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A Brookings Judicial Issues Forum

Polarizing the House of Representatives:
How Much Does Gerrymandering Matter?

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C O N T E N T S

INTRODUCTION:

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PROCEEDINGS

MR. NIVOLA: (In progress) — world of safe seats and relatively safe districts, members of Congress tend to grow more narrowly partisan. That is, they tend to appeal mainly to their party bases for votes instead of reaching across party lines to the more moderate midfield.

The upshot of that, of course, is that politics in Congress tends to become more polarized. This is not entirely a terrible thing in my opinion, but it is also often not a wonderful thing either. So the gerrymandering question as a whole has a bearing on the larger problem of political polarization in the U.S. Congress and therefore warrants some closer scrutiny.

Since I have brought up the subject of polarized politics, I would like to take this opportunity to mention that the session that you are about to hear is really part of a larger project that has been underway here at Brookings in collaboration with the Hoover Institution at Stanford University to do a full-throated study of all the

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implications of partisan polarization in U.S. politics, soup to nuts, everything from the root causes to the consequences of polarized politics.

Two of the panelists we have up here today, Tom Mann and Tom Edsall, are contributors to that project. These are the guys who have taken the closest look at how much difference gerrymandering actually makes in terms of polarizing the House of Representatives. But we also have two related events scheduled here this fall which you may want to pencil into your calendars. One is that on November 28th, Diana Mutz of the University of Pennsylvania will be here to discuss her fascinating, really path-breaking research on polarization and the role of the news media. And she will be joined in that discussion by two prominent journalists, Jonathan Rauch and Gregg Easterbrook, both of whom guests here at Brookings as well.

Then on December 8th, not to be confused with December 7th, a bunch of us are going to unveil our Brookings-Hoover book called "Red and Blue Nation?" volume one, and we hope that you might join us for that as well. Our lineup on December 8th will include Congressman Tom Davis of Virginia, Professors Morris Fiorina of Stanford, and Gary Jacobson of the University of California at San Diego, as well as several of my Brookings colleagues, Bill Galston, E.J. Dionne, and of course Tom Mann.

Now that I have cleared my throat and wasted some of your time, Stuart, let me quickly introduce our distinguished panel today. We have with us two top-notch attorneys, Sam Hirsch at the law firm of Jenner & Block, and Mark Braden at Baker &

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Hostetler. Messers Braden and Hirsch have been very much in the trenches of the redistricting legal disputes, legal battles, and we are very pleased that they could join us today.

Our two political analysts are the two Toms, Tom Mann and Tom Edsall. Tom Mann is a Senior Fellow with us in Governance Studies where he holds the Harriman Chair. He is also the co-author with Norm Ornstein at American Enterprise of a very important book called "The Broken Branch" which really addresses many of the dysfunctional implications of the sort of hyper-partisan climate in Congress these days. Tom Edsall holds the Pulitzer-Moore Chair in Public Affairs Journalism at Columbia University, and he is also the author of an outstanding recent book "Building Red America." Tom, since you never sent me a copy, I only have the library copy here, but I urge you to read that book, too.

(Laughter.)

MR. EDSALL: You can pay for it.

MR. NIVOLA: Thanks. Our moderator, of course, is Stuart Taylor.

MR. TAYLOR: Thank you, Pietro, and thank you all for coming. My main job is just to point to somebody and say could you talk for a while, but this time because there are a couple of reasons, I will just mention a couple of things before I start.

First, notwithstanding the arcane nature of our subject matter, it is getting some ink these days. Here is "Time" magazine's cover on Barack Obama, why he could be the next President by Joe Klein, and right in the fourth paragraph it quotes what

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Obama says at a town meeting in Illinois: "He moves through some fairly arcane stuff," here's that word again, "talking about how political gerrymandering has led to a generation of politicians who have come from safe districts where they don't have to consider the other side of the debate which has made compromise and, therefore, legislative progress more difficult. 'That is why I favored Arnold Schwarzenegger's proposal last year,' said Obama, 'a nonpartisan commission to draw the congressional district maps in California. Too bad it lost.'" So he is interested in this.

I just noticed coincidentally in Tom Mann's fine chapter in the book that Pietro just mentioned, a chapter is entitled "Polarizing the House of Representatives: How Much Does Gerrymandering Matter?" I think Tom might have planned it this way, but he wrote something that sounded like it might be the personification of Barack Obama in the context of is there any way to get away from polarization short of gerrymandering reform which can't do the job all by itself? Here is what Tom wrote: "A Teddy Roosevelt-like figure today might sense some market opportunity and use his presidential campaign to build a more centrist coalition. A necessary strategy and style of leadership, one more inclusive, less partisan and less divisive than we have seen in recent years is more likely to emerge when an ideologically aggressive majority takes a pounding in the midterm election leading up to the presidential contest. No particular relevance to recent events."

MR. MANN: Of course not.

MR. TAYLOR: With that introduction, Tom, why don't you explain

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everything that needs explaining here.

MR. MANN: In 5 minutes or less. Stuart, thank you. I'm delighted to be here. In some ways it seems rather odd that our subject is gerrymandering, safe seats, and the lack of competition. You can understand given the last five congressional elections why that might be our focus. This has been a period of extraordinary stability and stasis, the fewest number of incumbents defeated, fewest number of seats changing party hands than any comparable five election period in American political history.

And yet we are today, 8 days away from the 2006 midterm elections, with powerful signs of major electoral change, certainly in the House of Representatives likely to be sufficient to change the majority party and with in my view a slightly better even the chance of that majority shifting in the Senate as well.

In fact, these elections pose a test for our electoral system. Given the overall uncompetitive structure, is there enough flexibility in this rigid system to allow some form of democratic accountability? The electorate claims to be mad as hell and not willing to take it anymore. Does our electoral system permit that sentiment to be registered by changing the team that is in control? We will learn in 8 days, but our focus here is less on electoral turnover, changing party majorities, and more on partisan polarization, the ideological polarization of the political parties and the role that gerrymandering might play in its presence and the role it might play in its amelioration.

I will for the moment simply assert that partisan polarization is for real, it exists certainly at the elite level in legislatures and the Congress, it is present among

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activists, and there are signs of that polarization among voters. I am saying partisan polarization. I did not say all voters are to be found at the ideological poles, and there is lots of interesting debate about just what has not gone at the level of the individual voter, but the reality is, most of us as citizens and voters view the world through our partisan lenses and it has a profound effect on what we see, and it also has serious consequences for the way in which our political system operates.

There is a natural tendency for all of us to look for the villain with partisan polarization. I have been traveling around the country lately and I have not had a session in which a question wasn't asked about gerrymandering and how can we possibly get out of this current system without dealing with the problem of gerrymandering. The assumption is gerrymandering is the villain.

If you just sit back and think for a moment or even read Tom Edsall's book which will take you a lot longer, but even more profitable, any recounting of recent American history reveals multiple roots for this pattern of uncompetitiveness and partisan polarization certainly extending back to the 1960s including the counterculture, the reaction of the war in Vietnam, the Voting Rights Act, the economic development of the South, *Roe v. Wade*, all setting in motion a dynamic that played out over the late 1970s, 1980s, and 1990s. Therefore, as historians and political sociologists, we would be inclined to look for those broad set of forces, but as economists or rational choice political scientists, we are driven for the single cause, it is the Voting Rights Act, or in this case, it is gerrymandering.

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Gerrymandering provides almost an irresistible account of how this came to be. We know there has been a dwindling of competitiveness; we know districts have become more lopsided for one party or the other. We have seen redistricting plans that accomplish either a partisan or bipartisan form of decline in the competitiveness and the safeness for Democrats or Republicans. We know there are political incentives for doing it and there are the institutional mechanisms for making it come true. And we know the logic, redistricting diminishes competitiveness, diminished competitiveness increases polarization. The safer a seat for a Democrat or a Republican candidate, the more likely you get little competition in the general and only the threats or the reality of competition in primary elections which are driven by the ideological poles. Add to it a lot of color which we do in the paper and the book and it is irresistible as an argument. Unfortunately, it does not hold up very well to empirical scrutiny. Once you look at it, the story becomes much more complicated.

Partisan polarization is not limited to legislative bodies that have their lines redrawn every decade. It is apparent in the Senate; it is obvious in statewide elections. One can go back historically and find anomalies as well. The reality is that we have seen increasingly homogeneous areas appear in counties and states and other jurisdictions not subject to the regular line redrawing. By the way, there is a link between competitiveness and polarization. That is, members representing safe districts, not for themselves, but Democrats or Republicans tend to have more polarized political views. So that is a reality, but it is a small part of the explanation of polarization. In fact, the

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parties themselves at whatever level of competitiveness are much further apart today than they were decades ago. So the bottom line is, gerrymandering is not the major cause of polarization found in the nation, it accounts for only a small share of the decline of moderates and the sharpening of the partisan tensions in the House, but it is still worth paying attention to. Ironically, the arrow may go in the opposite direction. That is, gerrymandering may be more a consequence than a cause of polarization. Because of the high stakes involved with polarization and parity, politicians are driven now to manipulate the electoral rules of the game to squeeze out every last bit of partisan advantage. That is what Tom DeLay did in Texas.

