

A Divided Nation: Political Polarization and Dispute Resolution

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Abraham Lincoln stated in 1838, “America will never be destroyed from the outside. If we falter and lose our freedoms, it will be because we destroyed ourselves.”¹ This statement seems to have predicted the demise we are faced with today, which is, American political polarization. Our nation is so divided, that even in the face of a crisis our legislative body cannot compromise.² Altogether, this has halted the productivity of the legislative process and diminished the effective governance of our democracy.³ As political figures increasingly trade up patriotism for partisanship, one may question whether productivity will cease to exist in a politically divided government body.⁴

Moreover, if voters are hoping for a politically homogenous legislative, judicial, and executive branch, for the sake of productivity, what does that mean for democracy? In the words of Bill Moyers, a former White House Press Secretary, “[a]lthough our interests as citizens vary, each one is an artery to the heart that pumps life through the body politic, and each is

1. *Lincoln's Legacy: A Conversation with Henry Louis Gates, Jr.*, PBS (Jan. 12, 2009), <http://www.pbs.org/wnet/lookingforlincoln/about/lincolns-legacy-aconversation-with-henry-louis-gates-jr/297/>.

2. The 2013 government shutdown exemplifies the inability and unwillingness of legislative officials to make compromises in an emergency. In 2013, U.S. national debt increased to \$17 trillion so Congress enacted the sequestration, which included a number of spending cuts. With the new fiscal year and the implementation of the Affordable Care Act approaching, Congress was pressured into creating a resolution. However, the Democrat-led Senate and the Republican led-House could not agree on a resolution leaving the government officially shut down by October 1st. Brittany Crocker, *The Government ShutDown Explained*, Global Journalist (Oct. 24, 2013), <http://globaljournalist.org/2013/10/the-government-shutdown-explained/>.

3. *Id.*

4. See James R. Rogers, *The Impact of Divided Government on Legislative Production*, 123 *Public Choice* 217, 225-26 (2005).

[D]ivided legislatures have a large and statistically significant impact on legislative production. Each chamber in a divided legislature on average originates 80 fewer laws relative to chamber in unified legislatures. That represents a decrease in legislative production of almost 30 percent relative to the average number of enactments by chambers in unified legislatures.

Id.

important to the health of democracy.”⁵ The Framers intended for both majority and minority opinions to be safeguarded by our system of checks and balances—safeguards that come at a high cost today.⁶

Because we cannot conceive of relinquishing our democratic principles of checks and balances in exchange for a productive government body, we must pressure elected officials to find common ground with their adversaries. This requires that elected officials shift their attitudes from one of competitive to cooperative. They must expect mutually satisfactory outcomes rather than a zero-sum result. Though our country thrives on a politically adversarial discourse, our elected officials are ultimately playing on the same team. As President Barack Obama stated, “[t]he strongest democracies flourish from frequent and lively debate, but they endure when people of every background and belief find a way to set aside smaller differences in service of a greater purpose.”⁷ America’s democratic principles and need to carry out efficient governance greatly outweighs any small victories achieved by stubborn political parties.

This article will discuss the causes and consequences of party polarization and propose that the legislative body work more collaboratively and cooperatively through direct implementation of alternative dispute resolution techniques such as negotiation and mediation in the legislative process. Part I will define political polarization, what it looks like today, its causes and its consequences. Part II will propose and explain the use of dispute resolution techniques and tactics, such as, negotiation, mediation and alternative dispute resolution to mitigate the effects of political polarization. Part III will conclude that dispute resolution techniques and tactics will mitigate the inadequacies created by political polarization.

PART I: WHAT IS POLITICAL POLARIZATION?

Political polarization refers to “the vast and growing gap between liberals and conservatives . . . [which is] a defining feature of American politics today.”⁸ It is the “excessive partisanship and deep ideological

5. BILL D. MOYERS, MOYERS ON DEMOCRACY 14 (2008)

6. Paul M. Johnson, *Checks and Balances*, A GLOSSARY OF POLITICAL TERMS, https://www.auburn.edu/~johnspm/gloss/checks_and_balances (last visited Sept. 20, 2016).

7. Macon Phillips, *The First Press Conference*, THE WHITE HOUSE (Feb. 9, 2009, 8:10 PM), <https://www.whitehouse.gov/blog/2009/02/09/first-press-conference>.

8. Political Polarization, Pew Research Center, <http://www.pewresearch.org/packages/political-polarization/> (last visited Sept. 20, 2016).

division among political elites and officeholders.”⁹ Political polarization has defined the political climate since the 1970’s, and the divide continues to increase.¹⁰

Surprisingly, political parties were never intended by our founding fathers; they developed merely by accident.¹¹ In fact, the Framers warned of their destructive nature.¹² For instance, President George Washington stated:

However [political parties] may now and then answer popular ends, they are likely in the course of time and things, to become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion.¹³

Despite these warnings, political parties formed almost immediately in the late 1790s.¹⁴ Although undermining the central premise of democracy (“the people will rule”), the creation of political parties bridged that gap between elected officials and their voters as “vehicles of promotion.”¹⁵

Beginning in the early 1960’s, Franklin Roosevelt’s Old New Deal Coalition (“The Coalition”) began to dissipate.¹⁶ The Coalition had maintained the dominance of the Democratic Party in years prior.¹⁷ It consisted of a diverse group of voters with little in common, ranging from white southerners to ethnic minorities and working class voters.¹⁸ With the

9. Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in *Negotiating Political Agreements*, AM. POL. SCI. ASS’N 19, 19 (Jane Mansbridge & Cathie J. Martin eds., (2016)

<http://www.apsanet.org/portals/54/Files/Task%20Force%20Reports/Chapter2Mansbridge.pdf>.

