Can Super-Committees Cure Congressional Gridlock?

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I. INTRODUCTION

“If pro is the opposite of con, what’s the opposite of progress? Congress.”

The global economic system hung in the balance. All that was necessary to save the country from a probable double-dip recession and a potential global economic meltdown was

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1 Michael J. Teter, Recusal Legislating: Congress’s Answer to Institutional Stalemate, 48 Harv. J. on Legis. 1, 1 (2011) (joking that Congress is inexplicable mired in partisan gridlock).

simple: vote to raise the United States’ debt ceiling. Raising the debt ceiling has always been a “must-pass” piece of legislation, regardless of the heightened partisan nature surrounding each vote. “In the past, raising the debt ceiling was routine. Since the 1950s, Congress has always passed it, and every President has signed it. President Reagan did it 18 times. George W. Bush

the government defaults, it

will not have enough money to pay all of its bills…. The United States will owe about $307 billion … [but] [w]ithout enough money to pay all of its bills, the government will have to decide what to do. The possibilities range from “prioritizing” some payments and paying them first to paying bills in the order in which they were received. [A] Bipartisan Policy Center analysis notes that if the government were to choose to pay the interest on its debt, Social Security benefits, Medicaid and Medicare payments, defense contractors and unemployment benefits, it could not have enough left to pay for the salaries of federal workers and members of the military, Pell grants for college, highway construction or tax refunds, among other things.

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[T]he failure to raise the debt limit could slow the nation’s recovery, Ben S. Bernanke, the chairman of the Federal Reserve, warned in a speech last month. “Failing to raise the debt limit would require the federal government to delay or renege on payments for obligations already entered into,” he said. “In particular, even a short suspension of payments on principal or interest on the Treasury’s debt obligations could cause severe disruptions in financial markets and the payments system, induce ratings downgrades of U.S. government debt, create fundamental doubts about the creditworthiness of the United States and damage the special role of the dollar and Treasury securities in global markets in the longer term. Interest rates would likely rise, slowing the recovery and, perversely, worsening the deficit problem by increasing required interest payments on the debt for what might well be a protracted period.

3 *Id.* (noting that other countries took steps to protect themselves financially from a potential U.S. default with “Switzerland’s franc strengthened to a record high against the dollar this week, as concern about the debt limit in the United States and worries about the euro, given the Greek crisis, sent investors looking for safety.”).

did it seven times.” But, after over two years of wrangling and wrestling over the specifics necessary to approve an increase in the debt ceiling, Congress again found itself at an impasse. What force could have prevented Congress from passing legislation, albeit legislation that traditionally exudes ideological overtones that it has consistently passed since 1950? The answer: hyperpolarization.

Party polarization is not new to the reality of American politics. The causes were a varied combination of new and old political, cultural, and institutional forces. Historical polarization was limited in many ways by other institutional features of American politics, primarily the existence single-member (or winner-take-all) electoral districts. Comparatively, the rise of hyperpolarization is a relatively recent phenomenon. Our current political climate has been


6 See infra Part II.

7 See e.g., Paul Frymer, Debating the Causes of Party Polarization in America, 99 CAL. L. REV. 335, 337 (2011); Hahrie Han & David W. Brady, A Delayed Return to Historical Norms: Congressional Party Polarization After the Second World War, 37 BRIT. J. POL. SCI. 505 (2007).

8 Frymer, supra note 7, at 337 (noting that “[t]his specific constitutional feature has long undermined the possibilities for ideological and partisan polarization in America because it fragments representative constituencies into local, independent districts—enabling minority groups to have undue influence—and incentivizes national party leaders to emphasize strategies that appeal to the median voter.”)

9 See SEAN THERIAULT, PARTY POLARIZATION IN CONGRESS, 7 (2008); see also Fleisher & Bond, The Shrinking Middle in the US Congress, 34 BRIT. J. POL. SCI. 429, 429 (2004).
described as “[p]olitics as partisan warfare.” This ‘politics as partisan warfare’ has emerged over the past generation. For example, the term “gridlock” is said to have entered the political lexicon after the 1980 elections and much of the pervasive impact of modern hyperpolarization can be “traced to the mid-1980s and has continued to the present.” As polarization has increased, so has the intensity of political conflict and radical separation between the two major parties.


13 Fleisher & Bond, supra note 9, at 429; see also Richard Fleisher & Jon R. Bond, Congress and the President in a Partisan Era, in POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA 1–8 (Jon R. Bond & Richard Fleisher eds., 2000).
increased, the moderate policy viewpoint has all but been lost. The parties have crystallized their views. They are internally more coherent, and externally further apart from each other, than anytime in over a century. In 1976, moderates constituted 30% of the House; by 2002, this proportion shrunk to a meager 8%.

As Professor Richard Pildes astutely demonstrates, the rise of acrimonious hyperpolarization reflects a deep structural and historical transformation in American democracy. Thus, the “reality is that the era of highly polarized, partisan politics will endure

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14 See generally ABRAMOWITZ, supra note 11, at 1–2 (arguing that the problem of polarization drives a wedge between supporters of each party in the electorate while ostracizing moderate citizens from effecting the political process); Fleisher & Bond, supra note 9, at 429–30 (“[O]bserv[ing] that parties polarized because the shrinking number of partisan non–conformists —i.e., moderate and cross-pressured members … who have policy preferences outside the ideological mainstream of their party — resulted in more ideological homogeneous parties.”).

15 These figures are based on the standard DW-Nominate score measures of votes in Congress. See ABRAMOWITZ, supra note 11, at 141. Additionally, there was a corresponding rise of partisan members. Over the same period of time, “strong conservatives” grew from 17% of House Republicans to 67%, while House Democrats labeled as “strong liberals occupied 35% of all members, and rose to more than 50%. Id. at 142.

16 Pildes, supra note 10, at 332. This deep structural and historical transformation of American politics in many respects can be tied to the Enactment of the Voting Rights Act (VRA) of 1965. Id. at 288–297. That moment began the process of realigning the parties ideologically, purifying them, and creating clearer policy positions with significantly less overlap. The apex of this historical transformation is our currently hyperpolarized political process, devoid of a functioning political center. Historically high partisan
This current historical trend towards hyperpolarization has produce serious consequences. Hyperpolarization has ground the legislative process down to near non-existence. Without legislative compromise, little can be accomplished. This has always been disagreement will be a durable feature of American politics. See generally id. at 333–34. For a deeper analysis of the historical-institutional approach to understanding hyperpolarization see infra Part II.A.

17 Id. at 333.

18 One-quarter into the 112th Congress’s two-year term, “only 14 pieces of legislation originating in the House have become laws (12 bills and two house joint resolutions). Fourteen. Compare that with the House in the 111th Congress, which claimed 254 laws (plus 11 house joint resolutions) over two years. The 110th had 308 (plus 10 house joint resolutions).” Tina Dupuy, Ideology Trumps Accomplishments As 112th Congress Pursues Futile Bills, ATLANTIC, http://www.theatlantic.com/politics/archive/2011/07/ideology-trumps-accomplishment-as-112th-congress-pursues-futile-bills/242313/. See also, SARAH BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK 1 (2003) [hereinafter BINDER, STALEMATE] (noting that as “the two parties have polarized and the political center has stretched thin over the recent past … the polarization of the parties seems to encourage deadlock.”); Kathleen Hennnessey, “Not Quite a ‘do-nothing Congress,’ but it’s close.” L.A. TIMES., available at http://articles.latimes.com/2011/jul/04/nation/la-na-do-little-congress-20110704 (arguing that the 112th Congress is paced to become one of the least productive Congresses of all time based on the number of “votes taken, bills made into laws, nominees approved. By most of those metrics, this crowd is underperforming even the ‘do-nothing Congress’ of 1948, as President Harry Truman dubbed it. The hot-temper era of President Clinton’s impeachment in the 1990s saw more bills become law.”). Even legislation that is politically positive and considered a “no-brainer” such as Student Loan Forgiveness can been blocked based upon partisan interests. See Jonathan Weisman, Republicans in the Senate Block Bill
true, and our system was designed to produce moderate policy, but hyperpolarization has made compromise exceptionally difficult. Additionally, the consequences of partisan gridlock have undermined the public’s confidence in their duly elected representatives, and thus democracy itself, and constrain our leaders from enacting necessary policy. Congress’s approval rating has plummeted to a record low and hyperpolarization has harmed the United States’ ability to borrow on credit. Hyperpolarization has reached a fever pitch during President Obama’s

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20 See e.g., Tom Donnelly, Making Popular Constitutionalism Work, 2012 WIS. L. REV. 159, 178 (2012); Pildes, supra note 7, at 326.
22 Standard and Poor’s rating agency to view any chance for series fiscal reform so pessimistic that agency downgraded the nation's credit rating from AAA to AA+. Explaining their decision, the agency wrote: “[t]he downgrade reflects our view that the effectiveness, stability, and predictability of American policymaking and political institutions have weakened at a time of ongoing fiscal and economic challenges ... (we are) pessimistic about the capacity of Congress and the Administration to be able to leverage their agreement this week into a broader fiscal consolidation plan that stabilizes the government's debt dynamics any time soon. The outlook on the long-term rating is negative.” United States of America Long-Term Rating Lowered To ‘AA+’ Due To Political Risks, Rising Debt Burden;
Administration. It has affected the confirmation hearings of federal judges, the debates over the “public option,” and eventual passage of the Patient Protection and Affordable Care Act.