The second reason to pay attention is it only has a marginal effect, but guess what, everything important in democratic politics happens at the margin. And thirdly, while redistricting reform is not the most important or even a major source of polarization, it may be one of the instruments of reform that we can actually do something about. So the bottom line is, don't oversell gerrymandering is the cause, but don't dismiss it as one of a series of approaches to political reform. Thank you.

MR. TAYLOR: Thank you. Tom Edsall will speak next. He has spent more time on the campaign trail between scholarly works than any American with the possible exception of Williams Jennings Bryan and Howard Stases. Tom?

(Laughter.)

MR. EDSALL: Thank you very much, Stuart, for that gracious introduction. Stuart and I go back a long time.

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I agree pretty much with everything that Tom Mann said. Let me add just a few points specifically about gerrymandering. This tends to produce a very moralistic discussion where currently the debate says gerrymandering is an evil; it has resulted in a split country with no middle, and also in House elections that are not very reflective of national trends, when House elections used to be much more reflective. All of that is true. There are two sides to this debate though. Let me make them, and I have to say that I am split on this.

One is that we in America have a system where the victors get the fruit of victory and one of those fruits is redistricting what you control, and to take that away would take away one of the major party benefits that we have, and if you're trying to strengthen parties, gerrymandering is one of the key bases of a strong political party. It may have gone overboard, but I'll just point to that.

Secondly, having districts as they are, and both for demographic and gerrymandering reasons they are much more polarized, that may also strengthen party leadership. Dennis Hastert, Tom DeLay before him and John Boehner can well apply pressure on members of the Republican Caucus, warning of a challenge from the right in their districts and keep their guys in line and vote as they want them to as a party, again, this is for believers in party government, that provides a pretty effective tool in achieving that goal. You may want to have more people with pressures from the center or more Chris Shays types feeling freer to challenge the leadership, but I think a lot of this now comes at a time when much of the critique of gerrymandering is actually coming from the

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left and the Democratic side of the spectrum when the power has been held by the GOP. For years before this, Phil Burton redistricted California and Michael Berman, Howard Berman's brother, currently has redistricted California. There has been outcry, but hardly the same outcry as there was when Tom DeLay changed the districting patterns in Texas. It is a pretty legitimate argument on DeLay's side that the districts in Texas as agreed upon by the courts after 2000 were not reflective of Texas the state and you had I think a 17-13 Democratic majority in the delegation at that time, I could have the figure wrong, and the state was by no means a 17 to 13 Democratic majority state.

In California, Democrats could well have tried to take on the GOP and add another four or five seats, but they decided there they were worried in 2000 that the mayor of Los Angeles was going to run for Governor, Mayor Riordan, and he is a pro-choice candidate, the first pro-choice Republican in quite a while running for Governor, would seriously endanger the ability of Democrats to win in those contested districts, so they basically chickened out there and decided to go safety for everybody with the one pick-up seat going to the Democrats. All this is to suggest that this is a much grayer area.

The other area that we have not gone into much is the issue of the Voting Rights Act. Clearly, after the 1990 census, Lee Atwater very aggressively aligned himself with black leaders throughout the South and pushed for overwhelmingly black majority districts very successfully and that strategy paid off to some extent, expanding the Republican victory in 1994. Since then, the courts have ruled, and this I would leave to my colleagues to my right on this issue, but as I understand it, there has been a

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significant moderation of the legal position requiring black majority districts and you have an increasing number of black members of Congress being elected from black minority districts. They do that as incumbents, but I think even Cynthia McKinney had a black minority district which suggests that at least once in office blacks can do fairly well competing.

Let me just conclude by saying since this is such a moral debate it leaves me in doubt and having no real answer on this issue. I like political parties, I like keeping them in authority, but I really as a reporter would much prefer to have more competitive elections, and probably as a voter I would prefer to have more competitive elections.

So on that, maybe redistricting reform is a good idea, but reforms in this country have a long history of turning out to be lemons, so I would be very cautious in pursuing this.

MR. TAYLOR: Sam Hirsch will speak next. I know that the law in all of this is lucidly clear, and I am hoping that you could explain that to us quickly.

MR. HIRSCH: I will try. First of all, thanks to Stuart and the Brookings Institution for having me on this panel. It is not every day that you get to be on a panel with your favorite political scientist and your favorite political journalist. And though he hates to hear it, one of my favorite courtroom adversaries who blanches every time I say that, but it's true.

We find ourselves as Democrats—I'm a Democrat—in an odd position here. Eight days from election day, every single poll but one that I have seen publicly

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released in the last month shows Democrats with double-digit leads in the generic congressional ballot. Over the last week they have averaged 15-point leads. And yet there is still a serious question as to whether Democrats will retake the House of Representatives. That is peculiar, and you have to wonder why.

It seems to me there are three main reasons. The biggest one is the incumbency advantage. They walked into this process with 29 more incumbents than the Democrats did, and therefore the Republicans have a large built-in advantage. But the second-biggest reason is that we have so few truly competitive districts in the United States today. If you look at the major reports on competitive House races, they are typically listing 30 to 45 maybe that are truly competitive, maybe one or two dozen more that may edge into the competitive range, but basically 85 percent of the American people a week from Tuesday will be casting ballots for Congress in districts where they have no meaningful choice in the general election, it's a done deal.

Most of that is due to residential patterns, as Tom Mann said. People increasingly live near like-minded folks and because districting is geographic, we end up with a lot of homogeneously Republican or homogeneously Democratic districts.

But part of it is due to what I will call anticompetitive districting. Take California, for example, mentioned earlier, with 53 districts, all had of course general elections in 2002 and 2004, so 106 elections; one general election challenger broke the 40-percent barrier, not the 50, the 40-percent barrier. Similarly, in New Jersey where there is a very hot U.S. Senate race this year, there is at most one of 13 seats that are even

somewhat competitive at the House level. In Michigan where you have a very competitive gubernatorial and a fairly competitive Senate race, none of the 15 seats are on anyone's list of competitive elections. These are striking features, and they are quite common around the country, and I think they are issues of concern.

The third reason why Democrats have an uphill climb structurally, although I do think they will overcome it most likely, is that there is a huge pro-Republican partisan skew in the system, and although the first problem, anti-competitiveness gets a lot of attention, the Republican skew does not. It comes from two things, basically. In most of the country there is not much of a partisan bias in districting plans, but it turned out in 2001 and 2002 that in the four largest purple states, the ones that are not totally Democratic or totally Republican, Florida, Pennsylvania, Michigan, and Ohio, they all have Republican governors, Republican state houses, Republican state senates, and they use that unilateral control at state government to enact whopping partisan gerrymanders that gave those states en masse 2 to 2 Republican advantages, 26 Democrats, 51 Republicans from those four states, even though they are hotly competitive states in presidential elections, for example. Then in 2003, Texas follows suit and also got a 2 to 1 Republican advantage for their delegation, although obviously that is, as Tom Edsall said, a far more Republican state than the four I just mentioned.

A couple things, the anti-competitiveness point is not just detrimental to Democrats. If you think about it, Republicans had a pretty good year in 2004, but failed to capitalize on it in House races because there were so few competitive seats for them to

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pick up. So they actually picked up three seats, six of those were in Texas, and they actually lost seats in the other 49 states. It is also interesting that when I was describing anticompetitive and partisan gerrymanders, that Michigan was on both lists because the tradition is we think that there is either partisan gerrymanders or bipartisan gerrymanders and that the two are mutually exclusive and that if you are going to have a really aggressive partisan gerrymander, you necessarily create some relatively competitive seats. But I think that has now been disproved nationally, and in Michigan, which is something I am going to return to.

So what should courts do about all this? First of all, as to the lack of competitive districts, I think it is extremely difficult for courts to have any meaningful involvement here. For one thing, it is not at all clear what the proper or ideal level of competition or responsiveness is. And secondly, it is not at all clear whatever you think it might be could be derived from the Federal Constitution. So both in terms of identifying the harm and in terms of actually dealing with the material in litigation, I feel that courts currently play on role in ensuring competitiveness, that it is unlikely to change, and it is a very difficult issue for courts ever to get involved with.

As for partisan bias though, that is quite different. There, as a matter of fairness, as a matter of equal protection as in the Equal Protection Clause, I think that minimizing partisan bias is a realistic goal for courts to pursue. This issue has come before the U.S. Supreme Court in 1986 in *Bandimere*, in 2004, in *Vieth*, a case I was involved with, and again this year in *LULAC v. Perry*, the Texas case, which I also was

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involved with. We basically have been stuck in a certain groove here where under the current composition of the Court, four Justices think that partisan gerrymandering claims, claims of extreme bias in a districting plan, should be justiciable, and in fact, they would have struck down the Texas plan and would have considered striking down the Pennsylvania plan 2 years earlier. Four Justices think that federal courts lack the power to even deal with the issue. And then sitting in the middle is Justice Kennedy, as he will increasingly be sitting in the middle on many issues before the Supreme Court, and his view is that these partisan gerrymandering claims should remain justiciable, but he does not know how they should be justified. So we have a very awkward situation where effectively partisan gerrymanders get a pass from the Supreme Court, but the door is still open to challenge them, and the question is what could be a valid challenge.

