is not much evidence to support it. It is true that incumbent reelection rates have been rising and that there are more safe districts now than in the past. But it is not clear that gerrymandering is the cause. Safe districts actually increase more between redistricting cycles than during them. And Senate seats, which cannot be gerrymandered, have also become safer because voters are sorting themselves into enclaves with like-minded people.

Far more important is the fact that safe seats do not appear to be much more likely to produce extreme candidates than competitive seats. On both sides of the aisle, the voting patterns of people from swing districts are only slightly less extreme than those of their colleagues who enjoy safe seats. If you see a moderate in Congress, the odds are that he comes from a district that leans toward a different party.

But if gerrymandering safe seats is not the source of polarization, what is? Some believe that the problem began with party realignment, starting either in the New Deal era or during the 1960s, when the Voting Rights Act began to shift party allegiances in the South. Still others look to economic factors.

Whatever the source of change, we were once governed by a four-party system, one that contained New England Republicans and Southern Democrats. That fractured system allowed for moderation; it allowed for political deals that drew in members from both sides of the aisle. But Southern Democrats and New England Republicans, with a few exceptions, are now an extinct species, at least on the national stage. As a result, the parties are much more closely aligned and disciplined. Some think that political elites are causing polarization, and Geoff will talk about the way that primaries interact with party elites to produce polarized politics. Others think that the real problem, ironically enough, is the well-informed voter – that it’s you. You are the ones who know a lot about politics, whom politicians pay attention to, and whose views move farther to the left and the right.

The rough-and-tumble nature of politics – the incredible energy behind it – fuels restlessness and change. That makes it harder for us to regulate politics . . . but it does suggest at least one prediction that we can make about the politics of the next decade: they will change.
My intent is not to referee these arguments, but I want to suggest that the causes of polarization seem to be at some distance from gerrymandering. As best we can tell, they are complex and contingent sources; the courts might not have enough evidence to fix this problem even if they wanted to. Many of the likely causes of the current political atmosphere are well beyond what courts could conceivably address.

Now, while I believe that the Court cannot save us from our polarized politics, I would like to end on a slightly more cheerful note. Politics is remarkably flexible and dynamic. The parties are changelings; political leaders are shape-shifters. Regulating them is very difficult, something that does not bode particularly well for those of us who want the law to cure what currently ails us.

Take, for example, the struggles in campaign finance to regulate sources of money. Every time we regulate one institution, political interests shape-shift and become another. First, they inhabited the parties, next the 527s, then the 502(c)4s and (c)6s. Karl Rove was once inside the White House; now he is running a shadow Republican party that has no formal authority but hundreds of millions of dollars in its war chest. While the fluid and dynamic nature of politics makes it very difficult to solve a specific problem at a specific moment, it does have one benefit: namely, it ensures that many of these problems will be temporary. Dynamism in politics is a double-edged sword in this respect.

Consider the question of polarization that plagues us all today. For decades, people were concerned that the parties were too weak, too divided, too incoherent. We were not worried about polarized politics; we were worried about races between candidates who gave voters no real choice: it was Tweedle-Dum versus Tweedle-Dee. Even as recently as the last few years, academics have been calling for efforts to make the parties more coherent, not less. Many academics, for example, were mourning the rise of the candidate-centered election, in which the parties did nothing more than cater to the people running for office and had no influence over the positions that these candidates took. Now, of course, the worry is just the opposite.

One could say sarcastically that the lesson here is “be careful what you wish for,” but I think the lesson is a deeper one. We should be cautious in assuming that political arrangements will remain stable. It would be a mistake to think that what we have now is permanently etched into our system. Political elites will always have the incentive to exploit divisions within the party. There is little question, for example, that the GOP is currently a highly disciplined party, but it is an uneasy alliance. One of my friends likes to joke that the Republican Party is made up of the flat-earthers and the flat-taxers. Setting aside the exaggeration, I do have my doubts about whether the partnership will always remain so stable.

