

ISSN 1936-5349 (print)
ISSN 1936-5357 (online)

HARVARD

JOHN M. OLIN CENTER FOR LAW, ECONOMICS, AND BUSINESS

PARTYISM

Cass R. Sunstein

Forthcoming in *University of Chicago Legal Forum*

Discussion Paper No. 808

01/2015

Harvard Law School
Cambridge, MA 02138

This paper can be downloaded without charge from:

The Harvard John M. Olin Discussion Paper Series:
http://www.law.harvard.edu/programs/olin_center/

The Social Science Research Network Electronic Paper Collection:
<http://ssrn.com/abstract=2536084>

Preliminary draft 12/14/2014
University of Chicago Legal Forum, forthcoming
Subject to substantial revision
All rights reserved

Partyism

Cass R. Sunstein*

Abstract

“Partyism” is a form of hostility and prejudice that operates across political lines. For example, some Republicans have an immediate aversive reaction to Democrats, and some Democrats have the same aversive reaction to Republicans, so much so that they would discriminate against them in hiring or promotion decisions, or in imposing punishment. If elected officials suffer from partyism – perhaps because their constituents do -- they will devalue proposals from the opposing party and refuse to enter into agreements with its members, even if their independent assessment, freed from partyism, would be favorably disposed toward those proposals or agreements. In the United States, partyism has been rapidly growing, and it is quite pronounced– in some ways, more so than racism. It also has a series of adverse effects on governance itself, above all by making it difficult to enact desirable legislation and thus disrupting the system of separation of powers. Under circumstances of severe partyism, relatively broad delegations of authority to the executive branch, and a suitably receptive approach to the Chevron principle, have considerable appeal as ways of allowing significant social problems to be addressed. This conclusion bears on both domestic issues and foreign affairs.

I. The Goal

With respect to prejudice and hostility, the English language has a number of “isms.” Racism, sexism, classism, and speciesism are prominent examples. I aim to coin a new one here: *partyism*. The central idea is that merely by identifying with a

* Robert Walmsley University Professor, Harvard University. This essay is the written version of the keynote lecture for the 2014 annual symposium of the University of Chicago Legal Forum. Allowances should be made for an essay originally intended for oral presentation. Special thanks to the audience at the University of Chicago on that occasion and above all, to Matthew Lipka for extraordinary research assistance.

political party, a person becomes hostile to the opposing party and willing to believe that its members have a host of bad characteristics.¹

My major suggestion here is that partyism is real and on the rise, and that it has serious adverse consequences for governance, politics, and daily life. In some ways, partyism is now worse than racism. I also offer a few words about its causes and consequences and make some suggestions about what might be done about it. Under conditions of severe partyism, it becomes unusually difficult to address serious social problems, at least through legislation. To that extent, the system of separation of powers – which already imposes a series of barriers to legislative initiatives – become genuinely unsettled.

My principal proposal involves the importance and the value of grants of discretionary authority to the executive branch. I shall argue that amidst high levels of partyism, such grants can be highly desirable, at least if it is agreed that serious social problems need to be addressed. This conclusion has implications for judicial treatment of executive action, especially in areas of law in which the executive is interpreting vague or ambiguous statutory terms. Those who object to executive discretion, and to accompanying judicial doctrines, have things exactly backwards, at least under conditions of severe and persistent partyism.

II. Evidence

There is a great deal of evidence of partyism and its growth. Perhaps the simplest involves “thermometer ratings.”² With those ratings, people are asked to rate a range of groups on a scale of 1 to 100, where 100 means that the respondent feels “warm” toward the group and 0 means that the respondent feels “cold.” In-party rankings have remained stable over the last three decades, with both Democrats and Republicans ranking members of their own party around 70. By contrast, ratings of the out-party has experienced a remarkable fifteen-point dip since 1988.³ In 2008, the average out-party ranking was around 30 – and apparently declining.

By contrast, Republicans ranked “people on welfare,” in that year, at 50, and Democrats ranked “Big Business” at 52. It is remarkable but true that negative affect toward the opposing party is not merely greater than negative affect toward unwelcome people and causes; it is much greater.

A. Implicit Attitude Test

¹ Shanto Iyengar, Guarav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OPIN. Q. 405 (2012), available at <http://pcl.stanford.edu/research/2012/iyengar-poq-affect-not-ideology.pdf>.

² See Shanto Iyengar et al., *Affect, Not Ideology: A Social Identity Perspective on Affective Polarization*, 76 Public Opinion Quarterly 405 (2012).

³ Id.

Consider one of the most influential measures of prejudice: the implicit-association test.⁴ The test is simple to take. Participants see words on the upper corners of a screen -- for example, "white" paired with either "good" or "bad" in the upper left corner, and "black" paired with one of those same adjectives in the upper right. Then they see a picture or a word in the middle of the screen -- for example, a white face, an African-American face, or the word "joy" or "terrible." The task is to click on the upper corner that matches either the picture or the word in the middle.