All of this is obviously hanging by a thread because of the 4 to 1 to 4 distribution, and if a Republican President gets the opportunity to replace some of the justices or a Democratic President gets the opportunity to, you could see a real shift here. Certainly, if the liberal bloc of four became a bloc of five, we may suddenly see federal courts perhaps after the 2010 census actually invalidating the most extreme partisan gerrymanders. But without changes in the Supreme Court's composition, basically it is a question of whether lower federal courts and state supreme courts which seem like a likelier bet are willing to step into the void and try out some theories by which these claims can be actually adjudicated.

I think the likelier bet is that state supreme courts, not applying the Federal

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Constitution but applying their State Constitutions, pick on some of the uniquely State Constitutional language, like a lot of states, for example, have free and equal elections clauses, and try to experiment a little bit with restraining the worst tendencies of gerrymandering, but the track record suggests that this is not terribly likely.

What does happen and I think will continue to happen is if there is any kind of colorable claim on one person, one vote, or a Voting Rights Act claim, or a racial gerrymandering claim, or some State Constitutions have certain requirements about keeping countries whole, if there is a claim under that, that a partisan gerrymander will be struck down not as a partisan gerrymander, but as a violation of one of those things I just named. For example, we initially got the Pennsylvania gerrymander struck down because we pointed out to the courts that the biggest district had 17 more people in it than the smallest district, this is out of about 600,000 or 700,000 people, and the court said, fine, we will strike it down. They did not strike it down because a 17-person deviation in population was violating their sense of equality; they struck it down because they knew it was a really rotten, anticompetitive, partisanly skewed gerrymander. But the problem is, the legislature then came in, fixed it, reduced that 17-person deviation to one person, and we had no claim left.

Similarly, somewhat more seriously, in Texas, most of the 2003 DeLay gerrymander was upheld, a piece, however, was struck down in that there was a Voting Rights Act violation, a serious independent violation of the Voting Rights Act and of the voting rights of Latinos in Southern and Western Texas, and because of that, one district

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had to be significantly changed and four surrounding districts had to be changed somewhat. So that somewhat made the Texas plan a little bit more competitive, a little less skewed, but it was done through the Voting Rights Act, and the straight-on claims of partisan gerrymandering were rejected by the court.

So I think basically what I am painting is a fairly pessimistic picture. There is a problem, there is not much short-term prospect of judicial solution, and I think what that will do is increasingly create pressure for state constitutional reforms which I hope is something we discuss as this panel moves on.

MR. TAYLOR: I think we will get to that. Mr. Mark Braden will now talk.

MR. BRADEN: Pessimism about the law? Well, not for the lawyers. The law is perfect as far as the lawyers are concerned in the redistricting world right now. Major stakes, very confusing jurisprudence. A lawyer's delight. It may not be good for the republic, but it has been very good for the lawyers.

The whole notion of redistricting being a vital cog in America's political process really starts in 1964 when the Supreme Court decided that it would play a significant role in the redistricting process of our country, not that redistricting was not important prior to 1964. There were gerrymanders prior to 1964. The term comes from the Colonial period Governor Eldridge Gerry who is buried up on Capitol Hill, but the gerrymandering, or gerrymander to use the more modern pronunciation really is a child of the 1964 one-person, one-vote revolution of the Supreme Court.

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I think it is interesting to remember the other thing that happened in 1964. 1964 was the high-water mark of the Democratic political Party in the United States in the sense of the largest number of elected Democratic officials across the country, the largest number of chambers controlled and in control of the redistricting process. Following 1964, virtually every single state had to recast its legislative lines, many states redrew its legislative lines, and that process was not done with many Republicans sitting at the table. So you established a Democratic gerrymander nationwide I would argue to you starting in the late-1960s, reaffirmed in the 1970s, reaffirmed in the 1980s.

In the 1980s I was involved in an effort to get the court to consider partisan gerrymandering, the thought being that it was a nonjusticiable issue, an issue in which the courts would not deal. I was a lawyer in the *Bandimere* case and in the *Badham*. In *Bandimere*, strangely enough I was on the same side with the Indiana Democratic Party, or almost the same side. My position arguing for the Republican National Committee was that partisan gerrymandering was justiciable. It was not so clear that it was done in Indiana in that one situation; we did not think it was a particularly good gerrymander plan. As it turned out in the next election when the Democrats took over, they managed to prove it was not much of a partisan gerrymander. And the Democratic National Committee was on the other side. After mighty years of effort, the Republican Party was able to take over a significant number of legislative chambers in the line-drawing in a number of states. Suddenly there is now an interest in partisan gerrymandering in the academic communities, in law schools, that did not exist before.

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Welcome to conversion.

Partisan gerrymandering does play some role obviously in the notion of the polarization of Congress. That is a simple argument to make, but its role is probably smaller than the role of the jet airplane. Why do I say that? The jet airplane permits members of Congress, especially the House, to fly home every weekend. It is a 3-day Congress. I think if you looked at the percentage of members of Congress who actually live here in Washington now in the 21st century versus those who lived in Washington in the 1970s or 1980s, you would see a much smaller percentage. There is very little social interaction now between Republicans and Democrats. That probably as significant a role as the notion of partisan gerrymandering. The polarization is interesting, but it is a minor factor.

Polarization because of partisan gerrymandering? I would suggest you take a look at Connecticut. If the polls are correct, there might be three Republican members from Connecticut who may disappear in this next election. Knocking Formica, I hope that doesn't happen, but if we believe the polls, it may well happen. Those would be three Ripon Republicans.

I was involved in drawing the lines in Connecticut. The Connecticut plan under nobody's estimation is a gerrymander and it has a number of very competitive seats. Following this election by every measure that any political scientist is going to have, the loss of those three members is going to make Congress more polarized. What's going to happen in this election clearly, if the polls do in fact tell us what is going to

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happen, what is going to happen is a large number of Republican moderates in Pennsylvania, Ohio, and I don't know about the ones in Indiana, are likely to be former members of Congress, and none of that increase in polarization of Congress will be a factor of how the lines were drawn. So does it affect the margins? Of course it affects the margins. But it is a very minor factor.

The notion of how one deals with this, assuming one wants to deal with this, I would say from the views from many states, partisan gerrymandering or bipartisan gerrymandering in fact makes sense if you are running a state legislature or running a state government or if you are an individual living in a particular state because it results in a more stable congressional delegation which by definition, although not as important as it used to be, still the key to having a powerful congressional delegation is a stable congressional delegation. So the notion of partisan gerrymandering that keeps a stable Republican or Democratic delegation or a bipartisan gerrymandering as you have in California that creates a stable California delegation maybe in the abstract of the political scientist does not make much sense, but if you are in the state legislature and you are concerned about whether or not you are going to get more money to build some road in your district, the partisan or bipartisan gerrymander that stabilizes your delegation makes a lot of sense.

So I think there are many, many factors in the notion of polarization. I think the argument can be made that partisan gerrymandering and bipartisan gerrymandering that create safe seats has some marginal effect on it, but it is just very,

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very marginal.

MR. TAYLOR: Thanks very much. I am going to ask a few rounds of questions and am going to leave 30 or 40 minutes at least at the end for audience questions. My first round, as the panelists know, I am going to ask each of them to take up to 3 minutes to answer, and then in the subsequent rounds, try and hold it to 1 minute, and in the subsequent rounds, have some interaction back and forth.

I will go in the same order in which people have spoken, starting with you, Tom. Here is an article by yet another Brookings scholar that you run into every time you turn around, Jonathan Rauch who is also my colleague at "National Journal" in the January/February 2005 "Atlantic Monthly" headline "Bipolar Disorder: A Funny Thing Happened to Many of the Scholars Who Went Out Into the Country to Investigate the Red/Blue Divide," I think that's you. "They couldn't find it." And Jonathan Rauch writes after doing his own investigations, "I wound up believing that a dichotomy holds the solution to the puzzle: American politics is polarized, but the American public is not. In fact, what might be the most striking feature of the contemporary American landscape, a surprise given today's bitterly adversarial politics, is not the culture war, but the culture peace," and he documents that with many things including the fastest-growing group in American politics is independents, many of the centrists. How about that? Is he right?

MR. MANN: Of course not. Actually, Jonathan in making this case points out some truths, it is just that he is really only talking about part of the story, but that is why his article is really so useful.

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We have observed the difference in the intensity and level of closeness to the ideological poles between elites and ordinary citizens for at least a half-century. The articles began back in the 1950s, the more involved in politics you are, the more intensely you feel about politics, and the more you are likely to be faithful to the core beliefs of the party.