The story of the Debt Ceiling Crisis of 2011 illuminates the caustic influence hyperpolarization has on effectuating policy. The recent usage of a “Super-Committee” model

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Outlook Negative, Standard & Poors, Aug. 5, 2011,


25 Alice M. Rivlin, Senior Fellow, Economic Studies, Brookings Institute, The Debt Ceiling: An Artificial Crisis, Q&A at the Brookings Institute (July 28, 2011) (“We got into the mess of the debt ceiling because in our polarized politics the newly-elected members of the House were very intent on changing the federal
to address the effects of structural, historical, and fundamental changes to the political landscape, which produced hyperpolarization, is a worthwhile mechanism given the intractable nature of modern partisan gridlock. The “Super-Committee” model works as a ‘relief valve’ to reduce the backlog and pressure of hyperpolarization. Once released, consensus is possible. The failure of the “Super-Committee” to produce an agreement on deficit reduction is not an indication of inherent shortcomings in the model. Instead, retooling the “Super-Committee” model to address the hindrances to consensus will produce a viable response to gridlock. Very few other responses to hyperpolarization have been offered in the literature, and the few that have seek to cure polarization. These approaches fail to account for the intractable and enduring nature of polarization in the political process. Thus, unlike the model proposed in this Article, each

26 See e.g., Donnelly, supra note 20, at 187–88 (articulating his view that the two-party system’s propensity for stalemate empowers the Supreme Court to render unpopular decisions that propel polarization and advocates for a ‘People’s Veto’ on the Supreme Court decisions); Richard H. Pildes, The Constitution and Political Competition, 30 NOVA L. REV. 253 (2006) (hereinafter Pildes, Constiton) (previously arguing that gerrymandering deserves significant blame for polarization), Pildes, supra note 10, at 297–325 (arguing for changes in primary elections, gerrymandering, and internal legislative rules to reduce polarization but cautioning that these changes are unlikely to occur. Professor Pildes argues that moving away from primary elections represent the best chance to have modest effect on polarization and specifically institutional changes such as empowering minority parties in the legislature could compound polarization); Chenwei Zhang, Note, Towards a More Perfect Election: Improving The Top-Two Primary for Congressional and State Races, 73 OHIO ST. L.J. 615 (2012) (advocating a top-two primary model to more accurately reflect the preferences of the median voter of a jurisdiction).
solution either is ineffective, or at worst, fosters further gridlock.

This Article proposes a model Deficit Reduction Committee: the limited circumstances meriting use, the optimal structure of the committee, and the powers granted. Addressing paramount policy considerations that have faced the paralysis of polarization, such as addressing the growing federal deficit, is the ideal moment to utilize such a Committee. Moreover, a variety of structural changes to the “Super-Committee” model will encourage cooperation, provide the necessary political cover for compromise, and facilitate necessary policymaking.

Part II of this Article summarizes the causes and consequences of hyperpolarization in Congress and concludes that other alternatives to addressing partisan gridlock are ineffective at eradicating the root cause of polarization. Part III highlights polarization in action by discussing the Debt Ceiling Crisis of 2011 that led to the creation of the “Super-Committee” and concludes that hyperpolarization is an intractable component of modern policy-making requiring a creative response to cure congressional gridlock. Part IV presents the “Super-Committee” approach, including antecedent committee structures that have successfully addressed polarization, the 2011 “Super-Committee,” and concludes the “Super-Committee” model is a means of reducing polarization. Part V presents and describes the structure of the proposed model “Deficit Reduction Committee”: its rules, membership, mandates and goals. This part discusses the major practical advantages of using this specific model Committee to address hyperpolarization by highlighting important structural changes from the 2011 “Super-Committee,” how the model Committee incorporates structures utilized by the antecedent committees to be effective, and emphasizes the model Committee’s focus on the factors that led the previous “Super-Committee” to failure.
II. THE PROBLEM OF HYPERPOLARIZATION IN THE LEGISLATIVE PROCESS

“We think both parties misread the temper as well as the intelligence of the American electorate if they think it is ‘good politics’ to stall and delay and eventually come up with nothing.”\(^{27}\)

After the historic presidential election of 2008, there was a sense of hesitant optimism that President Obama’s sweeping victory, along with robust gains in both the House and the Senate by the Democratic Party, might help to reduce partisan squabbles and produce a environment that embraced compromise.\(^{28}\) Frankly, that did not happen. While, “the 111th Congress … produced an impressive spate of major legislative accomplishments, from a stimulus package to a sweeping health-care reform bill to major financial regulatory reform … all were passed after contentious, drawn-out, partisan battles that left most Americans less happy with the outcomes.”\(^{29}\) The hope that the Obama election would be a magic elixir, curing Washington of partisan divisions, did not pass and seems unlikely to occur. Realistically, the trend is towards more polarization —not less.\(^{30}\)

Polarization has become the standard under which Congress operates. This standard has calcified differences between the parties and has made passing legislation difficult. The causes

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\(^{27}\) Binder, Stalemate, supra note 18, at 1 (citing New York Times Editorial, June 24, 1956).


\(^{30}\) See Ronald Brownstein, A Reaganite or Jacksonian Wave?, NAT. J. (Oct. 31, 2009), http://www.nationaljournal.com/columns/political-connections/a-reaganite-or-jacksonian-wave--20091031 (“[O]n every front, the chasm is widening between the parties over Washington’s proper role.”).
and consequences of polarization are complex, and to a certain degree debatable. This section will begin by addressing four specific causes of polarization: (1) partisan gerrymandering of House districts, (2) structural and historical changes to American democracy, (3) political segregation of communities, and (4) procedures as roadblocks to consensus. Next, this section will unpack the consequences of hyperpolarization by discussing the negative effect partisanship has on both the legislative process and the public’s perception of Congress. Finally, this section will conclude that while the legislative process broken by polarization, relying upon an administrative solution is untenable.

A. The Causes

Political pundits and social scientists have offered a myriad of explanation for the causes of hyperpolarization, “including partisan redistricting, income inequality, constituency change, [and] or institutional change.”

Taken together, these explanations indicate that party polarization has multiple causes. From the multitude of possible factors, I have identified four specific institutional and cultural features that, it has been argued, primarily cause the rise of hyperpolarization. I discuss the degree to which these factors can be viewed as a culprit deserving the largest share of blame and derision for the rise of extreme partisanship.

Cause 1: Partisan Gerrymandering

Gerrymandering, the process of creating congressional seats that are overwhelmingly safe for one party or the other, while affecting polarization, is not the sole perpetrator of

31 THERIAULT, supra note 9, at 43 (citations omitted).

32 Id.

hyperpolarization. The theory that partisan gerrymandering increases polarization rests upon two faulty premises. First, that the modern gerrymandering practices have significantly increased the overwhelming safe seats for both parties, thus reducing the number of marginal or hotly contested districts. Second, the officials elected from these overwhelming safe districts are consistently more polarized than members elected from marginal districts that require the member to temper their partisan views.  

Undoubtedly, there has been a marked reduction in competitive congressional races. But, the evidence of gerrymandering as a major cause of hyperpolarization is meager. A majority of the increase in safe districts, and loss of more competitive ones, can be attributed to the years between redistricting cycles. A major alternative explanation for the decline in competitive districts is the geographic sorting of like-minded voters, localities representing ‘purifications’ of partisan views.

34 Pildes, supra note 10, at 308.

35 See generally Gary C. Jacobson, Comment, in 1 RED AND BLUE NATION, supra note 23, at 284–90; PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING (Thomas E. Mann & Bruce E. Cain eds., 2006).

36 See ABRAMOWITZ, supra note 11, at 147; Jacobson, Comment, supra note 35, at 284–85 (mentioning that most of the lost competitive House districts occurred between 1994 and 2000, therefore not as a result of a recent redistricting).

37 See infra PartII.A. Cause 3. Certainly, in an overly safe election district, a Democrat of Republican who wins the primary is likely to win the general election because close to 8-\% of the district’s population is composed of like-minded members who will vote for the primary election’s victor. Thus, ideologically hyper-partisan winners of closed primaries face no pressure to mollify their beliefs in order to win a general election when the district is overwhelming safe. The district can become overwhelming safe due to geographic migrations that tend to encourage similarly minded individuals to habit near populations
This is clear when you compare the House and the Senate. If gerrymandering directly caused polarization, we would likely see disparities between the House — where districts are gerrymandered — and the Senate which requires voting from across an entire state. Yet, polarization patterns have appeared relatively similar in both houses of Congress. As others have argued, “[i]t is not obvious that [redistricting controversies] are much more than a symptom of our political maladies rather than their cause.”