So, too, those on the Democratic side are hardly natural bedfellows. These alliances are ripe for shattering. The rough-and-tumble nature of politics—the incredible energy behind it—fuels restlessness and change. That makes it harder for us to regulate politics, to figure out what the right reform is and to predict its consequences, but it does suggest at least one prediction that we can make about the politics of the next decade: they will change.
Polarization in American politics today is generally understood to be a problem. Indeed, the current state of affairs seems incompatible with our constitutional aspirations for the way our government should operate. If the polarization in Washington simply reflected the polarization of the American people, then we could at least take some comfort in knowing that what is happening is the result of what our democracy calls for at the moment. But this turns out not to be true: the American public, in fact, is not all that polarized. Political scientists tell us that, at present, 40 to 45 percent of Americans are more or less moderate in their views, a percentage that has been fairly standard for much of American history. The greater polarization we perceive today is not reflected in the electorate, and that fact should give us pause.

Understanding polarization requires a closer look at how Congress is constituted. In 1970, 47 percent of the members of the U.S. Senate were regarded as moderate. Today, that figure is 5 percent, and it is even lower in the House of Representatives. The decline of moderate views in Congress suggests a kind of dysfunction—a dramatic gap between the views and attitudes of the American people and what we wind up with in our elected representatives. Something is out of whack.

Heather looked at the process of gerrymandering, in which districts are drawn to preserve safe seats, as one possible culprit. As she noted, despite the argument that more extreme candidates are elected in safe districts than in competitive districts, the empirical data suggest that the cause of today’s polarization is still not well established. Another possible culprit, perhaps ironically, is the primary system. In line with the theme of this panel, to the extent the primary system is a culprit, it is indeed an example of unintended consequences.

Party primaries came into existence in the late nineteenth and early twentieth centuries, largely as a reaction to the backroom deals of party bosses, who routinely selected candidates without any direct input from the “people,” thus limiting voters to a choice between the two individuals selected for them in smoke-filled rooms. Progressives thought that this arrangement was not a very good way to run a democracy, so they devised the primary as a way to take the selection of candidates out of the control of political hacks. The party primary was thought to be a highly democratizing institution that strengthened the American political system.

Ironically, party primaries are now seen as one of the potential culprits in the polarization problem. There are fairly obvious reasons why that might be so. Because Republicans and Democrats vote in separate primaries, one candidate is likely to represent more or less the mid-point among Republicans and the other is likely to represent the mid-point among Democrats. Both are likely to be relatively far from the center of the overall electorate. As a consequence, candidates selected in party primaries usually do not reflect the views of the 40 to 45 percent of Americans in the moderate middle. Rather, they tend to represent the 30 percent on either end of the spectrum.

This phenomenon appears to play a large role in producing the kind of polarization we see in our elected officials. We no longer have professional politicians looking for candidates who are most likely to win the general election—that is, candidates near the middle of the political spectrum. After all, if one side produced a moderate candidate and the other a relatively extreme candidate, you could be pretty sure who was more likely to win. The party elite understood this perfectly well.

Making the primary system even worse in this regard is the fact that participation in primary voting has fallen dramatically over the last half-century, from more than 70 percent fifty years ago to about 40 percent today. The people who are most likely to vote in party primaries are those who are most invested in the selection. They are likely to hold more extreme views than more moderate voters. Thus, one potential explanation for our current polarization problem is our use of party primaries, which produce more extreme rather than more moderate candidates for the general election.

H ow can we solve this problem? One possible solution, short of going back to the party bosses, is the open primary, which allows anyone to vote in a party primary, regardless of party affiliation. In 1990, however, the Supreme Court held that open primaries are unconstitutional, stating that the parties have

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a First Amendment right of association that guarantees them the right to decide for themselves who can participate in the selection of their own party’s candidate. The danger, of course, is that in an open primary of this sort Democrats could participate in a Republican primary to nominate the weakest Republican candidate. To allow individuals who are not members of the party to “distort” the selection process in this manner, the Court reasoned, is an unconstitutional violation of the party’s right of free association.