10. Drew DeSilver, *The Polarized Congress of Today has its Roots in the 1970s*, PEW RESEARCH CENTER (June 12, 2014), <http://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/>.

11. Todd Philips, *Political Parties Were Never Meant To Be*, THE HUFFINGTON POST (Aug. 31, 2012, 1:32 PM), http://www.huffingtonpost.com/todd-philips/political-parties-were-ne_b_1846903.html.

12. *Id.*

13. *George Washington’s Farewell Address 1796*, YALE LAW SCHOOL, http://avalon.law.yale.edu/18th_century/washing.asp (last visited Oct. 13, 2016).

14. *Two Parties Emerge*, U.S. HISTORY, <http://www.ushistory.org/us/19c.asp> (last visited Sept. 20, 2016).

15. Philips, *supra* note 11.

16. Alan Abramowitz, *How did American Politics Become So Polarized*, BIG THINK, <http://bigthink.com/videos/how-did-american-politics-become-so-polarized> (last visited Sept. 20, 2016).

17. *Id.*

18. *Id.*; see also *Franklin D. Roosevelt: The American Franchise*, MILLER CENTER, <http://millercenter.org/president/biography/fdroosevelt-the-american-franchise> (last visited Sep. 20,

increase of African American voters after the enactment of the Voting Rights Act, the Coalition became unstable as its more conservative members moved toward the Republican Party,¹⁹ forging an ideological realignment that influenced the next several decades.²⁰

The last several decades of voting records (1970-2012) evidence this ideological shift,²¹ from substantial overlap of the parties in the House of Representatives,²² to essentially no overlap in either the House or the Senate.²³ Currently, political antagonism has taken control of Congress, causing the legislative process to resemble a never-ending game of tug-of-war.²⁴ For instance, “voting in Congress is now almost purely one-dimensional— [political ideology] accounts for about ninety-three percent of roll call voting choices in the 113th House and Senate.”²⁵ This trend is also mirrored by the public’s attitude towards political rivals,²⁶ as evidenced by one-sided voting patterns, which have doubled over the last decade.²⁷ Consequently, any ideological commonality between the two parties has decreased substantially.²⁸ In addition, the moderate platform has decreased as voters who identify as moderates still maintain very conservative or

2015). “With FDR at its head, the Democratic Party put together a formidable coalition whose main components were lower-income groups in the great cities—African-Americans, union members, and ethnic and religious minorities, many from recent immigrant groups—and the traditional source of Democratic strength, ‘the Solid South.’” *Id.*

19. Abramowitz, *supra* note 16.

20. *Id.* The ideological realignment became apparent in the Nixon campaign, and continued into the Reagan campaign and into the take over of the House by the Republican Party led by Newt Gingrich. *Id.*

21. DeSilver, *supra* note 10.

22. *Id.* In 1973-74, 240 House members scored in between the most conservative Democrat congressman and the most liberal Republican congressman. In the Senate, twenty-nine senators scored between the most liberal Republican senator and the most conservative Democrat senator. By 1983-84, those numbers decreased to only ten senators and sixty-six representatives. Again, by 1993-94, that number fell to nine congressmen and three senators. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Carroll Doherty, *7 Things to Know about polarization in America*, PEW RESEARCH CENTER (June 12, 2014), <http://www.pewresearch.org/fact-tank/2014/06/12/7-things-to-know-about-polarization-in-america/>.

27. *Id.* “The share of Americans who express consistently conservative or consistently liberal opinions has doubled over the past two decades, from 10% to 21%.” *Id.*

28. *Id.* “The ‘median,’ or typical, Republican is now more conservative than 94% of Democrats, compared with 70% twenty years ago. And the median Democrat is more liberal than 92% of Republicans, up from 64%. Among Republicans and Democrats who are highly engaged in politics, 70% now take positions that are mostly or consistently in line with ideological bent of their party.”

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liberal opinions on hot-button issues such as gun control, health care policy, and immigration.²⁹ Moreover, this political divide among the general population has gone beyond political ideology and has developed into political antipathy.³⁰ Even so, members of the public view their opposing party as more than just an adversary; rather, they are viewed as a threat to national security.³¹

The negative consequences of political polarization manifests itself in Congress' inability to pass substantive laws.³² By the end of Congress' term in 2014, the 113th Congress had passed 212 pieces of substantive legislation, compared to the 463 pieces of substantive legislation passed by the 106th Congress, just a decade before.³³ Polarization threatens to destroy the efficiency of our democratic system³⁴ by complicating our government's ability to address domestic policy problems, halting the implementation of foreign policy and national security strategy, eroding public trust in the government, and causing intolerable, long-lasting destruction to American institutions.³⁵

Traditionally, compromise has been the solution to getting legislation passed, however, it has become increasingly difficult due to the current political climate.³⁶ For one, polarized representatives are inherently reluctant to compromise.³⁷ Further, constituents are unlikely to pressure their elected officials to compromise in an effort to get legislation passed.³⁸ Although voters say they prefer political officials who are willing to cooperate, they still prefer an end result favorable to their interests.³⁹

29. *Id.*

30. *Id.* "The share of Republicans who have very unfavorable opinions of the Democratic Party has jumped from 17% to 43% in the last 20 years. Similarly, the share of Democrats with very negative opinions of the Republican Party also has more than doubled, from 16% to 38%." *Id.*

31. *Id.*

32. Drew DeSilver, *In Late Spurt of Activity, Congress Avoids 'Least Productive' Title*, PEW RESEARCH CENTER (Dec. 29, 2014), <http://www.pewresearch.org/fact-tank/2014/12/29/in-late-spurt-of-activity-congress-avoids-least-productive-title/>.