Studies generally show that the House is slightly, but not significantly, more polarized than the Senate. Sean Theriault’s 2006 study of House versus Senate Polarization during the period of 1973–2004 concluded that House Republicans became 62% more polarized, Senate Republicans 51%, House Democrats 33%, and Senate Democrats 16% more polarized. Sean M. Theriault, Party Polarization in the U.S. Congress: Member Replacement and Member Adaptation, 12 PARTY POL. 483, 487 (2006); see also Peter Orszag, Too Much of a Good Thing: Why We Need Less Democracy, NEW REPUBLIC, Oct. 6, 2011, http://www.tnr.com/article/politics/magazine/94940/peter-orszag-democracy. Additionally, recent research has shown that the growth of Senate Polarization is tied to the matriculation of Senators who previously served in the House, these so-called “Gingrich Senators,” impacted by their constituencies and experiences in the House, are more partisan. See Sean M. Theriault & David W. Rohde, The Gingrich Senators and Party Polarization in the U.S. Senate, 73 J. POL. 1011 (2011).

NOLAN MCCARTY ET AL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 42 (2006); see also THERIAULT, supra note 9, at 84 (“[T]he accumulation of tests points to significant evidence that redistricting accounts for between 10 and 20 percent of party polarization in the U.S. House.”).
Finally, viewed together, there does not appear to be strong evidence that competitive districts produce more moderate or centrist elected officials. While elections have generally become much less competitive, the first proposition upon which gerrymandering-causes-polarization rests, it is clear that members elected from even competitive districts are more partisan, rather than less. Over the last generation, overall members of Congress have become increasingly polarized—regardless of party affiliation or geography. Thus, redistricting is only a piece of the polarization puzzle.

Cause 2: Structural and Historical Changes in American Democracy

Hyperpolarization reflects a deep structural and historical transformation in American after the enactment of the Voting Rights Act (VRA) of 1965. “That moment began the process of ideologically realigning the political parties and of purifying them, so that both parties are far more ideologically coherent, and differentiated from each other, than at any time in many generations.” The passage of the VRA importantly “shocked th[e] system” The VRA began

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40 See e.g., Girish J. Gulati, Revisiting the Link Between Electoral Competitiveness and Policy Extremism in the U.S. Congress, 32 AM. POL. RES. 495 (2004); Thomas E. Mann, Polarizing the House of Representatives: How Much Does Gerrymandering Matter, in RED AND BLUE NATION, supra note 23, 276 (finding that “[p]artisan polarization in the House clearly operates to a substantial extent independent of the competitiveness of congressional districts”) (emphasis added); see also Nolan M. McCarty, Keith T. Poole, & Howard Rosenthal, Does Gerrymandering Cause Polarization?, 53 AM. J. POL. SCI. 666–80 (2009).

41 ABRAMOWITZ, supra note 9, at 147.

42 Pildes, supra note 10, at 332.
what could be considered a “purification” of the parties by establishing an independent political system in the South in opposition to the Civil Rights movement, undermining the one-party monopoly that had developed from the strange-bedfellows relationship in the Democratic Party.  

It took about just over a generation, from 1965 to 1995, for the massive political restructuring engendered by the VRA to work its way through American democracy. “At some point in this dynamic, a tipping point is crossed. Conservatives who had long thought of themselves as Democrats decide that they are Republicans, and there is a cascade among others who perceive themselves in the same way.” The lingering effect of the VRA started an inexorable march towards hyperpolarization. It was not until the mid-1990s that the South became a genuine two-party system with partisan competition. Because of the purification of the parties and crystallization in ideology by citizens, hyperpolarization appears to be an

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43 Frymer, supra note 7, at 337. Professor Frymer would reframe the causal link between the VRA and developing hyperpolarization to focus broadly on the transformational period of the civil rights era. In his view, the broader forces at play during the civil rights movement reshaped the South, the nation, and the make-up of the political parties. Furthermore, many of the originating forces that propelled the civil rights movement began during the New Deal elections of the 1930s. Id. at 339. Finally, for Professor Frymer, the VRA singular effect on polarization was most acute in the early 1990s as racialized redistricting was used as a legal and political strategy and contributed to more Southern whites voting for Republican House candidates. Id.

44 Pildes, supra note 10, at 290.

45 Id. at 294.

enduring trend. Instead of entering a post-partisan stage, the purification of the parties continues, and partisanship seems to have only intensified. The transformational forces following the passage of the VRA launched a political realignment that continues to be in effect today, ensuring the enduring nature of hyperpolarization within our political system.

Cause 3: Political Segregation of Communities

Another crucial cause creating our hyperpolarized reality is that Democrats and Republicans are increasingly living in separate geographic locations throughout the country. Compared with the 1970s, “roughly 25 percent more of the American population now lives in a county that votes decisively, one way or the other, in presidential elections.” While the general focus on sorting has been the transformation of conservative southern Democrats into conservative southern Republicans, similar reclassifications occurred throughout the country. Political segregation of communities from the 1970s until now has also coincided with a number of social and economic transformations. “Political leaders were growing more extreme during this period, as Democrats and Republicans in Congress became more ideological, less moderate, and more partisan. Churches, clubs, and the economy were all going through a very similar kind of ideological reorganization.” Psychological evidence indicates that when people with similar

47 Pildes, supra note 10, at 276.

48 Orszag, supra note 38.

49 THERIAULT, supra note 9, at 48; see also Pildes, supra note 10, at 293 (“With the political parties coming to stand for more pure ideological platforms of liberalism or conservatism, voters then sorted themselves over time into party identifications and voting affiliations in ways that more closely mirrored their ideological and policy preferences than in the past.”).

50 BILL BISHOP & ROBERT G. CUSHING, supra note 37, at 13.
opinions are in proximity, their views become more radical. Thus, “[w]hen people talk to like-minded others, they tend to amplify their preexisting views, and to do so in a way that reduces their internal diversity.”

In addition, because people who share cultural and political preferences are drawn to each other, more states and counties are dominated by a single party supermajority. “Contrary to widespread belief, reducing the gerrymandering of congressional districts would make only a small dent in the problem. And unfortunately, homogeneous groups tend to reinforce and purify the views that bring them together: Sorting not only reflects polarization but also intensifies it.”

Thus, polarization is also understood as not only as a “phenomenon of opinion radicalization, but also as a process of ideological division and preference alignment.” Geographic sorting has created communities aligned in their political views in an unprecedented sense. Between 1972 and the early 2000s, the rate at which voters express liberal or conservative preferences on policy quadrupled with a marked rise in this relationship after 1992. As the voters become ideologically sorted and aligned and as constituencies of elected officials become more demographically, economically, and politically divergent, these aligned constituencies invariable elect more ideologically partisan members. Indeed, the 2010 Midterm Elections had a profound

51 CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE 8 (2009).


54 ABRAMOWITZ, supra note 11, at 44–45.

55 THERIAULT, supra note 9, at 102.
effect on congressional polarization, The 112th House is the most polarized on record; the 2010 cycle surpassed the 1994 “surge” election as the most polarization in memory,\textsuperscript{56} and the 2012 Presidential Election seemingly will continue the trend. This geographic sorting creates a one-way ratchet in polarization, ensuring hyperpolarization’s enduring quality, because as the political parties became to stand for purer ideological positions, voters sorted themselves in communities that would consistently vote to affirm the purified party viewpoint. Geographic sorting nationally has compounded hyperpolarization.

\textit{Cause 4: Procedures as Roadblocks to Consensus}

Finally, an important cause of polarization is the “the rise of congressional partisanship result[ing] mainly from the increasing restrictiveness of congressional rules, the increasingly ideological character of party leaders, and the growing ability of majority party leaders to control the congressional agenda, committee assignments, and other key resources.”\textsuperscript{57} This institutional model would seem to suggest that polarization is then an elite-driven enterprise. This is not the case. “[P]eople’s views on politics have not diverged considerably from those of their representatives. This suggests that polarization is not primarily an elite-driven phenomenon.”\textsuperscript{58} Instead, often the “realigning” of party views fell along polarized lines, specifically around the lightening rode issues of social welfare, racial, and cultural issues because these issues arouse the


\textsuperscript{58} Orszag, \textit{supra} note 38.
passions of the mass public.\textsuperscript{59} These issues tend to be easily understood, produce strong emotions, and to be associated with primordially held attitudes about society.\textsuperscript{60} Thus, it seems reasonable to assume that mass party polarization is “the result of people changing their parties instead of their attitudes.”\textsuperscript{61}

The increases in polarization only aggravated an institutional process that was intentionally designed make national legislating difficult. In the words of James Madison, to avoid the “facility and excess of law-making” that “seems to be the disease to which out governments are most liable.”\textsuperscript{62} The process of centralizing control in party leaders, which encourages party discipline and encourages polarization, began under Democratic control in the 1970s and 1980s.\textsuperscript{63} Over the last generation, changes to the formal and informal rules and practices have enabled strong party leaders to ensure strict party-line voting behavior on members. “Recent changes in the internal rules and practices of the House and Senate also may have reinforced the partisan incentives of members of Congress.”\textsuperscript{64} Thus, based upon changes to congressional rules, the increasing partisanship of party leaders, and increasing ability to ensure lockstep voting along party lines, institutional constrains both enable and exacerbate hyperpolarization.

\textsuperscript{59} Layman, \textit{supra} note 57, at 92.

\textsuperscript{60} \textit{Id.}


\textsuperscript{62} The Federalist No. 62, at 357 (James Madison) (Kathleen M. Sullivan ed., 2009).