Many white people quickly associate positive words like "joy," or an evidently European American (Caucasian) face, with the upper left corner when it says "white" and "good" -- but have a much harder time associating "joy" with the left corner when the words there are "black" and "good."⁵ So too, many white people quickly associate "terrible" with the left corner when it says "black" and "bad," but proceed a lot more slowly when the left corner says "white" and "bad."⁶ And when the picture in the middle is evidently of a European American (Caucasian), white people are a lot faster in associating it with the word "good" than when the picture is evidently of an African-American.⁷

It is tempting to think that racial prejudice is deeply engrained and that nothing comparable can be found in the political domain, at least with respect to the two major parties in the United States. (To be sure, we might expect to see strongly negative implicit attitudes for "Nazis" or "Communists.") To test for political prejudice, Shanto Iyengar and Sean Westwood, political scientists at Stanford University, conducted a large-scale implicit association test with 2,000 adults.⁸ They found people's political bias to be much larger than their racial bias. When Democrats see "joy," it is much easier for them to click on a corner that says "Democratic" and "good" than on one that says "Republican" and "good." Implicit

⁴ See, e.g., Anthony Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. OF PERSONALITY & SOC. PSYCH. 1464 (1998); N. Sriram & Anthony G. Greenwald, *The Brief Implicit Association Test*, 56 EXPERIMENTAL PSYCH. 283, 283 (2009) ("In eleven years since its introduction, the Implicit Association Test . . . has been used in several hundred studies to provide measures of association strengths.").

⁵ E.g., Greenwald, McGhee & Schwartz, *supra* note, at 1474; Scott A. Ottaway, Davis C. Hayden & Mark A. Oakes, *Implicit Attitudes and Racism: Effects of Word Familiarity and Frequency on the Implicit Association Test*, 19 SOC. COGNITION 97, 130 (2001); Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, Working Paper 12 (2014).

⁶ See sources cited in note *supra*.

⁷ This is a slight simplification of how the test works. See sources cited in note *supra*.

⁸ Iyengar & Westwood, *supra* note, at 9.

bias across racial lines remains significant, but it is significantly greater across political lines.⁹

B. Love and Marriage

If you are a Democrat, would you marry a Republican? Would you be upset if your sister did? Researchers have long asked such questions about race, and have found that along important dimensions, racial prejudice is decreasing.¹⁰ At the same time, party prejudice in the U.S. has jumped, infecting not only politics but also decisions about marriage. In 1960, just 5 percent of Republicans and 4 percent of Democrats said that they would feel “displeased” if their son or daughter married outside their political party.¹¹ By 2010, those numbers had reached 49 percent and 33 percent.¹² Interestingly, comparable increases cannot be found in the United Kingdom.¹³

In 2009, by contrast, 6 percent of Americans reported that they “would be fine” if a member of their family married someone of any other race or ethnicity, a sharp change from as recently as 1986, when 65 percent of respondents said that interracial marriage was not fine for anyone or not fine for them.¹⁴ Asked specifically about marriages between African-American and white partners, only 6 percent of white respondents and 3 percent of African-Americans recently said that “they could not accept a black-white interracial marriage in their family.”¹⁵ Similarly, a recent Gallup survey found that 87 percent of people approve of interracial marriage, while 4 percent did in 1958 – a dramatic shift in social norms, showing the opposite trend-line from that observed for partyism.¹⁶

C. Hiring

The IAT measures attitudes, not behavior. Growing disapproval of marriage across political lines suggests an increase in prejudice and hostility, but it might not map onto actual conduct. To investigate behavior, Iyengar and Westwood asked more than 1,000 people to look at the resumes of several high-school seniors and say which ones should be awarded a scholarship.¹⁷ Some of these resumes

⁹ *Id.* at 12.

¹⁰ See Iyengar et al., *supra* note, at 416 (showing a steady decrease in racial polarization from 1964 to 2008).

¹¹ Iyengar et al., *supra* note, at 415-18.

¹² *Id.*

¹³ *Id.*

¹⁴ PAUL TAYLOR ET AL., PEW SOCIAL & DEMOGRAPHIC TRENDS, THE RISE OF INTERMARRIAGE 7 (2012), available at <http://www.pewsocialtrends.org/files/2012/02/SDT-Intermarriage-II.pdf>.

¹⁵ *Id.* at 36.

¹⁶ <http://www.gallup.com/poll/163697/approve-marriage-blacks-whites.aspx>.

¹⁷ Iyengar & Westwood, *supra* note, at 14.

contained explicitly racial cues (“president of the African American Student Association”) while others had explicitly political ones (“president of the Young Republicans”).¹⁸

In terms of ultimate judgments, race certainly mattered: African-American participants preferred the African-American scholarship candidates 73 percent to 27 percent.¹⁹ For their part, whites showed a modest preference for African-American candidates as well, though by a significantly smaller margin.²⁰ But party affiliation made a much larger difference. Both Democrats and Republicans selected their in-party candidate about 80 percent of the time.²¹ Even when a candidate from the opposing party had better credentials, most people chose the candidate from their own party.²² With respect to race, in contrast, merit prevailed.²³ It is worth underlining this finding: *Racial preferences were eliminated when one candidate was clearly better than the other. By contrast, party preferences lead people to choose a clearly inferior candidate.*

A similar study asked students to play the role of college admissions director and to decide which applicants to invite for an on-campus interview, based on both objective criteria (SAT scores, class rank) and subjective evidence (teacher recommendations).²⁴ Among partisans with strong party identification, there was significant evidence of partyism: 44 percent of the participants reviewing someone from the opposite party selected the stronger applicant, while 79 percent of the participants in the control (where participants had no knowledge of the applicant’s party affiliation) selected the stronger applicant.²⁵

D. Trust

In a further test of the relationship between partyism and actual behavior, Iyengar and Westwood asked 800 people to play “the trust game,”²⁶ well known among behavioral scientists.²⁷ As the game is played, Player 1 is given some money (say, \$10) and told that she can give some, all or none of it to Player 2. Player 1 is

¹⁸ *Id.*

¹⁹ *Id.* at 16.