Citizens feel less strongly about matters, know less about the issue, and therefore, in that sense it is not a brutally, passionately polarized public when it comes to individual issues. And on issues like abortion there really has not been much change over the decades. That is to say, there is strong sentiment at either pole, that is, no legal access or full legal access, and the great middle wants to preserve legal access but discourage abortions in every way possible.

So all of that is true. The problem is, voters have come over the last couple of decades to sort themselves into one party or the other based on their broad ideology. So people who are roughly conservative have become Republicans, and people who are roughly liberal-moderate become Democrats. Their feelings about their partisanship are stronger today and they are more widespread than they were a generation ago, so they look at the political world, the economic world, the social world through their partisan lenses and that creates a new reality.

There was a wonderful piece in the paper about dinner parties. I have been telling this story for years, and it really is true. It's not just in Washington where it is unpleasant to go to a dinner party where both Democrats and Republicans are invited,

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it is also true in Kankekee and Omaha and other cities around the country. The fact is, citizens by virtue of their residential decisions, by virtue of this sorting, by virtue of their stronger party-line voting have come to reinforce the very partisan polarization that is so much more apparent at the elite level.

This talk about the increasing number of independents is just a myth. The independents movement peaked in the early-1970s and since then if you properly measure independents, that is, if you ask people who say they are independents if they lean toward one party or the other, you find most independents turn into partisans, and those independent leaners are as partisan as people who initially said they were Democrats or Republicans.

The fact is our politics of partisan polarization that we see manifestly in Congress in Washington and among activists is reinforced by what has happened to the ordinary citizen and it will take an extraordinary effort, maybe a modern day Teddy Roosevelt, to try to recreate a market for less partisan sentiment, less ideologically polarized sentiment, and more towards some center where once again it becomes tolerable to talk to people who wear a different party label.

MR. TAYLOR: Thanks. Tom Edsall, a two-part question about the Voting Rights Act. It had three parts but I couldn't keep track of them all. In particular, the 1982 amendments to the Voting Rights Act which as I think you have explained led to the pressure to draw majority minority districts.

The first part of the question is whether the drawing of majority minority

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districts which obviously increased the number of minority positions has been good for black and Hispanic voters. If Lee Atwater knew what he was doing, one might think it would not have been good for black and Hispanic voters, but that is the question. The second part is how do you think if at all it has affected race relations as the ripple effects go through our politics to race relations?

MR. EDSALL: The first question is, has it benefited the minority community?

MR. TAYLOR: Yes, in terms of their policy agenda being closer to what the legislative product is than it would otherwise be.

MR. EDSALL: Well, it depends on what you assume the minority agenda to be. If the minority vote is majority Democratic, in the long-run it has clearly undermined achieving a Democratic majority to pass Democratic policies because by concentrating all the black voters into one district you have reduced the possibility of having more than one or more than two Democratic districts and the other white districts are increasingly likely to become Republican as they did throughout the South.

Conversely, many black advocates argue that representation itself is very important and the only way to achieve representation especially before you have an incumbent in office is to have a 60-percent-plus district. My own view is that this country has moved a long way on race relations and that African Americans and Hispanics do not need 60-percent majority districts or 65 percent to win and there would be a much healthier situation to have head-on competition without creating special

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advantages for one group or another, but that is my view. The second question was?

MR. TAYLOR: The second part was do you think there has been any significant impact on race relations as a ripple effect of the majority minority redistricting or is it really just about politics?

MR. EDSALL: That is a good question. Certainly I don't think race relations have at the political level improved in the South where this has been the case where you have had, for example, in Georgia for quite a time, not right now, but for much of the 1990s an eight white and three black member delegation and there were such hostilities between John Lewis and Newt Gingrich that I don't think you could say that race relations were improved by this circumstance. As a corollary to my first answer, the answer would be no, that you are better off having more competition between the races for members of each race to have in the long-run better race relations.

MR. TAYLOR: Thanks, Tom. A question to Sam Hirsch, mid-decade redistricting seemed to be the newest and most distinctive controversy in the Texas case and in some other cases. Are we going to see more and more of this? What do you think about this? Is this a bad thing? Is it a good thing? Is it a coming thing?

MR. HIRSCH: Before I answer that I do want to say I think that what Tom just said presents a false dichotomy between 60- or 65-percent minority districts and having no legal protection at all for minority voters. There is a middle ground, there is actually where the law is today, and it is working much better than that answer would indicate.

MR. EDSALL: He was asking about in terms of the 1982 amendments, and they have been modified, and I agree with what you're saying basically.

MR. TAYLOR: Sam, if you would prefer to speak to that subject than the question I just asked you, go right ahead.

MR. HIRSCH: The mid-decade got a lot of attention because particularly of the Tom DeLay base gerrymander in Texas in 2003. A federal court had redrawn the map in 2001 when the legislature was under split control and the two chambers did not reach a compromise. It was a map that had a good attributes that which have been discussed, but the DeLay gerrymander then in 2003 replaced it in mid-decade which is something that we have almost never seen in modern American political history. There had been a similar event a few months earlier in Colorado, but a state court struck that down.

When the review of the DeLay 2003 gerrymander got to the U.S. Supreme Court, they upheld it, but they did not give a blanket green light to mid-decade redistricting. They said that in Texas it was the legislature replacing a map drawn by a federal court, number one, and that the federal court's map had reelected a majority Democratic congressional delegation in what we all concede is a majority Republican state and, therefore, the legislature had a reason to want to go in and fix it, and because of those two circumstances, they said that the Constitution did not prohibit that particular mid-decade redrawing. So the question is, is that a big green light that will allow states all over the country now after this coming election to start fiddling with their districts

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before the 2010 census? My guess is no, at least if you are talking about these sort of radical statewide redrawings of the map like we saw in Texas in 2003.

What I more fear is something that did not get a lot of national press and was very interesting which happened in Georgia earlier this year not at the congressional level, but at the state senate level. There you had a Republican state senator who was moving up and running for statewide office and thereby creating an open seat and his district was, although he was able to win it pretty well as an incumbent, inherently quite competitive. His brother-in-law wanted to run for the seat and did not want to face a competitive electorate, so the Republican Party in Georgia redrew that district and a couple of neighboring completely noncompetitive districts in order to make this competitive seat favor the Republican brother-in-law. What they did is they split the city of Athens, where the University of Georgia is, in half, and they split the county that Athens is in in half, and they basically busted up one of the clearest concentrations of Democratic and liberal voters in the entire state.

That was done in a partisan way in one district, but you can imagine the exact same thing in a split legislature happening when you take an open seat that is competitive in one part of the state and make it more Republican, and an open seat that is competitive in another part of the state and make it more Democratic, and so long as the surrounding districts are not too competitive, it may not affect the surrounding districts much, but then you have taken two potentially competitive open seats and made them both non competitive. So what little competition we have left in our system gets

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squeezed out. It is a very efficient way to campaign. You can either spend a lot of money on TV ads and radio ads, or you can lobby your legislature and fix your district. So I think that is actually something we need to keep an eye on at the congressional and state legislative levels because I think that the Supreme Court's decision is sufficiently vague as to perhaps allow that to go forward.

MR. TAYLOR: Thank you. Mark, I have a two-part question for you. First, do you want to react to anything you have just heard? Second, nonpartisan redistricting commissions or various other devices have been seen as the remedy for gerrymandering. What about that?

MR. BADEN: Nonpartisan redistricting commissions? Trying to find a nonpartisan in redistricting is like finding a neutral in the war between the sexes. I just don't know who that is, and I am exceptionally resistant to the notion of nonpartisan based upon who becomes members of nonpartisan commissions. They tend to be taken from law schools and academic institutions which are not notorious for having large numbers of Republicans in them, and in some cases from the state judiciary which is often, although not partisanly elected, is a result of partisan elections. So the notion of nonpartisan, by definition, if you are nonpartisan, you must know nothing about the redistricting process so you must be a bad choice to be involved in the line-drawing process.

That does not mean that the whole notion of commissions I would reject out of hand. I think it is in hand possible to construct a bipartisan commission that would

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have somebody who knew something about the partisan process, namely, partisans involved in a redrawing of districting lines. I am not of the assumption that amateurs are the best choice for deciding this.

There are other approaches that would work though, in fact, some of which the Congress could do in the congressional, which is we could return to the notion of having some type of standards in the redistricting process. Contrary to my view, I don't think the Supreme Court has invalidated all the additional notions one could reestablish through judicial fiat notions of compactness, political subdivisions, communities of interest is a little bit more of a loose term, but at least some of those would restrain on the margins the process and try to rein in the sort of unlimited bizarre looking almost polka-dot notion of creating representational districts and try and reestablish the notion that really existed prior to 1964 that we were talking about recognizable geographic units for representation.

The Voting Rights Act, just quickly, where we are now of course is we are in a cloudy situation as to what the law is. The law most certainly is not 60-percent districts. The dispute here is really between the notion of descriptive representation and substantive representation. It would appear that legislative bodies across the country are very different because of the Voting Rights Act and the fact that there are many more minority members in those. There are some exceptions, but in the South at least and throughout the Southwest the reason why we have these different chambers is the Voting Rights Act and the creation of majority minority districts, and we would have fewer

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members of the minority caucus without a doubt if we were not still talking about Section 5 and Section 2 enforcement type actions or preclearance actions.