\textsuperscript{63} See Rohde, \textit{supra} note 11 (providing a narrative of the internal rules and practices changed in the House that have provided centralized power in party leadership).

\textsuperscript{64} Pildes, \textit{supra} note 10, at 319.
B. The Consequences

The Civics 101 lesson on legislative gridlock was this: party policy disagreement forced deliberation and consensus —producing moderated policy views that retain the best ideas of both parties. Viewing legislative struggles through such Pollyannaish sentiment ignores the growing consensus that growing polarization has contributed to legislative stalemate and frustration in the policymaking process. Party polarization is “dangerous, it’s counterproductive and I think it represents an assault upon the constitutional premise of balance which has so graced the first two centuries of this republic…. [It] can lead only to stalemate.” Polarization condemns Congress to gridlock and alienates citizens from their government.

This gridlock in turn is counterproductive to fostering policy change. Studies have shown that party polarization in Congress is strongly associated with legislative gridlock and policy inaction. “In fact … ideological divergence between the parties has a stronger negative effect on government’s legislative productivity than does divided party control.” Thus, the

\[^{\text{65}}\text{See, e.g., Pildes, supra note 10, at 329 (“Only if the parties stand for clear ideologies and policies, and are sharply differentiated from each other, will voters be able to assess how government performs and to decide which party to keep in or throw out.”); Austin Ranney, The Doctrine of Responsible Party Government (1954); E.E. Schattschneider, Party Government (1942).}\]

\[^{\text{66}}\text{William E. Brock, A Recipe for Incivility, WASH. POST, June 27, 2004, at B7.}\]

\[^{\text{67}}\text{Id.}\]

\[^{\text{68}}\text{Binder, Dynamics, supra note 12, at 527.}\]

\[^{\text{69}}\text{Layman, supra note 57, at 100; see also David R. Jones, Party Polarization and Legislative Gridlock, 54 POL. RES. Q. 125, 137 (2001) (“[T]he results [of this study] show that higher party polarization increases gridlock, but that the magnitude of this increase diminishes to the extent that a party is closer to having enough seats to thwart filibusters and vetoes. Therefore, unified government is just as prone to}\]

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pronounced ideologically based policy differences that cause polarization lead to stalemate. These deleterious effects of polarization are further compounded as the percentage of moderate legislators shrinks.\textsuperscript{70}

Furthermore, the members of the respective parties have become almost twice as polarized over the past three decades. These hyperpolarized constituents have increasing cast straight ticket votes in presidential and congressional elections.\textsuperscript{71} In turn, this tendency to vote based a polarized ballot has produced more partisan candidates, especially in primary elections. Although the primary elections were created to democratize the electoral process and take candidate selection out of the hands of party bosses, the problem that has emerged over time is that primary elections tend to [be] much lower turnout events than general elections.\textsuperscript{72} With lower turnouts, primaries tend to be dominated by the most active and passionate members of the

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gridlock as divided government when parties are highly polarized and neither party has a large majority.”).
\end{quote}

\textsuperscript{70} Binder, \textit{Dynamics}, supra note 12, at 527–28 ("The ‘incredibly shrinking middle … seems to hamper substantially the ability of Congress and the president to reach agreement on the issues before them.”). The moderate voices in Congress have disappeared through two processes: replacement and conversion. "\textit{Replacement} occurs when mainstream partisans replaces a moderate or cross-pressured members who leaves Congress because of electoral defeat, running for another office, retirement or death. \textit{Conversion} occurs when a partisan non-conformist undergoes either an ideological shift in the direction of the member’s party mainstream or changes party affiliation. Fleisher & Bond, \textit{The Shrinking Middle}, supra note 10, at 445. Replacement is generally the common method of engendered more polarized candidates. \textit{Id.}

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} Pildes, \textit{supra} note 10, at 298–99.
As a result, primaries tend to produce candidates whose views are similar to the extremes of each party.\(^{73}\)

The primary consequence of a hyperpolarized political environment is that polarization erodes public approval of Congress, which in turn abrades the democratic legitimacy if the “people’s branch.”\(^{74}\) Increased polarization also is perceived to deserve blame for the perceived decline in civility in political discourse. Overall,

“party polarization has contributed to decreases in interest in politics and trust in government, to increased in alienation from politics, and ultimately to declines in party identification, political participation, and electoral turnout among American citizens… [This in turn] [p]ossibly creat[es] something of a vicious political circle, party polarization also make political moderates more likely to support and vote to achieve divided government –the electoral outcome that makes the effects of party polarization on policy making particularly pernicious.”\(^{75}\)

Paradoxically, while the public generally rebukes Congress for partisan decision-making, some citizens reward individual members for eschewing compromise. Simply put, citizens disapprove of Congress overall but support their individual representative because she has characteristics they [the constituent] likes.\(^{76}\) Individual members are thus incentivized, particularly when representing safe districts characterized by primary election competitions, to behave in a hyper-

\(^{73}\) Pildes, supra note 10, at 298–307 (articulating that this effect can be exacerbated by the legal structure a primary takes, with closed primaries tending to produce candidates whose views reside around the median party activist); see also Elizabeth Gerber & Rebecca Morton, Primary Election Systems and Representation, 14 J. L. ECON. & ORG. 304 (1998).

\(^{74}\) THERIAULT, supra note 9, at 9.

\(^{75}\) Layman, supra note 57, at 101.

partisan manner, thereby damaging the collective image of Congress. Finally, hyperpolarization is characterized by “confrontation, indecision, and deadlock.” Legislative inaction grinds the political process to a halt and prevents the passage of important, but somewhat contentious, pieces of legislation.

C. Delegating the Task to an Administrative Agency Would not Solve the Underlying Issue

With the legislative process broken, some will argue that important policy considerations, such as deficit reduction decisions, should be left to an administrative agency, that because the legislature constitutionally controls the power of the purse it is the most appropriate body to make budget decisions. This prescription rests on thin ice. Creating an administrative agency to address something like deficit reduction is vulnerable to three major criticisms: (1) delegation to administrative agencies is generally based on expertise, but Congress has the institutional capacity to craft the budget; (2) such a delegation could raise the Non-delegation doctrine from its grave; and (3) delegating the power to balance the budget reinforces Max Weber concern that there will be an “inexorable march forward of bureaucracy, and in that process of bureaucratization democracy would slowly be smothered.”

There are a number of areas in which delegation to executive agencies is not only permissible, but also necessary. Crafting the budget and paying for previously allocated funds

77 Id.

78 Pildes, supra note 10, at 326.


80 See Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 130 S.Ct. 3138, 3175 (Breyer, J. dissenting) (stating that “in a world in which we count on the Federal Government to regulate matters as
is a fundamentally legislative task. Choosing to delegate such an essentially legislative endeavor could violate implied constitutional standards, such as the non-delegation doctrine or separation of powers. Most likely, the non-delegation doctrine is too long dead to pay it much concern.\footnote{Earkin Chemerinsky, Constitutional Law: Principles and Policies 328-330 (3d ed.) (2006) (discussing the “demise” of the nondelegation doctrine); see also Michael J. Teter, Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process, 73 Ohio St. L.J. 288, (forthcoming).} After all, it’s been over seventy years since the Court has struck down a legislative act as an improper delegation.\footnote{Chemerinsky, supra note 81, at 328 (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) and Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).} But, crafting the budget is a quintessential legislative function and delegation is far more problematic when giving away core legislative functions. Finally, the concerns of delegating away core legislative tasks, which the legislature retain institutional competence to do, to a agency exacerbates the concern that government progressively seeks to take policymaking out of the hands of democratically elected representatives.\footnote{Teter, supra note 1, at 43.} Collectively, these reason support the contention that an administrative response to address hyperpolarization in deficit reduction is inadequate.

III. Polarization in Action: The Debt Ceiling Crisis of 2011

Throughout a two-year process, Congress was inexplicable unable to agree upon any legislation that represented long-term fiscal reform because it was hampered by the paralysis of complex as, say, nuclear-power production, the Court's assertion that we should simply learn to get by “without being” regulated “by experts” is, at best, unrealistic—at worst, dangerously so.”).
hyperpolarization. The waging of the “Deficit Wars” of 2009–2011, leading up to an eventual compromise and creation of the “Super-Committee” elucidates the obduracy created by partisan gridlock. This period was mired with (1) the failings of the legislative branch to pass meaningful fiscal reform legislation, and (2) the inability of the executive branch to capitalize upon congressional abdication. These failures provided the opportunity for creative solutions to gridlock and laid the foundation for utilizing the “Super-Committee” model.

A. Legislative Failure: The Conrad-Gregg Budget Commission

The clarion calls for fiscal reform are well known, but because of the highly polarized nature of our current political system, have prevented both comprehensive deficit reduction and the necessary raising of the statutory debt ceiling. Many members of both houses of Congress identified addressing the burgeoning federal debt as a main legislative priority. Simultaneously, members of Congress have consistently sought a Constitutional amendment to require a balanced federal budget. For example, the 110th Congress included two bills that would have created a balanced budget amendment to the Constitution, including, S.J. Res 24, 110th Cong. (2007) that was sponsored by Senators Lindsay Graham and Jim DeMint and the House bill, H.J. Res. 45, 110th Cong. (2007) that was sponsored by (then) Representative Kirsten Gillibrand and 31 cosponsors. Most recently, H.J. Res. 102, 112th Cong. (2012) was introduced by Representative Steve Chabot with seven cosponsors.