²⁰ *Id.*

²¹ *Id.* at 15-16.

²² *Id.* at 16-17.

²³ *Id.* at 18.

²⁴ Geoffrey D. Munro, Terell P. Lasane & Scott P. Leary, *Political Partisan Prejudice: Selective Distortion and Weighting of Evaluative Categories in College Admissions Applications*, 40 J. Applied Soc. Psych. 2434, 2440 (2010).

²⁵ *Id.* at 2444-45.

²⁶ Iyengar & Westwood, *supra* note, at 20.

²⁷ Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Fairness and the Assumptions of Economics*, 59 J. OF BUS. S285 (1986).

then told that the researcher will triple the amount that she allocates to Player 2 -- and that Player 2 can give some of that back to Player 1. When Player 1 decides how much money to give Player 2, a central question is how well she trusts him to return an equivalent or greater amount. Higher levels of trust will result in higher initial allocations.

Are people less willing to trust people of a different race or party affiliation? Iyengar and Westwood found that race did not matter -- but party did. People are significantly more trusting of others who share their party affiliation.²⁸

E. Other Evidence

Partisanship can motivate partisans to be especially inclined to share negative information about the opposing party -- or even to avoid its members altogether when forming a group.²⁹ In one experiment, participants were asked to decide whether a strongly worded opinion piece blaming congressional gridlock on one of the two political parties, including hyperbole and name calling, should be posted on a news organization's website.³⁰ The researchers found significant evidence of partisanship: 65 percentage of people were willing to post the article if it was critical of the opposing party, but only 25 percent were willing to share it if it criticized its own party.³¹ They also found that the intensity of a participant's partisan feelings correlated with their willingness to share a critical article.³²

In a second experiment, the researchers asked participants to pick a team of three people out of a list of four to join them in completing a puzzle game.³³ Participants were informed of the partisan identity and education level of the potential teammates; the least educated team member was always an independent. More than half the participants selected the least educated player for their team -- rather than choosing a better-educated member of the opposing party³⁴!

F. An Objection

From these studies, and various others,³⁵ it seems clear that partisanship is widespread in the United States. We can imagine reasonable disputes about the

²⁸ Iyengar & Westwood, *supra* note, at 21-23.

²⁹ Yphtach Lelkes & Sean J. Westwood, *The Nature and Limits of Partisan Prejudice*, Working Paper 2014.

³⁰ *Id.* at 9.

³¹ *Id.* at 10.

³² *Id.* at 11.

³³ *Id.* at 14.

³⁴ Note, however, that there are significant qualifications to this finding, with some reluctance to discriminate along party lines. *Id.*

³⁵ See Lillian Mason, *"I Disrespectfully Agree": The Differential Effects of Partisan Sorting on Social and Issue Polarization*, AM. J. OF POLI. SCI. (forthcoming 2014);

precise magnitude of the phenomenon, but not of its existence and significance. But there is an obvious objection to the effort to compare racism to partyism, and indeed to the very effort to describe partyism as seriously troubling. The objection is that people have legitimate reasons for objecting to people because of their political beliefs. If we think that Communism is hateful, we will not object to those who do not much like Communists. "Red-baiting" is not exactly admirable, but it would not be helpful to identify and to object to "Communismism."

For some people, a degree of suspicion and hostility across political lines is a product of legitimate disagreement, not of anything untoward. Racism and sexism are a product of devaluation of human beings on the basis of an immutable or at least irrelevant characteristic. Perhaps the same cannot be said for party affiliation. In fact the very idea of political prejudice, or any kind of corresponding "ism," might seem badly misdirected. Perhaps we are speaking here not of any kind of prejudice, but of a considered judgment about people who hold certain convictions. On certain assumptions, that is the precise opposite of prejudice.

To come to terms with this response, we need to begin by distinguishing between daily life and politics as such. It is hardly unreasonable to have a strong negative affect toward Nazis or Communists because of their political views. But if people dislike each other because an affiliation with one of the major parties in the United States, something does seem badly amiss. To be sure, some characteristics or even commitments of one or another party might seem troublesome or worse. But both parties are large and diverse, and it is odd to think that outside of the political domain, members of one party should actually dislike members of another party as such. Of course this judgment turns on substantive conclusions. If you believe that Republicans are essentially racists and sexists, antipathy toward Republicans is understandable, and so too if you believe that Democrats are unpatriotic socialists who seek to undermine the United States. But if you believe that across the two parties, good-faith disagreements are possible and pervasive, partyism will be hard to defend, not least if it seeps into daily life.