MR. TAYLOR: Thank you. Tom, could you give your view on nonpartisan commissions, bipartisan commissions, what remedies if any there may be for gerrymander? And if you want to if you can fit it into 3 minutes, broader remedies for polarization.

MR. MANN: Sure. Even though I am urging caution and moderation in assuming that gerrymander is a large factor, a significant factor in polarization, I nonetheless believe it is well worth pursuing various forms of redistricting reform. The U.S. is an outlier in the democratic world and the extent to which we allow those in office to control their own fates by rigging the rules, in virtually every other country it is done through such a nonpartisan commission boundary commission. I actually think Mark made a lot of sense, and what I would like to see is a combination of those two, that is, the expertise and obvious interest that the parties brought to bear, but also with some capacity to force them into a negotiation whereby you end up looking out for the public interest as well.

A former professor of mine, Donald Stokes, was the tiebreaker in such a bipartisan system in New Jersey for redrawing state legislative districts. He did it for two rounds, and then Larry Bartels (ph), another political scientist did it, and they actually produced a very admirable form of redistricting. The consequences served I think the broader interest as described by the standards in the law and in general of partisan

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fairness and competitiveness.

Sam Hirsch has actually crafted a model state constitutional amendment that would set up a commission with the parties each —

(tape interruption)

(In progress) — a pretty powerful tiebreaker who would respond to alternative plans drawn up by the partisan delegations and in which the public would have an important role to play. That is, the whole process would be transparent and the standards by which a plan is accepted would be quite explicit.

So the bottom line is I think it's possible to take into account partisan knowledge, partisan interest, but also add to that some public interest that would lead to more partisan fairness and more competition.

Take California. It is a state where we have seen from a very interesting study out of the Institute of Governmental Studies that probably in spite of the residential segregation that exists there, you could probably create 10 competitive districts out of the 53 without doing any damage to the other standards that exist. That kind of incremental change would be less dramatic in some other states but would have a positive impact as long as it was structured in a way to ensure partisan fairness as well.

MR. TAYLOR: Thanks. Tom, a somewhat related question. First, is there anything good about polarization? We have been proceeding on the assumption that it is all bad. Does it have any redeeming qualities?

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Second, what about proactive efforts by someone to draw competitive districts, even to gerrymander them in the sense of the default is usually compact contiguous county lines, and what we see is people torturing the shapes in order to get them more partisan. What if we tortured the shapes in order to get them more competitive? Would that make any sense, and who would do it?

MR. EDSALL: On the first question, is polarization good or bad?

MR. TAYLOR: The consensus seems to be it's not too great. But does it have any redeeming features?

MR. EDSALL: I'm not sure that is the right question. I think it may be that there is a very tentative view that the polarization we currently have is about to become irrelevant and that the divide, especially the culture war divide, if you look at the culture and you look at the world around us, it is a political fight, but in the culture, the left has won that fight. It really is no longer a matter of dispute. A lot of the culture war is based on women entering the work force and there is no way women are going to leave the work force, television now provides virtually every kind of sex opportunity you would want to watch except for perhaps Stuart.

(Laughter.)

MR. EDSALL: And I don't think that is going to change. You have companies providing insurance plans for same-sex couples and that is not likely to change. It is an ongoing fight, but in the culture, that is a fight that has been won.

Secondly, the economic fight, basically market economists or market

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advocates have won that fight and it no longer really is a major battle except to some extent between the two parties. So we have politics taking place in the past that is one of the reasons that at any rate this is going to break at some point and will no longer function as the divide. What was the second question about?

MR. TAYLOR: It was whether it would make any sense and whether there would be any constituency for actually proactively trying to draw more competitive districts as opposed to just falling back on more compact and contiguous districts. I think the Schwarzenegger proposal in California was something like that wasn't it?

MR. EDSALL: Did it have a provision requiring — that's one of the criteria?

MR. TAYLOR: Not through the courts, to have a state constitutional amendment, for example, that says let's try and make them competitive if we can, not just compact contiguous.

MR. EDSALL: I think the big danger in creating bipartisan or joint committees of some kind is that the tendency would be just to accommodate both parties and to have the kind of redistricting you have now in California. If you mandate competition, the problem would be maintaining the pressure for it. There is no constituency group pushing for competitive districts. The two constituencies of the Democrats and Republicans and they are pushing to protect their own, and if they are forced into a situation where they have to deal with the other party, their main drive is going to be to cut a deal and how you institutionally require competition to be considered

continually as a factor is a very good question. I guess that it would be subject to legal challenge if it failed to have that, but you would have to somewhat torture districts I suppose, but people torture districts all the time. That's part of the process of politics.

MR. TAYLOR: Sam Hirsch, they tortured them in Texas pretty notoriously. The Tom DeLay gerrymander which is what the case was about to a large extent and generated many articles. Is there any chance that that is going to backfire on the Republicans? Did they spread their voting base so thin and give away so many safe districts in order to try and create more Republican districts that a Democratic landslide which a lot of people think we are going to see could swamp them?

MR. HIRSCH: I don't think so. They went to pretty severe lengths. This is an outline of one of the more interesting districts that they drew, 300 miles long, in places less than 10 miles wide, but it was safe. And I think that there is now one sort of inherently competitive district in the entire state which is the newly created majority Latino district in Southwest Texas. The others are fairly well locked down for each respective party. In one case a long-standing and very effective Democratic incumbent is holding a majority Republican seat, in another case there is no Republican on the ballot, so they have to run a write-in candidacy to replace Tom DeLay. So there are two districts that are potentially competitive out there for those peculiar reasons, but they did a pretty good job of being both biased and anticompetitive.

Let me take on this notion though that the way you would create competitive seats is by destroying compactness and destroying respect for political

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subdivisions like counties and cities. Two states come to mind that have really pretty maps. One is Michigan at the congressional level which I spoke about earlier, a state with 15 districts, 14 completely uncompetitive, and a locked down 6 to 9 majority for the Republicans even though that state has gone Democratic in the last four presidential elections and in nine of the last 10 U.S. Senate elections. In fact, if one of the Democrats were to retire, that seat is the one competitive one, it would flip and it would be a 10 to 5 advantage.

We drew as plaintiffs in the Michigan litigation districts that like the ones enacted are very compact, very respectful of counties and cities, and would have had quite a few competitive seats and likely would have created a small Democratic majority in the delegation. So you can have very pretty districts with very different political results in the same state. And you can also have very good public interest results including competitiveness without destroying compactness, and the other example I want to give is New Jersey state legislature which Tom Mann spoke about.

There is not a single municipality at the state legislative level, not a single municipality other than the two really big ones that have to be split, are split. Those are Newark and Jersey City. So there is almost complete respect for municipalities. The map generated a 20-20 tie right off the bat in the New Jersey Senate, and a 44-36 Democratic majority in the Assembly which is quite representative of the people of New Jersey, and 18 out of the 40 districts immediately generated a general election contest where the winner had less than 60 percent. Something I just told you earlier never

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happens anymore in California at the congressional level.

The other thing is it was good for minority representation because that map ended up sending a record number of African Americans, a record number of Latinos, and a record number of Asian Americans to the state capitol in Trenton. So without having convoluted maps, if you have people who are in the tiebreaker role on a commission or whether through bipartisan agreement in a legislative setting, people who really want to reach a decent result, in most states it can be had, and the idea that it would require torturing districts I think is incorrect.

MR. TAYLOR: Thank you. Mark, I want to ask you about the Supreme Court's decision in June in the Texas gerrymander voting rights case. As I counted, there were 132 pages of opinion, six in all, none of them winning the full ascent of more than two justices, which I think might be something of a record. Did I miss one?

MR. BADEN: There is a majority opinion. Justice Kennedy's opinion striking down the violation of Latino voting rights was a 5-4.

MR. TAYLOR: But didn't various people say I don't join that part of the opinion? I stand corrected then.

MR. HIRSCH: But that was only about five paragraphs of his opinion. We wouldn't want too much clarity.

MR. TAYLOR: I was hoping that you could explain a little bit what the state of the law is under the Supreme Court, and in particular Justice Kennedy I thought had a particularly tantalizing sentence or two, and I will read them to you and ask you

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and ask you to parse them. Here is Justice Kennedy, "In the equal protection context, compactness focuses on the contours of district lines to determine whether race was the predominant factor in drawing those lines," which I take it is a bad thing. "Under Section 2 of the Voting Rights Act, by contrast, the injury is vote dilution, so the compactness inquiry embraces the compactness of the minority population, not the compactness of the contested district." What is this man talking about, and what does the law says?