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84 Press Release, New Democrats, We Need a Comprehensive Solution for Deficit Reduction (July 19, 2011), http://newdemocratcoalition-crowley.house.gov/press-release/new-democrats-we-need-comprehensive-solution-deficit-reduction (“[W]e believe that our nation’s fiscal health is critical to strengthening our ability to innovate, grow and compete in the global economy. At this critical juncture, in the midst of a fragile economic recovery, we must address our nation’s debt and get on a path toward long-term deficit reduction.”). Members of Congress have consistently sought a Constitutional amendment to require a balanced federal budget. For example, the 110th Congress included two bills that would have created a balanced budget amendment to the Constitution, including, S.J. Res 24, 110th Cong. (2007) that was sponsored by Senators Lindsay Graham and Jim DeMint and the House bill, H.J. Res. 45, 110th Cong. (2007) that was sponsored by (then) Representative Kirsten Gillibrand and 31 cosponsors. Most recently, H.J. Res. 102, 112th Cong. (2012) was introduced by Representative Steve Chabot with seven cosponsors.
passage of the debt bill has provided for decades an unparalleled opportunity for political opportunism, the articulation of conservative economics values, and clarifying of partisan differences. As a focal point of political concern, and a substantive area that provides substantial opportunity to score political points, it was not surprising legislative attempts were made to craft a solution to the rising deficit. Unfortunately, the legislative measures taken were shackled by the restraints of polarization.

Beginning in December 2009, Senators Judd Gregg (R-NH) and Kent Conrad (D-ND) reached across the isle to create a bipartisan a Commission to reduce the deficit. From its inception, the task force legislation was attack on partisan grounds. Democrats were concerned that the Commission would slash entitlements; while, the members of the Republican Party were concerned that the commission would raise taxes. As partisan criticisms emerged, important members of each party started removing their support. Significantly, then Senate Minority Mitch McConnell withdrew his support. He had once been a vocal proponent of the plan but bowed to

85 Kowalacky & LeLoup, supra note 4, at 14.
86 Press Release, Senators Conrad and Gregg Introduce New Bipartisan Fiscal Task Force Legislation to Confront Nation’s Budget Crisis (December 9, 2009), http://conrad.senate.gov/pressroom/record.cfm?id=320562 (creating an eighteen member bipartisan task force to provide a legislative solution to the nation’s long-term fiscal imbalance).
88 155 CONG. REC. S5342 (daily ed. May 12, 2009) (statement of Sen. Mitch McConnell) (“We must address the issue of entitlement spending now before it is too late…. [T]he best way to address the crisis
partisan pressures to scuttle the proposal. On Jan. 26, 2010, when the Conrad-Gregg bill, originally introduced as S. 2853, came for a vote in the Senate, it fell seven votes shy of the Senate's 60-vote threshold for passage, garnering 53 yeas and 46 nays, with one senator not voting. The measure failed primarily because seven republican cosponsor’s of the Conrad-Gregg proposal switched their position and voted against it on the floor.

The vote was seen as the result of hyperpolarization at work. Senator McConnell’s “no vote” was the perfect illustration of the harmful effects partisan gridlock has upon the political process. “[I]t's impossible to avoid the conclusion that the only thing that changed since May is the political usefulness of the proposal to McConnell's partisan goals. He was happy to claim fiscal responsibility while beating up Obama for fiscal recklessness.” Instead of seizing the moment to address a cognized concern facing the nation, the legislative process ground to a halt and produced only gridlock.

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90 Fred Hiatt, Where is McConnell’s Sense of Leadership?, WASH. POST. Feb. 1, 2010, at A17 (“no single vote by any single senator could possibly illustrate everything that is wrong with Washington today. No single vote could embody the full cynicism and cowardice of our political elite at its worst, or explain by itself why problems do not get solved. But here's one that comes close.”)

91 Id.
B. Executive Failure: The Simpson-Bowles Commission

Attempting to seize upon Congress’ inability to address fiscal reform, President Obama empowered his own independent Commission to address deficit reduction, but because of the partisan nature of our current political system this Commission also failed. Following on the heels of the failed Conrad-Gregg proposal, President Obama established through executive order the Nation Commission on Fiscal Responsibility and Reform to recommend measures that would address the nation’s debt problem.\(^{92}\) Framing the need for such a Commission, President Obama astutely identified that “the politics of dealing with chronic deficits is fraught with hard choices and therefore it's treacherous to officeholders here in Washington. As a consequence, nobody has been too eager to deal with it.”\(^{93}\) Polarization had prevented Congress from reaching consensus, but the President hoped an independent body would avoid the polarizing influence of politics, indeed, it “was structured in such a way as to rise above partisanship.”\(^{94}\)

Unfortunately, the Commission itself was insufficiently structured to avoid polarization. The executive order creating the Commission required fourteen of the eighteen members to approval the policies presented to garner official support of the Commission.\(^{95}\) When the

\(^{92}\) Proclamation No. 13531, 75 Fed. Reg. 7927 (Feb. 18, 2010).


\(^{94}\) Id.

\(^{95}\) Executive Order 13531, § 5(b) (“The issuance of a final report of the Commission shall require the approval of not less than 14 of the 18 members of the Commission.”).
Commission released its final report in December 2010,\(^96\) the plan received only eleven approval votes. Specifically, three Democratic members (thus in the President’s own party) selected for the Commission voted to oppose the plan — in essence torpedoing the proposal.\(^97\)

This outcome illuminates how institutionalized polarized politics has become. The Commission’s eighteen members represented a mixture of the parties. This in turn distilled the hyperpolarization inherent in our political system, compounding the problem of polarization to the Commission. One of the President’s personal selections for the Commission failed to approve the recommendations.\(^98\) Even the President himself seemed to initially distance himself from the proposals.\(^99\) Ultimately, hyperpolarization doomed the Commission to failure, thus even executive branch actions could not produce a proposal to address deficit reduction.


\(^{99}\) A number of separate theories have been presented as to why President Obama seemed to keep an arms length with the Simpson-Bowles plan, see, e.g., Erza Klein, The Reason the White House Didn’t Embrace Simpson-Bowles, Wash. Post. Feb. 27, 2012, http://www.washingtonpost.com/blogs/ezra-klein/post/the-
C. Finally A Compromise: The Super-Committee as the Answer to the Deficit Wars

Following upon the failure of the Simpson-Bowles Commission, the President submitted his own proposal for deficit reduction to Congress, but his plan was met with partisan opposition that led up to a potential default upon the federal debt. The serious consequences of this occurrence finally led the President and Congress to compromise on the federal debt ceiling, producing the “Super-Committee” to address deficit reduction.

After two recent failures and an election that produced a much more conservative Congress, Washington was back at an impasse of the federal debt, this time with heighten partisan cries for spending cuts. A budget shutdown in April 2011 nearly shut down the government. Months of negotiations crumbled under the muggy heat of partisan summer grappling between the President and the House. First, House Majority Leader Eric Cantor obstinately objected to a grand bargain crafted by the President and Speaker John Boehner. Next, the Speaker rejected the President’s proposed “grand bargain.”

reason-the-white-house-didnt-embrace-simpson-bowles/2011/08/25/gIQAq1j2dR_blog.html?wprss=ezra-klein (arguing the decision was kabuki theatre; a political decision to detach his support which could have tainted the proposal with heightened partisanship); Josh Barro, The Real Reason Obama Wouldn’t Embrace Simpson-Bowles, FORBES, Feb. 27, 2012, http://www.forbes.com/sites/joshbarro/2012/02/27/the-real-reason-obama-wouldnt-embrace-simpson-bowles/ (arguing that the President could not support the proposal because it would have required a significant tax hike upon the middle class).

100 Thompson, supra note 87.

With a looming default on the horizon, the stark deadline compelled collaboration. The “agreement raised the debt ceiling by up to $2.4 trillion in two stages, enough to keep borrowing into 2013. The pact called for at least $2.4 trillion in spending cuts over 10 years, with $900 billion in across-the-board cuts to be enacted immediately.” This compromised also authorized the establishment of the Joint Select Committee on Deficit Reduction (“Super-Committee), which was tasked with providing recommendations and legislative language to “significantly improve the short-term and long-term fiscal imbalance of the Federal Government.”

After two years of Deficit Wars, failed actions by both the legislative and executive branches, Washington had drawn two tactical lessons: “(1) Commissions insulate responsibility; and (2) Deadlines trigger action.” The inability of the tradition legislative process compelled

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103 A growing sense of concern was palpable in the months leading up to the compromise. The consequences of failing to raise the debt ceiling were potentially catastrophic. As discussed by Sec. Timothy Geithner, choosing to forgo payment on previously authorized expenses could have devastating effects on the United State’s ability to borrow money in the future, which would “lead to sharply higher interest rates and borrowing costs, declining home values and reduced retirement savings for Americans. Default would cause a financial crisis potentially more severe than the crisis from which we are only now starting to recover.” Letter from Sec. Timothy Geithner to Senator Harry Reid, April 4, 2011, available at http://www.treasury.gov/connect/blog/Pages/letter-to-congress.aspx.