In the political domain, of course, intensely held differences are common, and some kind of "we-they" attitude may be difficult or impossible to avoid. For members of Congress, such an attitude is, in a sense, built into the very structure of the two-party system. A degree of antipathy – at least if it is not personal -- may reflect principled disagreement, not prejudice at all. It may be hard to avoid a measure of antipathy with respect to people with whom you intensely disagree, most of the time, in your day job. The problem is that good faith disagreement is far from uncommon in politics, and in the face of such disagreement, the task is to seek to identify ways to move forward (or not), rather than to discredit arguments because of their source. With respect to politics itself, something like partyism may

be a product of principle, but it also has destructive consequences, as we shall shortly see.

G. Causes

What causes partyism? We do not yet know the answer, but some helpful clues have started to emerge.

1. *From ideological disagreement to partyism?* It is tempting to think that the growth in partyism is a product of the increasing intensity and visibility of ideological disagreements. Let us assume that at some point in the past – say, 1970 – one or another of the two parties, or perhaps both, had a “wider tent.” Let us assume, in fact, that the conservative wing of the Democratic Party was more conservative than the liberal wing of the Republican Party, so that the two parties had significant ideological overlap. If so, we would not expect to see much in the way of partyism.

This hypothesis could be tested in multiple ways. We could attempt to track ideological differences between the parties and test whether growth in ideological distance turned out to be correlated with increases in partyism. A strong correlation would not be definitive, but it would be at least suggestive. It would indicate that strong negative affect, across political lines, would have something to do with increasingly intense substantive disagreements. And if this turned out to be so, the rise of partyism would, in a sense, turn out to be rational, at least in the sense that prejudice and antipathy would be a product of something concrete and real. The role of partyism in the private domain would remain hard to defend, but in politics, at least, its recent increase would be comprehensible.

But a better way to test the hypothesis would be to see whether the intensity of people’s policy preferences predicts partyism. In other words: When people have very strong views about political issues, and when those very strong views suggest clear divisions across party lines, are they more likely to show a negative affect toward the opposing party? Surprisingly, *the connection between ideological polarization and negative affect is relatively weak*.³⁶ It appears that people’s partisan attachments are a product of their *identity* rather than their *ideology*. When Republicans dislike Democrats, or vice versa, it is largely because they are on the opposing side; substantive disagreements matter, to be sure, but they are not primary.

2. *Campaigns.* Do political campaigns create partyism? It is natural to suspect that they do, first because they make party differences salient, and second because part of the point is to cast the opposing side in a negative light. Iyengar and Westwood find support for this hypothesis. In particular, exposure to negative advertising contributes to a growth in partisan animus, and political campaigns

³⁶ See Iyengar et al., *supra* note, at 422-23; Mason, *supra* note, at 14.

themselves have that effect.³⁷ Apparently campaigns serve to “prime” partisan identity and also support stereotypical and negative perceptions of both supporters and opponents.

3. *Your media, my media.* In a fragmented media market, it is easy for people to segregate along partisan lines. Fox News has an identifiable conservative orientation; MSNBC has an identifiable liberal orientation. Some talk shows are easy to characterize in terms of the political commitments of the host. If a show or a station characterizes one group of people as “the other side,” and if those on that side are described as malicious, foolish, or power-hungry, then viewers or listeners should experience a rise in partyism.³⁸ We do not have clear data on this particular speculation, but some is emerging,³⁹ but it is reasonable to suspect that a fragmented media market, with clear political identifications, contributes a great deal to partyism.

III. Some Consequences

A. Source Devaluation and Political Polarization

Suppose that a society is divided on some proposition. The first group believes A and the second group believes not-A. Suppose that the first group is correct. Suppose finally that truthful information is provided, not from members of the first group but from some independent source, in support of A. It would be reasonable to suppose that the second group would come to believe A. But in important settings, the opposite happens. The second group continues to believe not-A, and even more firmly than before. The result of the correction is to increase polarization.

³⁷ See Iyengar et al., *supra* note, at 425-27 (finding that residence in a battleground state during an election year correlates significantly with intensity of partisan affect, and that partisan affect increases significantly over the course of a campaign, especially in battleground states); Guarav Sood, Shanto Iyengar & Kyle Dropp, *Coming to Dislike Your Opponents: The Polarizing Impact of Political Campaigns*, Working Paper April 2013 (finding that over the course of a campaign, partisans form more negative views of the opposing party, and the most strongly correlated feature is exposure to televised political advertising, especially negative ads).

³⁸ For relevant discussion, see Cass R. Sunstein *Republic.com 2.0* (2007).

³⁹ See Yphtach Lelkes, Shanto Iyengar & Gaurav Sood, *The Hostile Audience: Selective Exposure to Partisan Sources and Affective Polarization*, Working Paper 2013 (finding that for partisans who pay attention to politics, cable access is correlated with greater partisan affect in years when cable carried partisan content, and further finding that the preference of partisans for choosing, between MSNBC and Fox News, the news sources amenable to their party “in and of itself -- is sufficient to predict partisan animus, greater affect for in-party elites vis-à-vis out-party elites, greater social distance between partisans, and a preference for attack-oriented campaign rhetoric.”).