MR. BADEN: Nothing of great importance. If you want to know what the state of the law is now, you would be better off not reading the Texas opinion because it really did not do much; it did not affect the partisan gerrymandering analysis whatsoever. Prior to that case, we know that we had a 4-4-1 situation potentially and we ended up with a 4-4-1 situation where we are now. He didn't take over her dress, but he definitely took over Sandra Day O'Connor's shoes as to the swing person and now redistricting, whether we are talking about voting rights litigation or partisan litigation is really about Justice Kennedy and no one else.

Where we are on partisan gerrymandering, that issue simply is can we find a standard that will satisfy Justice Kennedy, assuming of course that Justices Roberts and Alito do buy onto the notion that it is justiciable. Assuming that you can get Justice Kennedy to identify something here that could be identified to recognize a claim probably along the notion that there is some literature out there by Gray King or Grafman that talk a little bit about analysis based upon partisan fairness or partisan symmetry, my guess is in the next cycle you are going to see partisan litigation across the country, good

for the lawyers again, and there will be another set of cases getting up to the Supreme Court probably with something along these partisan gerrymandering symmetry type analyses.

On the voting rights litigation, we are really pretty much where we were before the Texas case. I didn't really see the Texas case impacting significantly. It was always clear, at least from the Republican lawyer types looking in from the outside that the Bonilla district was the potential danger point in the litigation. Frankly, the notion that it is a particularly good gerrymander is not true, it was actually possible to get one more Republican district in the state which is what I urged them to do, but in reality, what often happens in a partisan gerrymandering situation, the internal interests of elected Republican officials in the legislature was more important to them, in other words, more important to electing their friends, rather than electing another Republican, sad but true.

So the notion that this impacted whatsoever, you would be better off, frankly, just simply not paying much attention to the Texas opinion and just go on from there as it is more confusing than useful.

MR. TAYLOR: Thank you. Why don't we see whether there are questions from the floor? I hope there are. If there are lulls, I'll try another one.

QUESTION: This is actually more of a comment, but it is with regard to your question earlier about the Voting Rights Act and your question about are majority minority districts beneficial for minority voters. I have somewhat of a personal interest in that we just worked for a long time with Mark Braden and the reauthorization of the

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Voting Rights Act talked about this issue a lot.

I think the question is, are districts where minority voters have an opportunity to elect their choice, are they important to minority voters, and I think yes. Voters' ability to elect who they want to elect is an important value and that for a long time, particularly in the South, that really was not possible without majority minority districts.

So majority minority districts are not an end unto themselves but, rather, were a necessary means for a long time starting really not until the 1990s until the 1982 amendments kicked in after the 1990s round of redistricting. Only then was it possible all over Georgia, South Carolina, Florida, for Latinos, all over the South for minority voters to have an opportunity to elect who they want to elect. So I think it is kind of an odd question, it is sort of the wrong question, the right question is, is it beneficial for voters to be able to elect who they want to elect in a world I should say of racially polarized voting? In a world where anyone will vote for anyone that is regardless of race, you wouldn't need to create special districts based on race, but that is not the world that we live in in many parts of the country. So where we have the persistence of racially polarized voting, which we still do, then I think, yes, you have to make the point that sometimes it is necessary to create majority minority and it is obviously beneficial for minority voters, and then whether or not that is good for the Democratic Party, that is a question that people will always debate, but for the voters themselves, I think it is a no-brainer.

MR. TAYLOR: If I could just ask you to follow-up, understanding your logic which makes perfect sense, you do get more black and Hispanic representatives, is there a cost to it? It is widely said that there is a cost. Yes, it helps the Republicans, they take over the House, and then you don't get the kind of legislation that minority voters want. And also the new Democrats they elect the argument would be that it is nice having them there, but their powerless because they are in a minority at a time when the majority is pretty dictatorial in the House. What about that?

QUESTION: I think people often point to the 1994 election as one in which the villain there is often the VRA to say that that caused — we all know that the Republicans won something like 50 seats in 1994, and even the most aggressive analysis to see what percentage of that may have been due to the fact that for the first time African American voters in the South were able to elect candidates of choice is 11, and that is the most aggressive analysis that I have seen of this by social scientists. So we are still talking about 39 or more seats that just flipped because that was the environment that we were in.

We also look at the South now, and how many Democratic Senators do we currently have from the Old South? The answer I think is four if you count Mary Landreau, two in Arkansas, and Bill Nelson, and that is it. So we have had a takeover by the Republican Party of the entire South, the old Confederacy, and none of those guys are elected because of line drawing. I think it is easy to scapegoat line drawing in the same way that we have been talking about, and I don't have a fully formed view yet on the

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IRCs and I am still trying to think about it, the independent redistricting commissions, but in terms of whether or not it's in the long-term interests of black and Latino voters, I think black and Latino voters have a long-term interest in being able to elect candidates of choice.

I think in terms of partisan interests, we have seen African Americans and Latinos be Democrats and Republicans, and a lot of them were Republicans I think with Eisenhower in 1956, and 1960 with Kennedy, you had a lot more African Americans certainly who were Republicans than you have now. We all know, it's the old story that the civil rights movement drove sea changes in the partisan political landscape and that I think is a very important and real fact, but I don't think you can say because minority political empowerment might be bad for Democrats a little bit in 2006, so they really shouldn't have political empowerment, I think we should say we should have minority political empowerment, and I do want to say elect candidates of choice, not necessarily elect African Americans and Latinos. We are talking about a lot of these folks now, Mel Watt and others, they are not in 60- or 65-percent districts, they are in 43- or 45-percent districts. We have some districts in Texas where African Americans elect candidates of choice who are Anglos. That happens, too. It is just a matter of being able to have your political expression realized as a community where there is polarization where you would want to have your political preference realized the same way white voters do.

So I think it is in the long-term interests of those communities, maybe not of the Democratic Party, but maybe again of the Democratic Party, and it is really the

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white voters in the Democratic Party who should be asked the question why they are not voting in bigger numbers for African American and Latino candidates.

MR. TAYLOR: I think Tom Mann wants to say something on this, and if any other panelist does, feel free to follow-up.

MR. MANN: Just to follow-up on one piece of it, right now the Republican vote is much more efficiently distributed across districts than the Democratic vote. If you distribute the 2000 presidential vote, say the two-party share of that, across the pre-2000 reapportionment, redistricting districts, Republicans win 228 even though they lost the plurality of the popular vote. After the redistricting they carried 240, so that round of redistricting which for the most part had nothing to do with race gained them an additional 12 seats.

And much of the previous redistricting had to do with where people reside. What we know is that the 30 safest, most lopsided districts are all Democratic districts. They tend to represent urban areas. They reflect in part the clustering of minorities, but also the fact that the gentrification of urban areas has led liberal Democrats to move back in, so you get overwhelmingly Democratic districts. So Democrats are at a loss for both of these, and they have very little to do with racial gerrymandering.

MR. TAYLOR: Thank you. Are there any other thoughts on this?

MR. BADEN: Yes, I think that is clearly true. The redistricting process in the South was really the outs against the ins and the alliance is sometimes cynical, and

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it is true, obviously with people looking at it who see you elect more blacks or Hispanics to Congress or state legislative chambers you might elect more Republicans, and that is partially true. But what is really fueling the reality was the notion that it was the ins versus the outs and the outs everywhere where the Republicans and the ethnic and racial minorities.

I would say the reality of course is now people talk about this notion of somehow it would be better to elect more white Democrats. If you elected more white Democrats, in this new Congress if the Democrats take over the House, would you have the committee chairmen that you are going to have who are members of the minority caucuses, and the answer is you wouldn't.

So this notion here that there is some tradeoff, no, it is no surprise to me that the minority communities want to be represented by their representatives rather than simply saying that the white Democratic power establishment should decide who their representatives are.

MR. TAYLOR: Yes, sir.

MR. MITCHELL: Gary Mitchell from "The Mitchell Report." I want to ask a question, and if drifts into being a statement, it really is intended to be a question. That is, looking at next Tuesday, if the polls are at least directionally correct if not beyond that, the districts that will change hands are districts that are competitive so that what you will lose, the Republicans will lose their more moderate members, the Democrats will elect more moderate members, so that the composition of the 110th

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Congress is a more rightwing Republican Party and a more moderate Democratic Party. That is a question.

MR. TAYLOR: Tom Edsall, do you want to take that?

MR. EDSALL: I'll have to think that through. I think that's a correct analysis, and from one line of argument like the Democratic Leadership Council, this theoretically should provide a Democratic Party more receptive to centrist approaches and push the Republican Party further to an extreme, making it a beneficial year for future years for the Democrats if what you are describing is correct. I think the outcome you are describing is likely to happen. What the consequences are, I don't know.

MR. : I think the estimates are among some inside that 25 to 27 of the Democrats in the Republican districts that are most at risk are likely to join the New Democrats or the Blue Dog Coalition or both, so I think that's a strong indicator. And because of the asymmetry, expecting few or no Democratic incumbents to lose, and remember, the four Democratic incumbents at risk are all quite conservative, the two Georgia Democrats, Boswell of Iowa and Hart of Illinois, if all of those hold on and we have the pattern we expect, then we will get precisely the political alignment that you have described.