106 Thompson, supra note 87.
the compromised debt ceiling deal to rely upon the “Super-Committee” model to address deficit reduction because it can circumvent hyperpolarization.

IV. THE SUPER-COMMITTEE APPROACH

Congressional abdication of policymaking is not a new phenomenon. At the same time, Congress has often restructured itself to produce more efficient policymaking when facing a perilous crisis. Whether designed as a “blue-ribbon commission, committees, councils, boards, or task forces” these bodies are created to “achieve diverse goals: to cope with increases in the scope of complexity of legislation, forge consensus, draft bills, finesse institutional obstacles, involve non-committee and junior members on issues, coordinate strategy, and promote interparty communications.”

This section will first discuss two antecedent instances of using the “Super-Committee” model in non-normative policymaking: the Defense Authorization Amendments and Base Closure and Realignment Act (“BRAC”) (establishing a non-partisan process for military base closure decisions); and the Joint Committee on Atomic Energy (“JCAE”) (creating a joint standing committee to address policy in the dawn of the atomic age), and conclude that their specific structures enabled the circumvention of polarization.

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Next, this section will address how the 2011 “Super-Committee” was created, discussing its structure and goals. Finally, this section will discuss the reasons for why the 2011 “Super-Committee” failed and conclude that the antecedent approaches provided better mechanisms for overcoming polarization.

A. Congress has Effectively Addressed Polarization Through the Use of Ad Hoc Committees

1. Base Closure and Realignment Commission: BRAC

an unelected commission appointed by the President. The Commission was comprised of nine members, nominated by the President but requiring the advice and consent of the Senate. The law required the President to seek the advice of the Speaker of the House and the Senate Majority Leader regarding two appointments each, and the House and Senate Minority Leaders concerning one appointment respectively.

The Commission retained the sole authority to make recommendations on base closure, but the process began with the Pentagon submitting a twenty-year force structure plan, including proposals such as necessary base closures, to Congress. Upon receiving the Pentagon’s list, the Commission began the process of making its own recommendations to Congress. Once the Commission created its own set of recommendations, based upon the Pentagon’s recommendations and their own additions to the list, it was required to submit a report of its findings, conclusions, and recommendations to the President and the congressional defense

112 Defense Base Closure and Realignment Commission § 2902(a).

113 Id. §§ 2902(c), 2912(d)(3). The 2001 amendments increased the number of commission members from eight to nine. Title XXX of the National Defense Authorization Act for Fiscal Year 2002 § 2912(d)(3), 115 Stat. 1342.

114 Defense Base Closure and Realignment Commission § 2902(c)(2). The President must also designate one of the members to serve as chair of the Commission. Id. § 2902(c)(3).

115 Id. § 2912(a). As part of the most recent force structure plan for the 2005 round of base realignments and closures, the Pentagon was charged with assessing the “probable threats to the national security” and determining the military forces required to meet these threats for the period extending to 2025. Id. § 2912(a). The Pentagon was also required to submit to Congress a “comprehensive inventory of military installations world-wide.” Id. § 2912(b).

116 Id. § 2914(d)(1).
committees. If the President approved of the recommendations, he would submit a report and certification to Congress.

BRAC’s recommendations would become effective unless Congress enacts a joint resolution disapproving of the Commission’s decisions within forty-five days of the President’s submission of his report. Congress was restricted in how a joint resolution of disapproval was established. First, the exact language provided in the BRAC law must be introduced within ten days after the President submits his report, the resolution must be referred to the Committees on Armed Services in both the House and the Senate, and if either committee failed to report out the resolution to the full chamber, the resolution was automatically discharged within twenty days. Furthermore, if both chambers passed the resolution, it would still be subject to a presidential veto. A veto in this circumstance would be likely because the President submitted, with his approval, the collection of bases to be closed.

Procedurally, BRAC was structured specifically to circumvent the many procedures, norms, and rules that often frustrate and prevent the formulation of federal policy with universal benefits but particularized costs. “The very procedures that often hold up the passage of a law were reversed in this case to make it more difficult for Congress to veto the Commission's proposals.” In essence, BRAC turned the negative nature of polarization, legislative

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117 Id. §§ 2903(d)(2)(A), 2903(d)(3).
118 Id. § 2903(e)(4).
119 Id. § 2904.
120 Id. § 2908(a)-(c).
122 Teter, supra note 1, at 16.
impotence, against itself. BRAC was designed to overcome the “small group of dedicated Members of Congress,” who, “applying all of the tricks of the trade, have been very effective in being able to block any base closure.”\textsuperscript{123} By isolating the specific hindrance to policy formulation, partisan interest in saving military bases in a member’s own district, and removing the polarizing effective of Congressional decision making, BRAC was successful.

2. Joint Committee on Atomic Energy (JCAE)

The JCAE was a successful and powerful joint committee because the committee operated under a shared mission and retained a high level of technical expertise that encouraged deference from the other members. “JCAE was established with extraordinary powers, to deal with what was perceived as an extraordinary challenge facing the nation.”\textsuperscript{124} While the JCAE was standing committee of Congress, in many respects if did not resemble any other congressional committee. It served “almost [as] a unicameral legislature within the bicameral Congress.”\textsuperscript{125} The JCAE was powerful in part because it enjoyed exclusive jurisdiction and had a unique structure. Congress gave JAE exclusive jurisdiction over “all bills, resolutions, and other matters”\textsuperscript{126} relating to civilian and military aspects of nuclear power. Further, it was the only permanent joint committee with legislative power in modern times.\textsuperscript{127}

\textsuperscript{123} Id.


\textsuperscript{125} Id.

\textsuperscript{126} 42 USC §2251.

\textsuperscript{127} Few temporary Joint Committees have had legislative authority. For example, the Joint Committee on Reorganization, which was created on Dec. 29, 1920 (41 Stat. 1083) to study the organization of the
The structure of the committee was loosely defined, but did include nine members from each house with no more than five members being from one party.\textsuperscript{128} It was informal practice to choose more senior Senators and Representatives to serve on the panel. Over time, the JCAE became “associated with the names of several Members of Congress who were to be perceived as giants.”\textsuperscript{129} The members serving on JCAE are predominately well known names. “Texas Democrat and future President Lyndon B. Johnson joined the panel as a House member in 1947, and later rejoined it as a Senator. Other major names from the joint committees’ roster include … Everett M. Dirksen (R-IL), Albert A. Gore, Sr. (DTN), [and] Henry M. ‘Scoop’ Jackson (D-WA).\textsuperscript{130}

In addition to having members who were considered “giants” on the committee, other important structural factors made the committee successful. The JCAE provided Congress with only one legislative option. “The joint committee arrangement resulted in Congress being presented with less opportunity for choice among alternative ideas. Instead of a choice from two or more measures, the House and Senate were faced with one legislative product presented to them from the start of the process.”\textsuperscript{131} Furthermore, the committee made policy in a much less transparent manner than its peer committees. “There was a tendency for many important policy questions to be decided in effect, by negotiations between JCAE and the Executive rather than executive branch, was given permission to “prepare and submit bills or resolutions.”

\textsuperscript{128} Davis, \textit{supra} note 124, at 12.


\textsuperscript{130} Hewlett, \textit{supra} note 110, at 436.

\textsuperscript{131} Davis, \textit{supra} note 124, at 28.
through the processes of public discussion or congressional debate.”

Finally, when “the joint committee was substantially united, the Congress almost invariably followed its lead, even when the Administration was strongly opposed.” Thus, the shared mission and goal that united the committee members influenced the way it was received by Congress. As one of the most powerful committees in modern times, JCAE highlights the strength of crafting a unicameral body from bicameral chambers when a policy area requires collective action.

B. What Happened: The 2011 “Super-Committee” to the Rescue?

After over two years of partisan bickering, the President and Congress agreed to compromise on deficit reduction and settled upon using a “Super-Committee” model to address polarization around fiscal reform, but failed to ensure that the Joint Select Committee on Deficit Reduction (“Super-Committee) was free of a partisan “Achilles heel.” Partisanship on the issue of deficit reduction did not dissipate when the comprised was reach, instead, the decision to use a “Super-Committee” instilled more partisan rancor. Members criticized the Super-Committee

132 Id.

133 Id.

134 Venting frustration with the pending vote on the Budget Control Act of 2011, Rep. Gary Ackerman (NY-5) exclaimed that he must revert back to the basic principle not to: “‘negotiate with thugs. 157 Cong. Rec. E1494-02, 2011 WL 3299304 (daily ed. Aug. 2, 2011) (statement of Rep. Ackerman). In his mind, [i]t's been long obvious that we have no partner with whom to negotiate; only a party that started as our comrades in government, then our colleagues, who evolved into our opponents, declared themselves our enemies and now demand that we be their enablers. I refuse to play.” Id. Continuing to chastise Congressional Republicans for refusing to rise above partisan politics and work towards the common good of the American people, Rep. Ackerman did not pull any punches. In his mind, these ‘thugs’ were
as usurping their legislative function and as a “Kevorkian Commission” that delays necessary decisions.\(^\text{135}\)

In the midst of partisan objections, the Budget Control Act created the “Super-Committee.”\(^\text{136}\) The stated goal of the “Super-Committee” was to reduce the federal budget deficit by at least $1.2 trillion from 2012-2021.\(^\text{137}\) The Committee was evenly split between Democratic and Republican members, with equal representation between House and the Senate.\(^\text{138}\) The Commission was given a deadline by which to provide the full chamber of its recommendations.\(^\text{139}\) Any recommendations it made were to be voted on immediately by both chambers of Congress, with no filibusters or amendments allowed.\(^\text{140}\) If the committee could not

“in the game to destroy, not build. They would destroy the government, and especially this presidency…. It will be endless. The president has given into all of their demands, and they remain insatiable. It's time we starved the beast.” \textit{Id.}

\(^{135}\) 157 Cong. Rec. E1494-02, 2011 WL 3299304 (daily ed. Aug. 2, 2011) (statement of Rep. Ackerman (“They set-up something that is their fail safe. I call it the "Kevorkian Commission" that will deliver the poison if in November, we don't volunteer to do it ourselves.”). \textit{See also}, Press Release, Rep. Dennis Kucinich, Why I Voted Against S. 365, the Budget Control Act of 2011 (Aug. 1, 2011) (“This bill is a direct assault on representative government. The House of Representatives and the Senate consist of 435 and 100 Members, respectively. With the creation of a super-committee, the Congress has been reduced to a czardom where 7 of 12 members are given [all] the power.”).