The underlying studies do not involve party differences as such, but they explore something very close to that, and they suggest the following proposition: An important consequence of partyism is to ensure that *people with a strong political identification will be relatively immune from corrections, even on matters of fact, from people who do not share that identification*. Since agreement on matters of fact is often a precondition for political progress, this phenomenon can be extremely destructive.

In a relevant experiment, people were exposed to a mock news article in which President George W. Bush defended the Iraq war, in part by suggesting (as President Bush in fact did) that there “was a risk, a real risk, that Saddam Hussein would pass weapons or materials or information to terrorist networks.”⁴⁰ After reading this article, they read about the Duelfer Report, which documented the lack of weapons of mass destruction in Iraq. Subjects were then asked to state their agreement, on a five-point scale (from “strongly agree” to “strongly disagree”) with the statement that Iraq “had an active weapons of mass destruction program, the ability to produce these weapons, and large stockpiles of WMD.”⁴¹

The effect of the correction greatly varied by political ideology. For very liberal subjects, there was a modest shift in favor of disagreement with this statement; the shift was not significant, because very liberal subjects already tended to disagree with it.⁴² But for those who characterized themselves as conservative, there was a statistically significant shift in the direction of *agreeing* with the statement. “In other words, the correction backfired – conservatives who received a correction telling them that Iraq did not have WMD were more likely to believe that Iraq had WMD than those in the control condition.”⁴³ It follows that the correction had a polarizing effect; it divided people more sharply, on the issue at hand, than they had been divided before.

An independent study confirmed the more general effect. People were asked to evaluate the proposition that cutting taxes is so effective in stimulating economic growth that it actually increases government revenue. They were then asked to read a correction. The correction actually increased people’s commitments to the proposition in question. “Conservatives presented with evidence that tax cuts do not increase government revenues ended up believing this claim more fervently than those who did not receive a correction.”⁴⁴

Or consider a test of whether apparently credible media corrections alter the belief, supported and pressed by former Alaska Governor Sarah Palin, that the

⁴⁰ Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 312 (2010).

⁴¹ *Id.* at 312-13.

⁴² *Id.* at 314.

⁴³ *Id.* at 314-15.

⁴⁴ *Id.* at 320.

Affordable Care Act would create “death panels.”⁴⁵ Among those who viewed Palin favorably but had limited political knowledge, the correction succeeded; it also succeeded among those who views Palin unfavorably.⁴⁶ But the correction actually backfired among Palin supporters with a high degree of political knowledge. After receiving the correction, they became *more* likely to believe that the Affordable Care Act contained death panels.⁴⁷

Liberals (and Democrats) are hardly immune to this effect. In 2005, many liberals wrongly believed that President George W. Bush had imposed a ban on stem cell research.⁴⁸ Presented with a correction from the New York Times or FoxNews.com, liberals generally continued to believe what they did before.⁴⁹ By contrast, conservatives accepted the correction.⁵⁰ Hence the correction produced an increase in polarization.

As noted, the relevant experiments involve people with clear ideological (rather than partisan) convictions, and there appears to be no clear evidence on the specific question whether the same effects would be observed for party. But in light of the general evidence of partyism, there is every reason to believe that they would. Indeed, an important and related study shows that people will follow the views of their party even when those views diverge from their independent judgments – and also that they are blind to the effects of party influence.⁵¹

In the relevant study, people – both Democrats and Republicans -- were asked their views about an assortment of political issues. As a result, it was possible to obtain a sense of how members of both parties thought about those issues. Otherwise identical groups were then asked about the same issues, but with one difference: They were informed of the views of party leadership. The effect of that information was significant. Armed with that information, people departed from the views that they would have held if they had not been so armed. Stunningly, the effect of the information “overwhelmed the impact of both the policy’s objective impact and participants’ ideological beliefs.”⁵² At the same time, people were blind to that impact; they actually said that their judgments were based solely on the merits, not on the effects of learning about the beliefs of party leaders. Here, then, is clear evidence of the consequences of partyism for people’s judgments – and of people’s unawareness of that fact.

⁴⁵ Brendan Nyhan, Jason Reifler & Peter A. Ubel, *The Hazards of Correcting Myths About Health Care Reform*, 51 *MED. CARE* 127, 127 (2013).

⁴⁶ *Id.* at 129-30.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Nyhan & Reifler, *supra* note, at 321.

⁵⁰ *Id.* at 321-22.

⁵¹ See Geoffrey Cohen, Party Over Policy, 85 *J Pers Soc Psychol.* 808 (2003).

⁵² *Id.*

B. Gridlock

It might be expected that under circumstances of partyism, legislation would be difficult to enact. If legislators themselves suffer from partyism, this conclusion should seem self-evident. And even if they do not – even if they feel no antagonism to members of the opposing party, and are fully willing to work with them -- constituent pressures should push in this direction. In fact, recent evidence suggests that partyism has been contributing to a highly unusual degree of inactivity in Congress.