MR. MITCHELL: May I ask a follow-up to that and just add, does that scenario at all have the potential to impact who gets elected Speaker and/or Majority Leader, and does it change the composition of the party chairs?

MR. : No, there is no competition for Speakership. Pelosi will be
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elected by acclamation, and Steny Hoyer is way ahead in the Majority Leader race. This strengthens his hand further, so I would guess no impact whatsoever. Nancy Pelosi has tried hard to build a constituency among the Blue Dogs and New Democrats within the Congress and has empowered Rahm Emanuel to recruit the strongest candidates whatever their ideology. So she is on record as supporting this thrust and she will be rewarded for the victory.

MR. EDSALL: I am not 100-percent sure though that all these guys coming in are committed to vote for her when it is a vote between presumably her and Hastert and if that vote has to go on the record. And if she has only a 1 vote or 2 vote margin, there in theory could be a problem for her.

MR. : Do you think Dennis Hastert will be a candidate for Speaker?

MR. EDSALL: I'm talking about whoever they put up.

MR. : You're saying whoever, right. He will be gone.

MR. MITCHELL: There is a third option.

MR. EDSALL: Which is?

MR. MITCHELL: It was briefly considered around the time that Gingrich stepped down and Livingston was an iffy candidate, and that is, there is no requirement in the Constitution that the Speaker has to be a member, and there was actual talk about bringing Bob Michel back.

MR. TAYLOR: Tom Mann for Speaker.

MR. HIRSCH: I think it is Melissa Bean, not Hart. You said that the

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fourth Democratic incumbent who is vulnerable is Hart. It's Bean.

MR. MANN: Bean, I'm sorry. I meant Bean.

MR. HIRSCH: Yes, you most certainly can come up with a scenario where, first of all, it is easy to come up with a scenario on Wednesday, we don't know which party is in the majority a week from this Wednesday. I think the chances of that are quite real because for a variety of different reasons there are a lot of close races, so I think that if we are talking about in about the 15-vote range which seems to be what most people are predicting give or take five or 10 seats, it would not be a surprise on Wednesday morning not knowing who won, and if there is a Democratic or for that matter Republican majority of two or three seats which is most certainly realistic, then all bets are off as to who the Speaker is.

If the Republicans have a one-vote majority, the way I count, that means Ron Paul has got to vote for something. Good luck on that one.

MR. TAYLOR: There is a question for the gentleman on the aisle.

MR. DOWNS: My name is Tim Downs. I have had some involvement in elections and recounts over the years. This is more of a technical question to our learned counsel. Is there any U.S. Constitutional prohibition against a legislative mandate ordering competitive, whatever that might mean, congressional or state legislative districts? We have been talking about this, and I haven't heard anyone directly address that question. There seems to be a presumption in the discussion that there is no constitutional impediment towards such legislation.

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MR. HIRSCH: When you say legislative do you mean congressional enactment or state legislative enactment?

MR. DOWNS: A congressional statutory directive ordering congressional districts of the states to reapportionment and/or the state legislatures to reapportion their own districts.

MR. HIRSCH: The answers are different depending on which one of those it is. Congress certainly has the power under the Elections Clause of Article 1 of the Federal Constitution to set some sort of constraints on congressional redistricting including some kind of requirements of additional competitive districts if they could draft such a thing. There is no constitutional barrier to that.

There may be a constitutional barrier to Congress dictating that state legislatures have to have a certain level of competitiveness in state legislative districting maps.

MR. BADEN: Yes, I think that is correct. In fact, there is no constitutional requirement for districting, period. Although it does appear that the Founding Fathers thought they were going to draw districts, you can see in the first few Congresses there was a handful of states that elected at large. That would be constitutionally permissible. The last time I checked, I think there actually is a bill floating around Congress now, I can't remember who by, talking about requiring states to create commissions.

MR. MANN: John Tanner.

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MR. BADEN: Tanner's bill, yes. And most certainly there have been in the past. Up until 24 there were standards for compactness and contiguousness in the federal statutory scheme. They disappeared in the 1920s. But you could something like that. I would argue that that would be an initial approach to do some type of standards like that that you could constrain the outlying, the really most outrageous types of congressional gerrymandering with some type of congressional restraint. Where you draw the line of course is always the tricky part.

MR. DOWNS: To be even more specific, would there be any constraint against a legislative solution which would mandate one man, one vote down to arithmetical niceties to mandate competitiveness with that kind of arithmetical nicety?

MR. BADEN: The detail is in the details though. How do you define them? I think it's hard to do.

MR. DOWNS: I'm saying assuming you could define it.

MR. BADEN: Clearly you could do it. Clearly there is no constitutional prohibition on you trying to enact something. It is the classic devil is in the details. What is competitive and how you would structure a statute that would really work, I'm being a Republican and I am always suspicious of reforms. It's one of those reforms, the impact of it and how it would play out I have great doubts about except for one thing, I'm sure it would be good for the lawyers. But other than that, I don't know whether we can do a statutory scheme that really does get you the competitive districts, but there are smarter people than me around for sure.

MR. HIRSCH: But on the specific question you're asking, yes, there is a constitutional restraint in all probability if they tried to enforce it against state legislatures, and, no, there isn't if it just applies to congressional.

MR. TAYLOR: In order to try and get everyone who has a question a chance to ask it, I am going to start on this side and go from front to back, and then start on this side and go from front to back which takes it down to Bill Galston first.

MR. GALSTON: It is always dangerous when a nonlawyer tries to pose a legal question to real lawyers, but I'll try anyway. It seems to me that at the constitutional level, the challenge is first of all to define a constitutional interest such that a case could be brought. Secondly, to specify who has standing to bring that suit. And third, to define some sort of standard on the basis of which that interest might be cashed out in the form of a decision.

But it does seem to me that if you're an originalist which on alternate Tuesdays I am, that there is a constitutional interest which was pretty clearly stated at the time of the Constitutional Convention and in the Federalist Papers, namely, that as between the two branches, the House of Representatives was intended to be the responsive branch, the branch that would indeed shift in response to shifts in public opinion. And the Senate by contrast in George Washington's famous phrase was supposed to be the saucer in which the liquid of public sentiment cooled.

If it is the case that the line drawing has the effect of dramatically reducing or truncating the responsiveness feature of the House of Representatives, that would seem

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in principle to be a constitutional interest, and not a trivial one. And just to state a hypothetical, suppose it were the case that when the dust settles on Wednesday or Thursday or whatever it is of next week there has been a 6 percentage point shift from the last midterm election but the House of Representatives remains in Republican hands and they lose 12 seats.

I would suggest that what I would consider to be a constitutional interest would be implicated by that because it would be a fairly clear statement of public desire to shift power in that branch but not translated into an actual shift of power. And if you don't like my numbers, add a few percentage points until you get a hypothetical that you do like.

What's wrong with that statement of the constitutional interest? That has nothing to do with fairness or proportional representation or any of the other charges that have been leveled against you and your side in recent fora which I have also attended; it has to do with a bedrock constitutional interest.

MR. HIRSCH: I couldn't agree more. Unfortunately, I think almost every word you said was contained in the briefs in *Vieth v. Jubelirer* which was the Pennsylvania gerrymandering case brought to the Supreme Court in the fall of 2003 and decided in the spring of 2004. There I was representing the Plaintiff/Appellants, we not only raised an Equal Protection argument and a First Amendment argument because gerrymandering is a form of discrimination based on political viewpoint, but we raised an Article 1 argument saying that the practice of gerrymandering is breaking down what the

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Founders intended the House to be particularly in distinction to the Senate where the House represents the House and the Representatives are chosen by the people of the several states, that is a quote from Article 1, and the Senate on the other hand represents the states, and the House has to be responsive and that's why all of them are up for reelection every 2 years, as opposed to the Executive or the Senate or the Judiciary where you have 4-year, 6-year, and life tenure.

So all these things were raised, and they were raised in a beautiful *amicus* brief written by Jack Rakove who is a Pulitzer Prize winning constitutional historian who raised the originalist argument that what we were saying was totally consistent with the Framers' actual views on what the House was intended to be, and he did an amazing job of going through the records of the framing and pulling out every detail that supported this.

It didn't make the slightest mark on the nine Justices. Literally, the Article 1 argument raised in that case barely surfaced in the opinions. There is literally no serious discussion in any of the six Justices' opinions who wrote in *Veith* about what you just raised and what I just described. I agree with you totally. I think it is a powerful point. It does not seem to have an audience in this current Supreme Court, unfortunately.

MR. BADEN: I don't have much to say other than ditto. I made those same arguments in a case from California, the *Badham* case, when we were objecting to the Burton gerrymander and we got no mileage out of that whatsoever.

MR. RAMSEY: Clay Ramsey, the Program on International Policy
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Attitudes. Something that comes up in the journalistic literature a lot on this subject is the idea that applied social science as it exists today has brought tremendous sophistication to the gerrymandering process and that everything can be done with a razor cut. I have always wondered about that, and finally with you two gentlemen I could ask this. If you compare how it is done today with the work of the old masters, the way gerrymandering might have been done with the information people had between 1910 and 1950, do you think there is really any significant difference brought by technology?