33. *Id.*

34. William A. Galston, *Political Polarization and the U.S. Judiciary*, 77 UMKC L. REV. 307, 319-20 (2008).

35. *Id.* at 319-20.

36. Drew DeSilver, *The Polarized Congress of Today has its Roots in the 1970s*, PEW RESEARCH CENTER (June 12, 2014), <http://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/>.

37. *Id.*

38. *Id.*

39. *Id.* "A 56% majority prefers political leaders who 'are willing to compromise,' while 39% prefer leaders who 'stick to their positions.'" *Section 4: Political Compromise and Divisive Policy*

There are several different theories as to why American politics have become so polarized. These theories can be divided into two categories: external and internal.⁴⁰ The external category emphasizes movement in the societal, economic, and electoral environments, and how they have altered incentives for political officials to cooperate or polarize.⁴¹ The internal category highlights the formal and informal institutions of Congress and how they have transformed it in ways that increase polarization.⁴² It is important to highlight these theories because they reveal inherent problems within the legislative system that can be addressed specifically by dispute resolution tactics. Additionally, sorting out the reliable and unreliable theories will help in identifying dispute resolution tactics as a remedy that is narrowly tailored to this specific problem.

External Category

Under the external category is the “Polarized Electorate” theory, which states that elected officials are polarized because their constituents are.⁴³ This theory, though enticing, has little evidence to support it.⁴⁴ It requires the evidence of two trends: (1) *partisan sorting*, which is the increasing support for political parties based on ideology, and (2) an increasingly polarized policy preference or ideological identification.⁴⁵ As to partisan sorting, there is evidence that voters have become better sorted into the party system.⁴⁶ However, as to the second trend, voter-policy polarization is less clear.⁴⁷ Though voters identify with a party, their policy positions remain moderate.⁴⁸ In fact, representatives were more extreme in their policy positions than their constituents.⁴⁹ Although this theory lacks substantial evidence to support it, it demonstrates that voters will sort themselves according to elite polarization so the incentives for representatives to take

Debates, PEW RESEARCH CENTER, (June 12, 2014), <http://www.people-press.org/2014/06/12/section-4-political-compromise-and-divisive-policy-debates/>.

40. Barber and McCarty, *supra* note 9, at 23.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 23-24.

46. *Id.* at 24. “[O]ver time, voters have increasingly held political views that consistently align with the parties’ policy positions.” *Id.*

47. *Id.* at 25.

48. *Id.* at 25.

49. *Id.*

positions that support their constituents will reduce.⁵⁰ Thus, public pressure alone may have little effect in implementing any mediation or negotiation strategies in legislative making.

Another theory under the external category is the “Southern Realignment,” which states that because conservatives now dominate the historically liberal South, median southern Democrats are now more liberal and the southern Republicans have become more conservative.⁵¹ However, this theory lacks support because it relies primarily on the disappearance of conservative Democrats.⁵² Doing so neglects the polarization of non-Southerners.⁵³ Still, this movement shows us that the change in demographics of the Southern electorate has impacted polarization in the South.⁵⁴

Moreover, “gerrymandering” has also been cited as an external explanation for the polarization in American politics.⁵⁵ Gerrymandering is defined as “the dividing of a state, county, etc., into election districts so as to give one political party a majority in many districts while concentrating the voting strength of the other party into as few districts as possible.”⁵⁶ The argument is that because state legislatures are permitted to draw congressional district lines, districts are becoming overwhelmingly partisan and prevent other parties from competing against the dominant party.⁵⁷ Yet the evidence supporting this theory is weak.⁵⁸ First, this does not apply to the Senate since they are elected by the entirety of the state.⁵⁹ However, evidence has shown that Congress would be just as polarized if districts were drawn randomly.⁶⁰ Thus, the argument that the difference in how Republicans and Democrats represent moderate districts relates more to polarization than the difference within a party representing a party-

50. *Id.*

51. *Id.* at 26; *see also* Abramowitz, *supra* note 16.

52. Barber & McCarty, *supra* note 9, at 26.

53. *Id.*

54. *Id.* at 27.

55. *Id.*

56. *Gerrymander*, DICTRIONARY.COM <http://dictionary.reference.com/browse/gerrymander> (last visited Sep. 21, 2016, 10:33 AM).

57. Barber & McCarty, *supra* note 9, at 27.

58. *Id.*

59. *Id.*

60. Barber & McCarty, *supra* note 9. “McCarty, Poole and Rosenthal (2009) generated random districts and determined the expected partisan ship of representatives form these hypothetical districts given the demographic characteristics of the simulated district. The result was that the simulated legislatures generated by randomly creating districts are almost as polarized as the current Congress.” *Id.*

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dominated district.⁶¹ Again, this moves the emphasis away from the public to the legislative representatives when implementing mediation and negotiation tactics.