1. *Measures.* During the year that Harry Truman complained of the "Do Nothing Congress," 511 statutes were enacted (and that was only one year of a two-year session).⁵³ As of this writing (December 2014), the 113th Congress is on pace to be the least productive since 1973, at least if measured by the number of enacted statutes.⁵⁴ Thus far, 186 statutes have been enacted.⁵⁵ The previous Congress enacted the next fewest (281).⁵⁶ This dramatic decrease is not only a product of a reduction in purely ceremonial legislation: fewer substantive laws were enacted in the first nineteen months of the 113th Congress than in any Congress of the preceding two decades.⁵⁷

It is true that a purely numerical measure will not be adequate, even if it is focused only on substantive statutes. A Congress might enact few laws, but those ' that it enacts might be exceptionally important. By another and in some ways better measure, Congress also appears to have become unusually gridlocked. Sarah Binder assesses legislative gridlock by examining what proportion of the most salient legislative issues are acted on by Congress by the end of a congressional session. To assess issue salience, she investigated the number of appearances an issue makes in the *New York Times* unsigned editorials to assess issue salience. She finds that the 112th Congress, in session from 2011-12, was the most gridlocked in the data set (tied only with 1999-2000), going back to 1947. By her measure, more than 70 percent of all salient issues were gridlocked in that Congress, compared to fewer than 30 percent in 1947.⁵⁸

⁵³ Matt Viser, *This Congress Going Down As Least Productive*, *Boston Globe*, Dec. 4, 2013, available at <http://www.bostonglobe.com/news/politics/2013/12/04/congress-course-make-history-least-productive/kGAVEBskUeqCB0htOUG9GI/story.html>

⁵⁴ *Bills by Final Status*, govtrack.us, <https://www.govtrack.us/congress/bills/statistics> (last visited Dec. 1, 2014).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Drew Desilver, *Congress Continues Its Streak of Passing Few Significant Laws*, July 31, 2014, <http://www.pewresearch.org/fact-tank/2014/07/31/congress-continues-its-streak-of-passing-few-significant-laws/>.

⁵⁸ SARAH BINDER, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS, *POLARIZED WE GOVERN?* 9-10 (2014), available at

2. *Is gridlock bad?* There is of course a legitimate question whether gridlock is good or bad. If an active Congress would reduce social welfare, there would be a good argument for an inactive Congress. Social welfare is the guide, not the volume of activity. A blocked national legislature is something to lament only if the result, all things considered, is to diminish social welfare. One issue is whether and to what extent the legislative status quo is wanting; if it is not, new enactments are not so desirable. Another issue is whether new enactments would be improvements; if they would not be, then gridlock is a blessing, not a curse.

A full account of any particular state of affairs would require a theory of optimal deadlock. This is not the place for any such theory. But it seems reasonable to think that if a nation faces a range of serious problems, if imaginable initiatives would reduce or solve those problems, and if partyism makes it difficult to undertake those initiatives, then something is badly amiss. Under imaginable assumptions, all of those assumptions are eminently reasonable.

IV. Solutions

My principal goal here has been positive rather than normative. It is possible to believe that partyism is growing and real but that nothing should be done about it. But the increase in partyism has produced serious problems for American government. How might institutions respond?

It is tempting to urge that we should aim at its causes, to the extent that we are able to identify them. That would certainly be most direct and ambitious response. But James Madison's words of the Federalist No. 10, applied to the related phenomenon of faction, are highly relevant here: "Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency."⁵⁹

With Madison's caution in mind, we should acknowledge that it would be folly to attempt to abolish partyism. To be sure, the nature and degree of partyism are not static. As we have seen, partyism has increased significantly in recent decades, and it might turn out to be much lower in 2035 than it is 2015. But changes of that kind cannot easily be engineered. They are more likely to be a function of an array of social forces, including emerging technologies, invisible-hand mechanisms, and the decentralized decisions of a wide range of private and public actors.

http://www.brookings.edu/~media/research/files/papers/2014/05/27%20polarized%20we%20govern%20binder/brookingscep_m_polarized_figreplacedtextrevtva.blerev.pdf. Data on the 113th Congress was not available when this study was published.

⁵⁹ See The Federalist No. 10.

The real solutions lie not in aiming at the causes of partyism but in working to counteract its effects. Consider three possibilities.

A. Timing Is Everything

For obvious reasons, partyism is likely to be most intense before a presidential or mid-term election. At that point, negative campaigning will be heightened, and politicians might well be at risk if they attempt to make common cause with those from the opposing party. By contrast, partyism is likely to be reduced in the immediate aftermath of a presidential campaign, when the newly elected Commander-in-Chief enjoys a “honeymoon period.” The term is a good one, because it captures a central feature of the immediate aftermath of an election, which is that a new relationship is created with a kind of warm glow. In the presence of that glow, partyism is diminished, at least for a time, and it may be possible to accomplish a great deal.

The point suggests the immense importance of the period of presidential transition, and the need for a president-elect to focus carefully on the top priorities of her or his first term. Clear identification of those priorities, alongside a strategy for bringing them to fruition, had long been exceedingly important. But under conditions of partyism, it is essential to any president-elect, and potentially to the nation as a while.