Party primaries are now seen as one of the potential culprits in the polarization problem. We no longer have professional politicians looking for candidates who are most likely to win the general election – that is, candidates near the middle of the political spectrum.

More recently, several states have begun experimenting with a different form of open primary, one that is nonpartisan. Anyone can run in this type of primary, and the highest vote-getters, regardless of party affiliation, earn a place on the ballot. This system has the potential to give moderate voters a much greater influence on the selection of candidates who appear on the general election ballot. The parties themselves can either endorse one or both of the candidates selected in the nonpartisan primary, or they can use other mechanisms to put their own candidates on the ballot. The constitutionality of this system remains to be determined, but in 2007, the Supreme Court tentatively suggested that such a system might be constitutional.

The other issue I want to mention puts the Court in a very different light than the gerrymandering issue. In the gerrymandering context, the Court might be taken to task for being too passive in its willingness to allow states to have partisan gerrymanders. In the campaign finance context, however, the objection to the role of the Court is somewhat different. The concern in this context is that money – particularly corporate and union money – has too great an influence on the political process, creating disillusion and alienation on the part of voters, who feel that the “system” is completely outside their control or influence. They may therefore turn away from active participation in our democracy. Money is also viewed as having too great an influence in terms of both corrupting candidates and officeholders and allowing the views and interests of corporations and unions to dominate the political process.

Faced with these considerations, Congress, in bipartisan legislation signed by President George W. Bush, enacted the Bipartisan Campaign Finance Act of 2002, which limited the amount that corporations and unions could spend in political campaigns. Two years ago, in Citizens United v. Federal Election Commission, in a sharply divided decision, the Supreme Court held the legislation unconstitutional, concluding that restrictions on the ability of corporations and unions to spend whatever they wished in the political process violate the First Amendment. That decision put an enormous obstacle in the way of those who believe that the current state of affairs is incompatible with a healthy democratic system. As a practical matter, and short of a constitutional amendment, the only realistic way that Citizens United could be overturned is if the fears of Congress and of the dissenters in Citizens United prove to be true. In Citizens United, the majority argued that the justifications offered by Congress for the law were too speculative to warrant what they saw as a severe restriction on the rights of corporations and unions. If it turns out that the members of Congress who enacted the legislation and the justices who dissented in Citizens United were correct, and that a world of freewheeling and unlimited corporate and union political expenditures does indeed have dire consequences for our political system, then a future Court might be in a position to overrule Citizens United. The catch-22, however, is that even if the Court at that point is prepared to overrule Citizens United, it is highly unlikely that a Congress elected by corporate and union expenditures will be willing to enact legislation restricting the very expenditures that got them elected.
Mickey Edwards

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A successful democracy requires successful institutions that carry out their functions well, that earn the respect of the people, and that therefore make the people comfortable with the system in which they live and in which they are willing to participate. When we talk about our institutions, we note that our political system is not working; our election system is not working; and our governing system is not working. Those are fundamental problems that diminish people’s confidence in the institutions that we ask them to support. I believe the root cause of these problems is the amount of control over the election system and the governing system that we have ceded to the political parties that control access to the ballot, how district lines are drawn, who sits on what committees, and how the basic functions of Congress are carried out.

All of us want choices in life. We want choices in our smartphones, and we want choices in the kinds of microwaves we can buy. But we allow two private parties to tell us that unless we are able to jump over major barriers, when we go to the polls in November we may choose, among all the people in our constituency, between Candidate A and Candidate B. I do not know why we insist on more choice among the electronics we use than among the people who make our laws, but we have let our local, state, and federal governments cede the power that we entrust to them to private organizations that have as their only goal the gaining and keeping of power.