Further, many scholars rely on primary elections to explain the polarization in American politics.⁶² In a primary election, registered party members vote on a candidate to represent their party in the general election.⁶³ Scholars argue that moderate candidates should be allowed to participate in partisan primary elections since “only conservatives can win Republican primaries and [only] liberals can win Democratic primaries.”⁶⁴ Though there has been some supportive evidence to back this argument, it is moderate at best.⁶⁵ Still, the recent change in California from a closed primary to a blanket primary, in which all voters can participate, shows some hope in producing moderate candidates in competitive districts.⁶⁶ Further, this highlights the affects the implementation of a process designed to encourage bipartisanship and provides support for implementing an alternative dispute resolution procedure in the legislative process.

The argument that economic inequality has resulted in polarization is more promising.⁶⁷ The relationship between polarization and economic inequality is unique.⁶⁸ Inequality caused by rising high incomes supports the increase in conservative economic policies, which then discourages policy responses to economic inequality, which in turn facilitates greater inequality causing polarization.⁶⁹ The growing divide between the rich and the poor,

61. Barber & McCarty, *supra* note 9, at 27.

62. *Id.*

63. *How Does the Presidential Primary Process Work?*, VOTESMART, <https://votesmart.org/education/presidential-primary#.VINF6cbA20s> (last visited Sep. 21, 2016).

64. Barber & McCarty, *supra* note 9, at 29.

65. *Id.*

Kaufmann, Gimpel, and Hoffman (2003) found that presidential primary voters in states with open primaries hold political ideologies similar to the general electorate, whereas in states with closed primaries, the two electorates are more ideologically distinct. Gerber and Morton (1998) found that the positions of legislators nominated in open primaries hew more closely to district preferences, whereas Brady, Han, and Pope (2007) found that legislators who hew closely to the general-election electorate suffer an electoral penalty in primaries.

Id.

66. Barber & McCarty, *supra* note 9, at 29.

67. *Id.* at 30.

68. *Id.*

69. *Id.* “[V]oting behavior and partisan identification increasingly correlate with income . . . and that the ideal points of legislators are increasingly correlated with average district income.”

and its relationship to polarization, provide a valuable insight into its effect on legislation produced by the legislative body.⁷⁰

Another theory suggests that private campaign finance is linked to polarization.⁷¹ The argument is that elected officials take extreme policy positions on behalf of their donors.⁷² Still, the evidence supporting this theory is weak.⁷³ Though research suggests that individual donors are more extreme than non-donors, and the amount of individual donors is increasing, there is still insufficient evidence to support the connection.⁷⁴ Even so, it does not readily imply a causal connection.⁷⁵

The media's effect on politics is a familiar topic, and thus, a common theory for why American politics has become so polarized.⁷⁶ It is not news that media outlets pick sides. So too, do their viewers.⁷⁷ For this reason, elected officials and candidates fear that if they take moderate stances, party activists will use that against them.⁷⁸ Additionally, these media outlets give voice to extreme political activists.⁷⁹ This theory is significant considering that America relies on transparency to facilitate democratic self-governance and conversely, mediation relies on private conversation.⁸⁰

Internal Theories

Under the internal explanations category is the "rule change" theory, which states that polarization is due to changes in the rules and procedures of Congress.⁸¹ More specifically, the amendment process was modified to encourage party line voting.⁸² Yet, this argument is deficient for several

70. *Id.* at 30.

71. *Id.* at 31-32.

72. *Id.* at 32.

73. *Id.*

74. *Id.* ; see also Doherty, *supra* note 25. "Political donation rates are roughly double the national average among ideologically consistent liberals (31% have donated money) and conservatives (26%)." *Id.*

75. Barber & McCarty, *supra* note 9, at 32.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Barack Obama, *Transparency and Open Government*, THE WHITE HOUSE, https://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment (last visited Sept. 21, 2016); Adam L. Powers, *Frequently Asked Questions About Mediation*, MARK POWERS LLP, <http://www.markspowers.com/pg15.cfm> (last visited Sept. 21, 2016).

81. Barber & McCarty, *supra* note 9, at 33.

82. *Id.* at 34.

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reasons: (1) change does not affect the Senate, (2) it is unlikely that a single rule change can explain a gradual increase in polarization over the last four decades, and (3) it is not distinct from the procedures in state legislatures.⁸³ Another similar argument states that the power of the controlling party in the House has increased their ability to generate more party line votes.⁸⁴ However, like the rule change theory, this only applies to the House and does not account for the strength of the growing polarization.⁸⁵ Still, this theory demonstrates the effects of procedure on deal-making, which would support implementing a dispute resolution process to legislative procedure.

Further, scholars argue that because party leaders in the House and Senate have become so powerful, they can pressure members of the party to vote on party lines, thereby increasing polarization.⁸⁶ This argument fails because party pressure cannot be measured without making strong assumptions about the behavior of individual elected official.⁸⁷ Similarly, the “teamship” theory is commonly used to explain the polarized political climate.⁸⁸ The argument is that the competitive nature of the elections drives party members to increasingly distinguish themselves from their opposite party creating a teamship-like environment.⁸⁹ Still, this theory does not account for the sudden up rise in polarization in our country.⁹⁰ Under this theory, polarization should have begun and stuck around as soon as political parties gained traction in the electorate.⁹¹ Even so, this argument highlights the complexity of law making and the need to implement a mediation policy that would represent the interests of all party members, not just the present parties to the negotiation.