B. Precommitment Strategies

Under creatively designed laws, significant reform can happen as a result of congressional inaction. Consider, for example, the Defense Base Realignment and Closure Act of 1990,⁶⁰ which enables the president to appoint the nine members of a base-closing commission. The commission produces a list of recommended military-base closures, and if the president approves, they happen — unless Congress enacts a resolution of disapproval within 45 days. If Congress does nothing, the closures go into effect.

A more controversial example is known as “the sequester.”⁶¹ In 2011, Congress and President Obama completed a difficult negotiation by agreeing that unless Congress enacted new legislation, automatic (and aggressive) spending cuts would go into effect in 2013.⁶² At the time, few people favored the automatic cuts; they saw them as a mechanism to force Congress to do its job. But the sequester did go into effect, and for better or worse, it has had major effects on federal spending. The power of the 2011 decision was that it established a drastic outcome if Congress

⁶⁰ Public Law 101-510.

⁶¹ The Budget Control Act of 2011 ([Pub.L. 112-25](#), [S. 365](#), 125 [Stat. 240](#), enacted August 2, 2011).

⁶² *Id.*

failed to act. The noteworthy surprise was that as a result of partyism, the default outcome actually went into effect.

If the goal is to reform Social Security, to make significant changes in fiscal policy, or to achieve any other large-scale goal, it is possible to imagine a strategy of this kind: With or without the help of a commission, Congress could allow specified reforms to occur on a specified date unless a future Congress says otherwise. Of course there is a serious challenge to efforts of this kind: Solutions to the problem of partyism might be defeated by partyism. But in some cases, some kind of precommitment strategy, or an alteration of the status quo, has sufficient appeal to be feasible.

C. Delegation and Technocracy

In many cases, the best response to partyism lies in delegation, and in particular in strengthening the hand of technocratic forces within government. The basic idea is that the resolution of many political questions should not turn on politics, at least not in any simple or crude sense. Partyism is unhelpful, because partisan differences are irrelevant or nearly so. Consider these problems:

1. Should EPA reduce the permissible level of ozone in the ambient air from 75 parts per billion (ppb) to 70 ppb, 65 ppb, or 60 ppb?
2. Should OSHA issue a new rule to control exposure to silica in the construction industry?
3. Should the Department of Transportation require rearview cameras to be installed in new automobiles?
4. Should the Food and Drug Administration (FDA) ban asthma inhalers that emit CFCs?

All of these questions are highly technical. They cannot possibly be answered without careful engagement with empirical issues. Policymakers need to know the benefits of imaginable policies in terms of health and safety. They also need to know the costs, monetary and otherwise. Would a new rule for silica cost \$100 million, or \$500 million, or \$1 billion? What would be the consequences of those costs? Would they result in fewer jobs or in reduced wages? What are the actual harms associated with exposure to silica at various lives? With proposed regulations, how many lives would be saved?

To be sure, judgments of value may play a role in controversies of this kind, but with imaginable empirical projections, there may be sufficient consensus to ensure agreement on particular outcomes, even amidst significant differences in value and across party lines. If, for example, a silica regulation would cost \$1 billion and save merely two lives per year, few people would support it, whatever their party affiliation. And if it would cost \$100 million and save 700 lives per year, few people would reject it. In any event, it is hopeless to try to answer many of the central questions by reference to one's party identification.

No one denies that Republicans and Democrats have different attitudes toward the Environmental Protection Agency and the Occupational Safety and Health Administration, and those different attitudes might well lead to disagreements about particular initiatives. What I am urging here is that many disagreements are not really about values or partisan commitments, but about facts, and when facts are sufficiently engaged, disagreements across party lines will often melt away.

In these circumstances, broad delegations to the executive branch make a great deal of sense, at least (and this is an important proviso) *if officials within that branch can be trusted to make decisions with careful reference to the facts*. In my view, institutional characteristics of the executive branch justify a degree of trust, at least as a general rule. The reason is that the executive branch – again as a general rule – tends both to have a great deal of technical expertise and to treat technical issues as they should be treated. Ironically, it has a degree of insulation from day-to-day politics, enabling it to focus on questions as specialists do.⁶³ To the extent that this is so, there are significant advantages in allowing the specialists to do their work, subject of course to ultimate legislative control, but not to the day-to-day conflicts made inevitable by partyism.

If this is so, then partyism provides yet another reason to embrace the time-honored idea that agencies should be allowed to interpret ambiguous statutory terms as they see fit, so long as their interpretations are reasonable.⁶⁴ Indeed, we might be prepared to go somewhat further. Some statutes – like some constitutional provisions – endure for long periods of time, and must be construed across significant changes in both facts and values. Of course the executive branch must respect the law as Congress has enacted it. But common law courts have long had the authority to adapt statutory terms to new or unanticipated circumstances, even when the interpretation fits awkwardly with the apparent meaning of the text.⁶⁵ Under circumstances of partyism, it is plausible to think that agencies should have the same power – and perhaps a bit more so.⁶⁶ The reason is that a well-functioning nation requires adjustments across time, and agencies are often in the best position to make those adjustments.

Do the same arguments apply in the domain of foreign affairs? That question raises many problems, and full argument would require a far more detailed treatment than I am able to provide here.⁶⁷ But here as well, the executive branch has important informational advantages, and at least under circumstances of severe

⁶³ See Cass R. Sunstein, *Valuing Life* (2014).