I would like to add to what Geoff said about the role of the primary election in producing more extreme candidates, an issue I approach from a purely process and constitutional direction. Take, for instance, the 2010 Delaware U.S. Senate primary. In a state of one million people, thirty thousand voted for Christine O’Donnell, and as a result, Mike Castle, former governor and popular congressman, could not appear on the ballot. Similarly, at the 2010 Republican convention in Utah—a state of three million people—350,000 voted for someone other than the incumbent Senator Robert Bennett, who then could not appear on the ballot. In most states, a loss in the primary precludes a candidate from appearing on the general election ballot, no matter how many people in the state might have preferred that candidate as their first choice.

When you are elected to public office, you should base your vote on three things only: first, your constituents’ preferences and interests; second, your own judgment; and third, what the Constitution allows or prohibits. When you let other factors enter into that equation—voting because it is good for your party, or because of who contributed to your campaign—you are not merely playing games with politics, you are eroding the entire democratic system. Democracy is not about whether the candidates elected are centrist, or moderate. It is about whether the voters are able to choose among all the possible people they might be able to select to make laws for them in Washington. As Justice Souter mentioned, it would be nice if you had a more centrist outcome. That is not my primary concern, however, because most of the great movements that have made progress in our country—the civil rights movement, the women’s movement, the gay rights movement, the labor movement—were not movements from the center. The center has no magic to it. Progress comes from having principles and operating a system whereby the people have choices.

The Constitution states that to be a member of the U.S. Senate or the House of Representatives, you must be an inhabitant of the state from which you are elected. This provision, which broke from previous experiences in governance elsewhere, means that you must know your constituents, their concerns, and their preferences. I served in the House as a Republican in a heavily Democratic district that had not elected a Democrat since 1928. When the Democrats controlled the legislature, they redrew my district. (I should say that Republicans do exactly the same thing.) My district moved from the center of Oklahoma all the way up to Kansas, and then in an upside down “L” halfway over to Arkansas. After the redistricting, I was representing wheat farmers, cattle ranchers, and small-town people whose views, perspectives, and concerns I did not really understand. They were the ones who were hurt by a system that allowed districts to be redrawn according to what served the advantages of the political party in power.
The root cause of our problems is the amount of control over the election system and the governing system that we have ceded to the political parties that control access to the ballot; how district lines are drawn; who sits on what committees; and how the basic functions of Congress are carried out.

When George W. Bush was president, Washington Post columnist Dana Milbank wrote that the president was stepping out of his role as head of government to function in his other role as head of state. I was teaching at the Woodrow Wilson School at Princeton University at the time, and I asked my students, “What jumps out at you about that description? Is it basing rights, flyover rights, trade agreements?” The answer is: the president is not the head of government! We do not have a head of government. We have three separate, equal branches of government, and that separation of powers is critical to the way we operate as a free people. Our system vests a great deal of power in Congress, which has the final say over going to war, over tax rates, over spending decisions, over creating or ending programs. The situation in Congress today recalls Gilbert and Sullivan’s H.M.S. Pinafore, in which Sir Joseph maintains that he has been appointed ruler of the Queen’s Navy because “I always voted at my party’s call, and never thought of thinking for myself at all.” In Congress, your party label decides how you vote on Elena Kagan’s or Sonia Sotomayor’s confirmation to the Supreme Court; how you vote on economic stimulus; how you vote on almost every kind of issue that comes up.

There are solutions. I favor all candidates running on the same ballot. I favor the nonpartisan redistricting commissions that have been implemented in thirteen states. And I favor changing the entire basic functioning of Congress: a shift to nonpartisan staff and taking away from party leaders the ability to choose who sits on what committees in exchange for promises to vote the party line. I would also advocate a move toward a less partisan speakership. But we will not solve the problem unless we change our framework. We keep going back to the theme of, “Take back our government.” We did it in 2010, 2008, 2006, and 2004. Nothing changes! And it is because the system we have is based on the good of the party, not the good of the country.

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