\(^{136}\) Budget Control Act, P.L. 112-25, § 401(b)(1)

\(^{137}\) \textit{Id.} at § 401(b)(2).

\(^{138}\) \textit{Id.} at § 401(b)(3)(B)(4).

\(^{139}\) \textit{Id.} at § 401(b)(3)(B)(i).

\(^{140}\) \textit{See generally id.} at § 402.
agree on a plan, or if Congress did not enact its recommendations by Dec. 23, 2012, the result would be $1.2 trillion in automatic spending cuts — called “trigger” cuts — in January 2013, half of which would come from Pentagon programs and the other half from Entitlement programs. Medicaid and Medicare benefits would be exempt, although provider payments could be reduced.\textsuperscript{141}

Such drastic consequences were meant to act as a “nuclear option”, hopefully holding both parties’ feet to the fire in order to ensure that the process of reducing the federal deficit was not hindered by partisan politics. The thought of such draconian cuts was meant to scare the Committee into compromise. Thus, the “Super-Committee” was structured to avoid polarization by provided for expedited review of the Committee’s proposals and provided strong incentives against failing to compromise.

C. Why it Failed: Polarization Prevented Consensus

The “Super-Committee” failed for primarily because the structure of the Committee left it susceptible to gridlock, and additionally, public pressure upon Committee members ratcheted up the pressure to hold partisan lines. The “Super-Committee” itself rationalized its failure by mentioning the long and arduous the process of addressing fiscal reform. “After months of hard work and intense deliberations, we have come to the conclusion today that it will not be possible to make any bipartisan agreement available to the public before the committee’s deadline.”\textsuperscript{142} In

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Press Release, Statement from Co-Chairs of the Joint Select Committee on Deficit Reduction, Co-Chairs Announcing Committee’s Inability to Reach Bipartisan Agreement (Nov. 21, 2011), http://www.deficitreduction.gov/public/index.cfm/pressreleases?ID=fa0e02f6-2cc2-4aa6-b32a-3c7f6155806d.
\end{itemize}
\end{footnotesize}
reality, the “Super-Committee” was inevitably going to fail based upon failings in its overall structure. The “Super-Committee” failed because: (1) the structure of the Committee only distilled and intensified the hyperpolarization inherent in our political system, (2) this in turn was exacerbated by the intense media attention placed upon the Committee members, and (3) the public lost a sense of urgency in fixing the deficit.

The equal representation of each party on the “Super-Committee” reinforced the polarized nature of the system. Every Republican member of the “Super-Committee” was a signatory of Grover Norquist’s Taxpayer’s Protection Pledge. If tax increases were a component of deficit reduction, which is almost invariable a requisite decision to reduce the deficit, Republican members would bear the full brunt of partisan dissatisfaction. This pressure similarly applied to Democratic members of the Committee to not drastically cut entitlements. Thus, whether a body of 535 members or 12 members decided how to approach deficit reduction, both groups would feel pressures against compromising.

Additionally, the media attention placed upon the Committee was enormous and excruciatingly critical of each member’s motives. The media attention on each step in the


144 Orszag, supra note 38.
negotiation process only undermined the Committee member’s ability to reach consensus. For example, it was reported that Republicans had offered a plan that included tax hikes.\footnote{Gail Russell Chaddock, \textit{A Turning Point for the Debt Super Committee? Tax revenues on the Table}, CS MONITOR, Nov. 10, 2011, http://www.csmonitor.com/USA/Politics/2011/1110/A-turning-point-for-debt-super-committee-Tax-revenues-on-the-table.} The Democrats, unsatisfied with this new plan, were put on the defensive and had to air their continued opposition to the plan.\footnote{Michael McAuliff & Sam Stein, \textit{Super Committee Stalled After Democrats Reject Latest GOP ‘Spitball’ Offer on Tax Hikes}, HUFFINGTON POST., Nov. 18, 2011, http://www.huffingtonpost.com/2011/11/18/super-committee-stall-gop-spitball-offer-tax-hikes_n_1102159.html.} This forced each side to entrench and defend their positions; Republicans had to look firm on not raising taxes, and Democrats had to argue Republican concessions amount to nothing more than fake gold.\footnote{\textit{Id.}} The media obsession with each step in the negotiations stifled the ability of each side to air concessions and seek compromise. It further forced the Committee member’s to be aware that concession was perceived as “selling-out” the party. Neither of these processes helped produce a deficit reduction solution.

Finally, the public’s sense of a fierce urgency of avoiding a catastrophic default on the statutory debt that fueled the necessity to compromise in August 2011 dissipated as the “Super-Committee” worked on its proposal. The sentiment that a default would have serious and “painful implications for people in every walk of American life”\footnote{Letter from Sec. Timothy Geithner to Sen. Ron Johnson, June 29, 2011, 3, available at http://www.treasury.gov/initiatives/Documents/DLJohnsonLetter062911.pdf.} was washed away by the belief in Congressional inability to by-pass gridlock. Immediately after the creation of the
“Super-Committee,” a simple Google search produced over 6.7 million articles on the 2011 debt crisis.\(^{149}\) Instead of remaining a high priority, this sense of concern about the debt ceiling transformed into a prediction of failure. This is clear because while the failure of the Super-Committee further undermined the public’s belief in Congress’ ability to reach a compromise, failure was hardly unexpected.\(^{150}\) Very few anticipated the Committee to overcome hyperpolarization. Thus, the “Super-Committee” failed because it was not structured to overcome gridlock, which was exacerbated by heightened media attention upon the Committee members who were open to compromise, ultimately playing into the commonly accepted narrative that Congress is the opposite of progress.

V. CURING GRIDLOCK: THE MODEL “DEFICIT REDUCTION COMMITTEE” PROPOSAL

As the previous sections illustrates, our hyperpolarization system is marred with partisan gridlock, recalcitrant opposition to compromise, and appears to be an enduring component of our

\(^{149}\) Thompson, \textit{supra} note 25 (“A Google search for "2011 'budget showdown'" returns 6.7 million articles.”).

political process. Hyperpolarization harms our political process by lowering public opinion of
government, grinding the legislative process into inaction and stalemate, and resulted in
producing the ideological brinksmanship surrounding the Debt Ceiling Crisis of 2011 that
pushed our nation to the precipice of a catastrophic default upon our federal debt. While the
discussion of the causes and consequences of hyperpolarization is well documented,\textsuperscript{151} very little
scholarship has focused on addressing and overcoming the roots of hyperpolarization.

Congress has previously utilized a form of lawmaking by which it removes or rescues
itself from the aspects of the policymaking process producing stalemate.\textsuperscript{152} Previous efforts to
address congressional stalemate crafted in the form of a “Super-Committee” have had varying
degrees of success in curing gridlock. The “Super-Committee” model is only effective when the
moment is ripe, and the moment is often not ripe.\textsuperscript{153} Though these moments are rare, and thus
there are only a few examples of successful “Super-Committees”, the examples of BRAC, JAEC,
and the structure of the 2011 “Super-Committee” serves as useful examples for resolving the
stalemate now associated deficit reduction.

A. The Model “Deficit Reduction Committee” Proposal

The model “Deficit Reduction Committee” is functionally very similar to the 2011
“Super-Committee” but is improved by incorporating “best-practices” identified in the successful
antecedent Committees, and specifically addresses causes of failure that mired the 2011 “Super-
Committee.” This section will include (1) a discussion of the structure of the model “Deficit

\textsuperscript{151} See supra notes 31–78 and accompanying text.

\textsuperscript{152} Teter, supra note 1, at 3.

\textsuperscript{153} Id.
Reduction Committee,” (2) also highlighting the major differences from the 2011 “Super-Committee,” and (3) finally discussing the ideal time to use the model Committee.