83. *Id.* at 33-34.

84. *Id.* at 34.

85. *Id.*

86. *Id.*

87. *Id.*

“Snyder and Groseclose assumed that members are free from party pressure on lopsided votes; therefore, a comparison between positions on lopsided and close votes can reveal the effects of party pressure. They found that, indeed, there are policy areas in which party pressure is more common, but they did not find a steady increase in partisan pressure commensurate with the increase in polarization observed during the past 40 years.”

Id.

88. *Id.* at 35.

89. *Id.*

90. *Id.*

91. *Id.*

Lastly, it is believed that the breakdown of bipartisan norms in Capitol Hill has led to polarization.⁹² As the ability to travel has increased, elected officials no longer need to stay in Washington D.C. when they do not have to; instead, they can travel back to or stay in their home states.⁹³ Because of this, representatives are less capable of creating cross-partisan friendships with their co-members causing a lack of the trust and civility necessary to make compromises.⁹⁴ Though this hypothesis is tempting, it has not been substantiated.⁹⁵ Yet this theory signifies the legislature's need for trust and camaraderie and the lack thereof. Mediation and negotiation can play a significant role in abating this problem by highlighting the need for mutual understanding and respect between the parties.⁹⁶

So, which theory is correct? In answering this question, it is important to remember that these theories are not mutually exclusive; external and internal forces can combine to cause and exacerbate the problem.⁹⁷ Thus, the focus should not be on identifying a sole cause of polarization, but rather on what these theories together say about the problem and the solution. Seeing and understanding the full picture of the problem makes it easier in identifying a practical, workable solution.

PART II: WHAT IS THE SOLUTION?

Turning to the solution of political polarization, how do we begin to solve this crisis? "As members of the ADR profession, we have a responsibility to bring our skills to the forefront to help develop civil collaborative discussion (a) among us as citizens, (b) between citizens and politicians, and (c) push for it among our politicians."⁹⁸ Following this call

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. S. Elise Peeples, *The Space Between the Parties: A Model for Understanding the Magic of Mediation*, MEDIATE (Dec. 1998), <http://www.mediate.com/articles/peeples1.cfm>.

We do not come together to determine right or wrong, winners or losers, but to attempt to express, to receive and to respect. If respect and understanding occur, then it is not essential that the two parties agree with each other—it is enough that they are able to move into the Between . . . where we can let go of ego . . . and find the solutions that have evaded us.

Id.

97. Barber & McCarty, *supra* note 9, at 23.

98. Craig Tipton Distelhorst, *Civil, Collaborative Discourse on Public Policy*, 45 MD. BAR J. 38, 40 (2012).

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to duty, the question then becomes, how can dispute resolution techniques solve the issue? In the question lies the answer: dispute resolution techniques resolve disputes, such as the ones that exist in the American legislature. “[N]egotiators often fail to reach agreements [sic] because they lack a process for exploring and meeting the essential interests of both (or all) parties.”⁹⁹ Dispute resolution techniques can provide legislators with that “process,” which could abate the polarization crisis.¹⁰⁰

First, legislators must employ “deliberate negotiation,” that is, “negotiation based on a process of mutual justification, respect, and reciprocal fairness.”¹⁰¹ This type of negotiating would require legislators to “(1) [i]dentify win-win issues to make strategic trades, (2) look beyond the 24/7 news cycle, (3) seek out low-risk venues for honest, open communication, (4) sequence issues strategically to build trust, and (5) engage genuine differences with vigor and principle.”¹⁰²

The first tactic Congress must employ is seeking mutually satisfying options in bargaining.¹⁰³ Ideally, a win-win agreement would be one that “each party gains but with distinct benefits; no losses.”¹⁰⁴ Where these agreements can be found, they should be made; however, more commonly, legislators find themselves in a “Negotiation Myopia.”¹⁰⁵ A “Negotiation Myopia” is a scenario in which both parties differ too greatly to make a good deal for both of them, but other promises can be added to the deal to satisfy both parties.¹⁰⁶ However, in the legislative process, there are many more interested parties to the deal, such as party members and constituents, both complicating the deal.¹⁰⁷ Still, “mutual gains may be discovered or created through negotiations [and] . . . these gains often build on taking the

99. L. Michael Hager, *Congress Needs a Mediation Tool to Dissolve Gridlock* (June 18, 2010), THE WASHINGTON POST, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/17/AR2010061704566.html> (alteration in original) (quoting ROGER FISHER, WILLIAM L. URY, & BRUCE PATTON, *GETTING TO YES* (2011)).

100. *Id.*

101. Mark E. Warren & Jane Mansbridge, *Deliberative Negotiation*, in *Negotiating Political Agreements*, AM. POL. SCI. ASS’N 86, 92 (Jane Mansbridge & Cathie J. Martin eds., 2016) <http://www.apsanet.org/portals/54/Files/Task%20Force%20Reports/Chapter5Mansbridge.pdf>.

102. Robert C. Bordone & Tobias Berkman, *Negotiation Advice for the 112th Congress*, HARVARD L. BLOG (Nov. 17, 2010), <http://www.hnlr.org/2010/11/negotiation-advice-for-the-112th-congress/>.