MR. HIRSCH: Yes, and no. The fundamental ideas of gerrymandering are still the same which is pack your opponents into a few districts that they win overwhelmingly and then spread your supporters among the remaining which you can win by a comfortable but not overwhelming margin. So the basic packing and cracking ideas have been there going back to the 1700s at least, even before Eldridge Gerry.

The computers have sped up the process and they have allowed you to do it with a bit finer granularity which is why we actually did see less compact districts not so much after 2000, but in the 1990s the average district compactness measures by quantitative specific measurements, and there are dozens of them out there competing, but it really was a good bit worse than in the 1910 to 1950 era, for example. As you get less compact you can do even finer slicing and dicing of voters, and at some point you get to the point where you are breaking up precincts and you don't even have voting data at less than precinct level so you start making recourse to census data about race and also to various marketing data that is used by direct mail marketers that tells them to send you a

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catalogue for brand X instead of brand Y, or product A instead of product B. So there is a lot of data that we have now at the block by block level that got used in the 1990s, and actually got used in some ways I think less dramatically in the 2000s because everyone was on alert after the Supreme Court stuck down some of the really strange looking districts. But I think the computers have sped up the process and have allowed it to be fine-tuned a bit.

The technological changes are dwarfed by the actual political changes. I think Tom spoke of this earlier. The predictability of voting behavior if you look at it over the last 30 to 35 years has increased dramatically. People who vote Democratic for President are much more likely to vote Democratic for the U.S. Senate and for the U.S. House, and that is likely to hold over a series of elections. That was much less true 30 to 35 years ago, and it is really that predictability that allows you to cut the margins a little bit closer and get more gains from gerrymandering.

MR. BADEN: I have two things I would add to that. One, the recent changes in technology namely in this cycle and in the last two cycles where we have gone from mainframe computers to the laptop situation has opened the process up to many more players. It used to be that the way lines were drawn in the legislative body if they was drawn by the legislative body, the leadership would know what the whole plan looked like and you as a member might know what your district looked like, but they weren't planning on sharing that plan with anybody else because it would make it difficult to pass.

The same thing with congressional districts. If they knew you had an interest in a congressional district, you might know about that, but you have an opportunity to know what the plan looked like after it had already passed.

Now with the computer situation, that simply is not possible to do, so you have a lot more players in the process inputting into the process. Does it make the quality of the gerrymandering, I hate to use that term, some people might be offended, but the degree to which you can do it, it really doesn't improve it that much because a lot of the issues here are really projections looking forward. It's a little like polling; no matter how much data you have, there is always the key final step of having a smart poller who is looking at the numbers trying to make projections in turnouts. It is the same way in the line drawing process.

The other change though, again, is 1964 and the aftermath of that which has disconnected our redistricting process from its earlier geographic roots. We are now willing to do things that people wouldn't have done there because it was thought that geographic political subdistricts, compactness, resistance to change and status quo were more important than the aftermath of the 1964 decisions and the courts have minimized the importance of those issues, and when you get rid of the importance of county lines, it does in the margin make it easier to gerrymander if you don't have to follow county lines or city lines and it opens up avenues that wouldn't have otherwise been available, the notion of cracking a census bloc, for those of you involved in this process, as small a unit of which you have numbers from the Census Bureau, people would have never even

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thought of that before, but now that you can do it and there is no sort of constraint on it, everyone does it.

MR. TAYLOR: In fact, I think some of the Justices dissenting from the reapportionment decisions said this is going to unleash more gerrymandering didn't they?

MR. BADEN: Sure. It absolutely will.

MR. TAYLOR: Is there anyone else on this side of the room? I don't see one, so over here.

MS. WHEAT: Sara Wheat (ph), *The New York Times*. In this room Friday actually Scott Keeter and Andy Kohut presented some survey data that suggests that citizens don't really mind necessarily, I might be simplifying a bit, but they see some advantages to having noncompetitiveness races. They feel like candidates will spend more time campaigning than legislating if they do have competitive races. So my first question is, is it a fair assumption to start off from the premise that competitive races are better?

And my second question is, is there a relationship between this attitude that the Pew Survey data suggests and the increasing homogeneity of people's residential choices in terms of ideology?

MR. MANN: I'm not quite sure what your second point was.

MR. WHEAT: Is there fear of conflict that people are trying to avoid, they don't want to see campaigns where candidates — and they don't want to have to live next door to people who they might not agree with.

MR. MANN: Political scientists have done research on this, and in fact, if your only measure of the health of a representational system is both the linkage between the Representative and his or her constituents or the degree of satisfaction with the constituents, then you could have all safe seats because that would achieve it. What it wouldn't achieve is what Bill Galston was talking about which is change, the capacity for a segment of the electorate upset about the state of affairs to change the team in power. It seems to me any conception of democracy and democratic accountability has to allow for that possibility or you lose any real meaningful sort of electoral control, you have simple stasis in which every district continues to be represented in the same way, voters happy, but you set up no capacity for deliberation, for legislation in the national interest, for democratic accountability.

On the second point, the public is conflict averse. The John Hibbing book "Congress as Public Enemy" makes this very clear. The public has never internalized the Madisonian system. They don't understand that we are really quite diverse in our views, that we disagree with one another. They have this notion that most important issues are consensual and that if only those people in Washington would just do that, do the right thing and get along, then everything would be happy.

So I think it reflects both their choice of residence, we are just more comfortable being around like-minded people with the same values, and their perception of how a representational body ought to work.

QUESTION: Along these lines, actually I wanted to go back to a question

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along the lines of what was asked earlier about gerrymandering today versus gerrymandering in the old days.

The American electorate is probably the most mobile in the world. I think 40 million Americans change their place of residence every year or something like that. It is a huge number. And 10-year intervals between redistricting is a long time. The question is, how stable are modern gerrymanders? What is their shelf life? Maybe this is an issue that will recede simply because of the sheer mobility of the American population.

MR. HIRSCH: In the 1990s in the five consecutive elections of 1992 through 2000, 75 percent of all congressional districts never changed hands from one party to the other. This year maybe affect the numbers for the current decade, but based on 2002 and 2004, it looked like it was going to be far more stable this decade.

If districts are not drawn in the first instance that are somewhere near the competitive point, the idea that mobility is going to knock them over into the other party's camp is dubious, I think. They have to be somewhere in the ballpark to begin with, and they just aren't right now by and large.

MR. EDSALL: Secondly, if people are moving into districts where they are finding compatible people, you are going to get reinforcement of the majority rather than a challenge to the majority.

QUESTION: (Off mike) for Europolitics. It is a related question. It is about the prison population in the United States, and perhaps it is more a legal question.

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Is there a constitutional requirement or legislation dealing with the issue of whether prisoners or ex-prisoners can vote or not? And has anyone ever raised the issue from an equal rights point of view when you look at the proportion of minority populations in U.S. prisons.

MR. BADEN: The Ninth Circuit the last time I checked. Yes, there is a lot of litigation going on right now on that issue, although so far the folks who are attempting to make the racial base claim have been unsuccessful generally with the exception of the Ninth Circuit. The notion of who has the right to vote is a state provision. There is a mixed bag relating to what I would term felon disenfranchisement.

In Vermont, as an example, you can be in prison and vote. That is the only state I am aware of right now where in fact prisoners can cast ballots. Generally across the United States you range from those who are disenfranchised for felony convictions while they are incarcerated or during the term of their sentence, to total disenfranchisement forever, to a period of, say in the State of Washington if they enforce the statute which they didn't, felons are disenfranchised unless they pay off a certain system of payments of the cost of their victims' fees, et cetera. So it is very much a mixed bag.

There is a lot of litigation going on on this issue. Most of it has been unsuccessful, some of it based on an equal protection racial-based argument. They generally have lost, but the Supreme Court has not pronounced on this that I am aware of yet decisively. It will probably soon.

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MR. HIRSCH: Yes, the Supreme Court has had cases before it about whether or not claims of racial discrimination based on felon disenfranchisement are cognizable under the Voting Rights Act. There is a split among the lower courts on that right now, and the Supreme Court has not yet taken the issue on, but I imagine will eventually.

MR. TAYLOR: Are there more questions? I don't see one. Why don't I invite any panelist who thinks that something that needs to be said and hasn't been said yet to say it?

MR. MANN: Or at least that everyone hasn't said it.

(Laughter.)

MR. BADEN: I just wanted to say the Republicans aren't dead yet. We might still actually control the House or the Senate at the end of this election, contrary to everything that has been said. There is still an election, so every now and then those elections surprise you on the polls, so I won't accept the premise we've had here that we are dead yet. We might be on life support, but I'm not sure.

MR. TAYLOR: Having opened with praise of Obama, maybe we should close with that. Thank you to all our panelists, and thank you for very good questions. I appreciate your attention.

(END OF RECORDED SEGMENT.)

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