⁶⁴ See *Chevron v. NRDC*, 467 U.S. 837 (1984).

⁶⁵ See *Church of the Holy Trinity v. US*, 143 US 457 (1892); *Riggs v. Palmer*, 115 N.Y. 506 (1889).

⁶⁶ For possible support, see *Entergy v. Riverkeeper*, 556 US 208 (2009).

⁶⁷ For relevant discussion, see Eric A. Posner and Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 *Yale LJ* 1170 (2007).

partyism, mandatory resort to Congress could prevent highly desirable action. When circumstances change in the world, action by the United States might have to change as well, and if legislative authorization is invariably required, desirable action might be prevented, at least under conditions of partyism.

These points should not be misunderstood. I am not suggesting that the President can make war on his own, violate constitutional restrictions on his authority, disregard legal requirements, or otherwise abandon the constitutional plan. But Congress itself has to make decisions – for example, in generating the text of an authorization for the use of military force (AUMF) – and where threats to national security are real, there are good arguments for a degree of breadth and flexibility rather than narrowness and constraint. And where the text of an AUMF is ambiguous, there are good arguments in favor of the view that just as in the domestic sphere, the President should have some scope for interpreting that text as he sees fit.⁶⁸

Of course it is true that this argument will have little appeal to those who believe that the executive branch itself suffers from serious institutional biases, or who think that it is important to impose sharp discipline on the discretion of the executive branch. And it must be emphasized that I am not arguing for a radical idea, or dramatic departure from the status quo. No one contends that Congress should give genuinely blank checks to the executive. The argument is only that in an era of partyism, there is increased reason for allowing a degree of discretion – and for judicial receptivity to agency decisions in the face of genuine ambiguity.

D. A Note on the Fragility of Institutional Judgments

While the main goal here has been positive rather than normative, we have seen that an understanding of the problem of partyism fortifies the case for certain forms of executive action, and for receptivity to a degree of discretion on the part of the executive branch. It is important to acknowledge, however, that in practice, people's judgments about the authority of the executive are greatly and even decisively affected by their approval or disapproval of the incumbent president. Under a Republican president, Democrats do not approve of the idea of a discretion-wielding chief executive, enabled by deferential courts. Under a Democratic president, Republicans tend to have, and even to voice, the same cautions and concerns. During the George W. Bush Administration, it was common for Democrats to object to an overreaching executive and to argue for regular resort to the national legislation. During the Obama Administration, Democrats have rarely taken such positions, and Republicans have made arguments against executive discretion that they eschewed under Republican leadership.

In this respect, some of the most important institutional judgments are fragile and even unstable. They are weakly held in the sense that they predictably “flip” with

⁶⁸ See Posner and Sunstein, *supra* note.

changes in the allocation of political power. We could even see institutional judgments as victims of partyism itself. Questions of institutional authority are, in a sense, overwhelmed by short-term assessments of the particular people who are currently occupying relevant offices. For this reason, it is possible that evaluations of arguments in favor a receptive approach to presidential power in light of partyism will be dominated by one factor: evaluation of the current occupant of the Oval Office.

The aspiration, of course, is that institutional claims can be evaluated behind a kind of veil of ignorance, and that short-term considerations about the immediate winners and losers might be put to one side. For political actors, of course, adoption of a veil of ignorance is extremely challenging, between short-term electoral considerations often argue against it. If, for example, a Republican politician argues for acceptance of presidential discretion when the President is a Democrat, she might seriously endanger her political prospects. Even for observers, the challenge is also real, because short-term political considerations have such salience. My hope is that the standard claims on behalf of executive authority – strengthened in the face of partyism – can be seen to rest on assumptions that while hardly irresistible, are plausible enough, both now and for the foreseeable future.

Conclusion

Partyism is real, and it is increasing, and it has serious adverse effects both in daily life and in the political domain. It makes governance more difficult and in some cases even impossible. Even when legislators are aware that a bipartisan agreement would be sensible, they might well be under severe electoral pressure not to enter into it, because they might face some kind of reprisal from constituents or colleagues.

Even under current conditions, the effects of partyism have been far serious in some periods than in others. On the eve of a midterm election, for example, those effects are likely to be heightened. In the six months after a presidential election, they are likely to be reduced. But for structural reasons, large-scale reductions in partyism are unlikely, certainly in the short-term.

Is this a problem? If the statutory status quo is pretty good, and if further action from the national government would likely make things worse, then there would little reason to lament the existence of partyism. In such circumstances, partyism might turn out to be a valuable safeguard. But if a nation faces serious problems, and if imaginable initiatives would helpfully address them, then partyism might turn out to create significant dangers for both peace and prosperity.

At least in the immediate future, it seems unlikely that the United States will be able to make significant progress in reducing the causes of partyism. If such reductions are to occur, it will probably be a product of spontaneous forces rather

than of any kind of self-conscious design. The best hope lies in reducing partyism's effects. I have suggested that the most promising approach lies in relatively broad delegations of authority, emphasizing technocratic expertise, and in a receptive approach to the *Chevron* principle, allowing adaptations (not violations) of statutory text to changing values and circumstances.