103. *Id.*

104. Warren & Mansbridge, *supra* note 101, at 93.

105. *Id.* at 95.

106. *Id.*

107. *Id.* at 96.

perspective of others; and . . . those perspectives often can be obtained in the course of informal, friendly, repeated, and relatively open relationship.”¹⁰⁸

The notion that “[c]ommunication is at the root of any successful negotiation”¹⁰⁹ should be a common, reoccurring theme in negotiation strategy.¹¹⁰ “[R]epeated interactions in Congress . . . is a ‘key ingredient to ongoing successful negotiation.’”¹¹¹ Even so, the complex nature of the legislative process adds several other parties to the mix.¹¹² Constituents and elected members of the political party must feel like their interests are being represented in these deals too.¹¹³ Thus, it is important to not only encourage a strong relationship between both parties present to the deal, but it is also important to encourage a relationship with constituents and other elected members of the respective political party.¹¹⁴

This may be difficult because, as mentioned in the third strategy above, parties must “seek out low-risk venues for honest, open communication,” which implicates private meetings behind closed doors.¹¹⁵ “[T]hese settings allow for arguing and persuasion, because negotiators do not have to stick to their fixed preferences behind closed doors and are allowed to ‘think out loud’ about possible negotiating solutions.”¹¹⁶ However, in this context, “closing the doors” necessarily assumes that one or more parties will not be in attendance, namely, constituents or other elected members of the respective political party.¹¹⁷ This contradicts our notions of a democratic society, transparency being key to self-governance.¹¹⁸ Yet, delving more into the topic reveals how transparency is not always “democratic.”¹¹⁹

The second strategy above—“look beyond the 24/7 news cycle”¹²⁰—recommends that Congressmen look past their representation in the media

108. *Id.* (alteration in original); see also Bordone & Berkman, *supra* note 102. “There are other sets of issues where one party might care a lot and the other party might be largely indifferent . . . By trading on such issues, both parties gain.”

109. Glenn Davis, *Why Can't Congress Negotiate?*, INDEP. VOTER NETWORK (Jan. 27, 2014), <http://ivn.us/2014/01/27/cant-congress-negotiate/>.

110. Bordone & Berkman, *supra*, note 102.

111. Davis, *supra* note 109.

112. Warren & Mansbridge, *supra* note 101, at 96.

113. *Id.*

114. *Id.*

115. Bordone & Berkman, *supra* note 102.

116. Warren & Mansbridge, *supra* note 101, at 106.

117. *Id.*

118. Warren & Mansbridge, *supra* note 101, at 108.

119. *Id.*

120. Bordone & Berkman, *supra* note 102.

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because it invites the undue influence of those seeking to have their voice heard.¹²¹ Political activists are those who pay the most attention to those detailed negotiations, and because of this, their voices are heard louder than other constituents.¹²² Further, this was not a norm perceived by our founding fathers, as even “delegates at the Federal Convention debated whether to require that roll-call votes be made public.”¹²³

There is clear evidence from the United States and the United Kingdom that “demands for transparency appeared during periods of heightened fears that representatives were biased.”¹²⁴ Conversely, “during periods where fears of bias were less present, the public was more accepting of closed-door sessions.”¹²⁵ Thus, the desired setting for having deliberative negotiations can be created by building trust with the respective elected political party members and constituents.¹²⁶ Developing relationships can build trust.¹²⁷ Yet, constituents pose a unique challenge to developing relationships. To develop a strong relationship with a constituency, an elected official must “(1) respect and understand the needs and motivations of [his/her] constituents, (2) meet their needs if they are in keeping with your organization’s values, mission, and vision, (3) communicate your programs and activates and their value to the constituents, and (4) follow up and nurture the relationship.”¹²⁸ Thus, constituents might consider looking for these behaviors in re-electing an elected official for another term, and conversely, elected officials might seek to implement these behaviors to win the trust of the public.

Further, it may be necessary to consider the effect incumbency has on relationships in the political arena.¹²⁹ Incumbency may allow for more repeated interaction between members of the opposing party that can fuel a better relationship for making deals.¹³⁰

121. Warren & Mansbridge, *supra* note 101, at 109.

122. *Id.* at 110.

123. *Id.* at 109.

124. *Id.*

125. *Id.*

126. Warren & Mansbridge, *supra* note 101, at 111.

127. Yan Ki Bonnie Cheng, *Power and Trust in Negotiation and Decision-Making: A Critical Evaluation*, HARV. NEGOT. L. REV. (Sept. 1, 2009), <http://www.hnlr.org/2009/09/power-and-trust-in-negotiation-and-decision-making-a-critical-evaluation/>.

128. Simone P. Joyaux, *Building Relationships with Your Constituents*, SimoneJoyaux 1, 1 <http://www.simonejoyaux.com/downloads/BuildingRelationships.pdf> (last visited Sep. 22, 2016).

129. Warren & Mansbridge, *supra* note 101, at 104.

130. *Id.* at 105.

When adversaries know each other well, they are far more likely to recognize whether the other side's refusal to compromise on a principle is a negotiating tactic or a real political constraint. They are less likely to act as players in the classic bargaining game who hold out for their maximum individual payoff, producing an outcome that makes both sides worse off. In longer-term relationships, legislators have a better sense of their colleagues' intentions, their trustworthiness, and the political constraints they are facing—and their colleagues know that they do. They are repeat players. That enables all to make more confident judgments about when to compromise and when not to.¹³¹

Still, this contradicts democratic norms because incumbents generally have less-contested elections and the public loses control over their representatives when they do not have a quality competitor, or a competitor at all, to vote for in the alternate.¹³² However, in light of the relationship between incumbencies and deal making, the public should keep this in mind when voting for incumbents, as should incumbents when they decide their campaign strategy.

Even where relationships fail or prove to be insufficient, trust can be built. Consider the fourth strategy, which recommends that legislators “sequence issues strategically to build trust.”¹³³ This would require legislators to make small, mutually satisfactory agreements at the outset of the negotiation before moving on to more difficult issues.¹³⁴ This would allow legislators to “generate positive momentum and tangible gains” and makes the adversarial party “less likely to defect later when the issues become more challenging.”¹³⁵ Though this may seem contradictory to the fifth strategy recommendation to “engage genuine differences with vigor and principle,” it is important to remember that “[k]eeping these differences from spilling over and poisoning progress in other domains, however, is a hallmark of a truly great negotiator.”¹³⁶ In other words, legislators would be well advised to “pick and choose their battles” because some small issues are worth conceding on to “lose the battle but win the war.”¹³⁷

Mediation can also be an effective and practical tool for our polarized legislatures. In such situations, “[w]hen senators or representatives find themselves locked into irreconcilable positions on issues of national

131. Warren & Mansbridge, *supra* note 101, at 104-05.

132. *Id.* at 105.

133. Bordone & Berkman, *supra* note 102.

134. *Id.*

135. *Id.*

136. Bordone & Berkman, *supra* note 102.

137. *Id.*

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importance, third-party mediation could help overcome a stalemate.”¹³⁸ A neutral, third-party can do this by looking at the issue in a nonpartisan manner, which will help the parties move away from their party-allegiances and look at the issue objectively.¹³⁹ This comes at no risk to legislators because, unlike arbitration or litigation, mediations are simply “assisted negotiations.”¹⁴⁰ In other words, “[t]he mediator assists the parties to understand their respective interests and helps them devise solutions that satisfy those interests—but only the parties can decide the ultimate outcome.”¹⁴¹

Still, this can be easier said than done because elected officials are subject to public scrutiny.¹⁴² For instance, if a legislator takes a hard position on an issue during his campaign, he may feel constrained in altering his position.¹⁴³ Still, in that case, mediation will at least provide legislators the opportunity to have their side considered, and to hear and consider the other party’s position. That way, the legislator’s supporters can feel like their opinion was heard and considered too, while also having the opportunity to reconsider their own position.

Mediation is also especially well-suited for addressing *all* parties involved (party members and constituents) because of the opportunity to “caucus.”¹⁴⁴ During a caucus, each interested party can meet separately with the mediator allowing the party to maintain a hard position while exploring other options.¹⁴⁵ This is similar to the “closed door” scenario referred to earlier, where legislators can talk more freely without the public scrutiny.¹⁴⁶

138. Hager, *supra* note 99; see also Sarah Gonski, *Easing Gridlock in the United States Congress through Mediation: Letting our Cities and Streets Teach Us Lessons on Getting Along*, THE A.B.A., 1, 2 (2013),

http://www.americanbar.org/content/dam/aba/events/dispute_resolution/lawschool/boskey_essay_content/2013/easing_gridlock_in_the_united_states_congress_through_mediation_letting_our_cities_and_states_teach_us_lessons_on_getting_along.authcheckdam.pdf.

139. See Hager, *supra* note 99.

140. *Id.*

141. *Id.*

142. See Norm Brand, *Using Mediation Effectively*, MEDIATE.COM, (Sept. 2000), <http://www.mediate.com/articles/nbrand2.cfm>.

143. *Id.*

144. *Id.*

145. *Id.*

146. Sarah Gonski, *Easing Gridlock in the United States Congress through Mediation: Letting our Cities and Streets Teach Us Lessons on Getting Along*, THE A.B.A., 1, 19 (2013), http://www.americanbar.org/content/dam/aba/events/dispute_resolution/lawschool/boskey_essay_content/2013/easing_gridlock_in_the_united_states_congress_through_mediation_letting_our_cities_and_states_teach_us_lessons_on_getting_along.authcheckdam.pdf.

Complicating the situation is the fact that confidentiality is a large component of mediation and contradicts our notions of democracy, which values transparency.¹⁴⁷ However, in this case, the confidential conversations going on behind closed doors are with a mediator, rather than the opposing party.¹⁴⁸ Because of the mediator's neutral nature and lack of authority to decide an outcome, there are little public concerns that justify transparency in this case.¹⁴⁹ Even so, mediators should be required to have "a politically neutral history; campaign donations or public statements made in favor of one party or another would necessarily disqualify them for employment by inspiring distrust or suspicions of bias."¹⁵⁰

Overall, the democratic concerns are substantially outweighed by the benefits of mediation. Mediation has the potential to (1) "increase the number of truly bipartisan compromise bills,"¹⁵¹ (2) "move legislation toward the middle of the political spectrum,"¹⁵² and (3) "[b]etter organiz[e] for complex issues."¹⁵³ If anything, mediation should become a "democratic norm" because it reconciles with the vision of the country's founders.¹⁵⁴

Further, states already use mediators in their legislative process, which could serve as a model for the federal government.¹⁵⁵ For instance, the Illinois General Assembly asked Judge Getty to lead a multi-party mediation in an effort to create a successor to a bill that was within hours of expiring.¹⁵⁶ The expiration of the bill would have meant that the telecommunications industry would go unregulated.¹⁵⁷ Even this looming expiration date wasn't enough to encourage agreement between the opposing political parties.¹⁵⁸ Thus, mediation served as the key to creating a bill that was accepted almost unanimously before time ran out.¹⁵⁹

147. *Id.* at 14.

148. *See* Brand, *supra* note 142.

149. *Id.*

150. Gonski, *supra* note 146, at 12.

151. *Id.* at 16.

152. *Id.* at 17.

153. *Id.* at 19.

154. *See* Todd Phillips, *Political Parties Were Never Meant To Be*, THE HUFFINGTON POST (Aug. 31, 2012, 1:32 PM), http://www.huffingtonpost.com/todd-phillips/political-parties-were-ne_b_1846903.html.

155. Gonski, *supra* note 146, at 4.

156. *Id.*

157. *Id.* "Because regulation of the telecommunications industry is such a contentious issue with significant amounts of money at stake, over thirty interested parties were invited to participate in mediation." *Id.* at 5.

158. *Id.* at 19.

159. *Id.* at 5.

Georgia cities provide another example of using mediation in local legislation.¹⁶⁰ Georgia's cities and counties shared revenues and were tasked with devising a distribution plan for those revenues.¹⁶¹ The parties were given sixty days to negotiate amongst each other and if no agreement was produced, the plan would move to arbitration.¹⁶² With the assistance of mediators, an agreement was finally reached, though not without some strategy on the mediators' part.¹⁶³

Similarly, North Carolina passed a statute allowing the school board to mediate any inadequacies in the school budget with county commissioners.¹⁶⁴ Since the passage of the statute, twenty-nine of the thirty mediations resulted in successful settlements.¹⁶⁵ A particularly interesting byproduct of these mediations was the social bond that was formed during private communications of the mediation.¹⁶⁶ In that situation, lawmakers felt more comfortable to empathize with one another, breaking down adversarial barriers.¹⁶⁷

This situation references a few of the proposed theories that have led to mediation. For instance, the idea that lawmakers spend less time together because of these technological advancements in traveling, resulting in less of them staying in Washington D.C. and getting to know one another, as referenced in the North Carolina case.¹⁶⁸ In that case, being together in a less formal and more social atmosphere was beneficial to the development of relationships across the aisle and, as a result, the decrease in the adversarial nature of the legislature.¹⁶⁹ Second, the theory that media's overwhelming attention to politics hampers political compromise is also highlighted in the North Carolina case. North Carolina's lawmakers' success in building relationships during these private communications really evidences media's effect in hampering communication.

160. *Id.* at 6.

161. *Id.*

162. *Id.*

163. *Id.* "Even more so than private parties, politicians are often suspicious of each other" thus, "mediators used an evaluative mediation style as opposed to a more traditional facilitative style." *Id.* By doing so, "the mediator is more freely able to give advice and suggest equitable resolutions or new avenues of solutions to explore" as opposed to "facilitative mediation in which the mediator does not give advice or make assessments." *Id.*

164. *Id.* at 7.

165. *Id.*

166. *Id.*

167. *Id.* at 8.

168. *Id.* at 7.

169. *Id.* at 8.

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From looking at both negotiation and mediation strategies in the political legislative realm, several things are evident: (1) they both provide a process to which polarization can be solved, and yet (2) we delay incorporating them into the legislative process because of our democratic norms. Thus, we should reconsider our democratic norms. The founders safeguarded the public from tyranny and over-control through a process of checks and balances, and yet the public is an arm of the government as much as the executive is. Because we have no systematic check, the public must check themselves. A way of doing this would be encouraging the implementation of these tactics in our legislative process.

PART III: CONCLUSION

As America looks forward to the 2016 presidential election, it is apparent that American politics is changing.¹⁷⁰ The rise of candidates such as Bernie Sanders and Donald Trump evidences the growing support for extremists.¹⁷¹ Both candidates play on the growing anger and fear that the public has with the government.¹⁷² Thus, at the moment, “the angry voices are the loudest in the room.”¹⁷³

Clearly, national anger is misplaced. If the American people are angry and fearful of our government’s lack of productivity or action in certain policy issues, extremism is not the answer. Divided legislatures are not productive, and chances are, with an extreme president, the American government will continue along an unproductive path. Mediation and negotiation tactics would provide a process for legislatures to overcome this division. For the sake of securing a productive and efficient democracy, we must encourage the implementation of these tactics for “[t]he American spirit wears no political label. In service to others and yes, in sacrifice for our country, there are no Republicans; there are no Democrats; there are only Americans.”¹⁷⁴

170. Peter W. Stevenson, *What Unities Bernie Sanders and Donald Trump? Anger.*, THE WASHINGTON POST (Jan. 26, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/01/26/what-bernie-sanders-and-donald-trump-have-in-common-theyre-angry-and-proud-of-it/>.

171. *Id.*

172. *Id.*

173. *Id.*

174. John Kerry, *Commencement Address at Bedford High School in Toledo, Ohio*, The American Presidency Project (June 6, 2004), <http://www.presidency.ucsb.edu/ws/?pid=29699>.