1. The Structure of the Model Committee

The structure of the model “Deficit Reduction Committee” salvages the useful strategies and addresses the factors that led to the failure of the 2011 “Super-Committee” and incorporates “best-practices” from the previously successful models. The model Committee would be consist eight members, including four from each House of Congress. Each Congressional leader (i.e. Speaker of the House, Majority Leader of the Senate, and Minority Leaders) would appoint two members to serve on the Committee. The appointment process would normalize the tacit rule used by JAEC to include only members with serious political clout, and would also prioritize selecting members perceived as “moderates, mavericks, and institutionalists.”

Furthermore, Committee hearings should be specifically exempted from “Sunshine” laws and conducted totally out of the public’s eye. All Committee meetings will exclude the general public and C-SPAN should not be given access to televise any Committee hearing. This in turn would allow for the usage of “facilitated consensus” methods of conflict resolution to help encourage compromise.

The consequences of failing to propose a deficit reduction plan or the failure of the full Congress to approve of the “Deficit Reduction Committee’s” proposal would “trigger” deep, and massive, cuts to Defense spending and Entitlement programs. Specifically, failing to propose or approve the plan would accrue $3.6 Trillion dollars in cuts. Finally, if the Committee approves the proposal, it would receive expedited review before both chambers of Congress without the

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154 SARAH BINDER, ADVICE & DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY 100 (2009).
possibility of filibuster or amendment. Thus, the model “Deficit Reduction Committee” relies upon the successful structural elements of the 2011 “Super-Committee” and incorporates successful strategies from the previously successful models.

2. The Model Committee Overcomes the Inherent Flaws of the 2011 “Super-Committee” and Would Overcome Stalemate

The structure of the model “Deficit Reduction Committee” is specifically calibrated to overcome hyperpolarization. The major failing of the 2011 “Super-Committee” was its inability to reach consensus and present any proposal to the entire chamber. Thus, the recommendations differentiating the model “Deficit Reduction Committee” from the 2011 “Super-Committee” focus primarily on optimizing the opportunities for committee members to reach consensus.

An important shortcoming in the 2011 “Super-Committee” was the selection of members who would not eschew their party line. For example, each republican member of the 2011 “Super-Committee” was a signatory to Grover Norquist’s Tax Pledge. Their pledge indicated a complete lack of willingness to compromise. The model Committee relies upon the precedent of the JAEC to appoint members with individual political clout. These members are the most able to deflect partisan pressures against compromise. Members with enough political clout could withstand allegations that they betrayed their conservative base by raising taxes. In addition, seeking “moderates, mavericks, and intuitionalists” further insulates the Committee members against partisan pressures. Being shielded from partisan attack is the first step towards reaching

155 These three characteristics defined members of the “Gang of 14,” the bipartisan group of Senators who averted the fallout of the “nuclear option to end the judicial filibusters” by compromising on the usage of the delay tactic. Id.
compromise. In addition, the size of the Committee is smaller to reduce the chance for an obstinate member to “hang” the Committee. This is akin to the small size utilized by BRAC. Another shortcoming of the 2011 “Super-Committee” was the deleterious effect media over-exposure had upon the process. By restricting Committee hearings from the public and preventing televised hearings, the Committee’s dealings will be shrouded enough to provide the cover necessary for the members to reach consensus. This in turn will provide the opportunity for the Committee to use mediation and facilitation techniques.

These strategies will produce a proposal from the Committee. Thus, it is important that the proposal receives support and approve by the legislature. After producing a deficit reduction proposal, the “Deficit Reduction Committee’s” recommendations will be primed for acceptance by the full chamber. By requiring “fast-tracking” procedures using a straight up and down vote, absent filibuster, the model “Deficit Reduction Commission” turns the very “pressures, structures, and processes which usually serve to forestall lawmaking … to stop congressional interference with the law created.”  Again, this is a best practice that has been successfully employed by BRAC. Finally, the “trigger cuts” concept is an ideal lever on congressional gridlock. The “draconian” trigger cuts incentivize the committee members, and the full chamber, to accept the committee recommendations. Once up for a vote, the full chamber must choose between the Deficit Reduction Committee’s recommendations, the deep cuts required by the act, or a comprehensive deficit reduction plan crafted by either chamber offered as an alternative to the committee’s recommendations. By tripling the “trigger” cuts, the choice of rejecting the proposal becomes inconceivable. Such drastic cuts would certainly be felt by Americans from all walks of life, in essence carrying the same consequences as a potential debt default. This “threat

156 Teter, supra note 1, at 4.
of Medicare cuts (for Democrats) and defense cuts (for Republicans) may pressure Congress to agree to the super-committee’s recommendation.”

Thus, the model “Deficit Reduction Committee” structural focus is pinpointed on propelling a compromise plan is augmented but retaining highly effective tools to encourage the eventual support of the approved proposals.

3. The Model Committee is Ideally Suited to Address Highly Polarized Issues like the Federal Deficit

The model Committee would be tasked with a similarly broad goal of addressing fiscal reform, or another significantly polarized issue. As the examples of this Article show, certain policy problems are so inundated by ideological partisanship that achieving a viable solution is impossible. Still, the option of bypassing the traditional legislative process should be done hesitantly. An over-reliance on the model poses the risk of encouraging legislators to abstain from the traditional checks on policy enactment enshrined throughout of Constitutional system. Congress should employ a “Super-Committee” model only when: (1) Congress agrees on the need to act; (2) Congressional compromise is impeded by partisan gridlock or legislative stalemate; (3) Congress has undertaken numerous attempts to compromise, and (4) Congressional devolution provides encourages the use of mediation strategies.


158 Teter, supra note 1, at 4.

159 This framework modifies Professor Teter’s “recusal legislation” framework. See Teter, supra note 1, at 4. Specifically, Professor Teter argues that successful Congressional abdication requires consensus on the substance of the policy that ought to be enacted. This frames recusal legislating as a means of enacting necessary policy that would be enacted but for inaction and stalemate. This view is too limited. Instead, I
Such a framework makes the model “Deficit Reduction Committee” an appropriate proposal for both the highly contentious debate on deficit reduction as well as other issues hindered by hyperpolarization. Often, even among the most contentious issues, Congress agrees on the need to act. And, the heightened partisan nature of our contemporary political system prevents this legislation despite broad agreement on the necessity for reform. Thus, the major roadblock preventing necessary legislation is the paralyzing effect of hyperpolarization and the inability to overcome clear policy difference. This is a problem aptly suited for a mediation approach to conflict resolution. Finally, by requiring an almost exhaustive deference to the legislative process before abdicating to a “Super-Committee” model, the concerns about the undemocratic nature of congressional delegation are limited.\textsuperscript{160} Thus, if all four features are met, the model “Deficit Reduction Committee” is applicable to a myriad of policy disputes afflicted by the enduring concern of hyperpolarization.

\textsuperscript{160} A “Super-Committee” is arguably an even more anti-democratic tool than even a traditional agency delegation because conferring authority extends to a small subset of the legislature instead of to an executive branch agency. \textit{See} JERRY L. MARSHAW, GREED, CHOAS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 152–53 (1997) (arguing the because the President is democratically elected, delegation to the executive branch retains a modicum of the responsiveness).
Table 1: Comparison between the model “Deficit Reduction Committee” and the 2011 “Super-Committee

<table>
<thead>
<tr>
<th>Size</th>
<th>Consequence</th>
<th>Membership</th>
<th>Approval</th>
<th>Transparency</th>
<th>Facilitation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Old</td>
<td>The Super-Committee established by the Budget Control Act of 2011 was 12 members</td>
<td>If a plan was not presented to Congress by Nov. 23, 2011 and/or not approved by the full body of Congress, $1.2 trillion dollars in cuts across Defense and Social Services would occur</td>
<td>Consisted of members with clout, but with members who delivered powerful speeches “in defense of Democratic priorities” and every republican member as a signatory to the Taxpayer Protection Pledge</td>
<td>Recommendations must be approved by full chamber on a straight “up or down” vote, without amendment or filibuster</td>
<td>Held mixture of public and private meetings, periodically allowed audio and video coverage of these meetings, and maintain records of the hearings that were easily accessible to the public.</td>
</tr>
<tr>
<td>Deficit Reduction Committee</td>
<td>8 Members to keep an equal number between parties and houses but optimizing size</td>
<td>Triple the trigger cuts, make draconian cuts seem cuddly</td>
<td>Normalized process of including political elites with clout. Specifically, look to include “moderates, mavericks, and institutionalists.”</td>
<td>Keep the same</td>
<td>Would utilize “facilitated consensus” methods</td>
</tr>
</tbody>
</table>

B. Practical Benefits and Limitations of the Model “Deficit Reduction Committee”

The previous discussion of the model “Deficit Reduction Committee” illuminates the functional features of the proposal, outlines the differences between the failed 2011 “Super-Committee” and the model Committee, and articulated a framework for the ideal moments to use such a model Committee. This section uses the lessons learned from the failed 2011 “Super-Committee” and the successful antecedent Committees to highlight specific changes in the model Committee that enable it to overcome hyperpolarization and to articulate concerns this proposal will engender.
The goal of the model “Deficit Reduction Committee” is simple: to circumvent the malaise of partisan gridlock and stalemate. In order to overcome the dilemma of gridlock, an institutional reform that “recues” the larger body from decision-making can make great strides to reduce hyperpolarization. Because the current system is mired by partisan warfare such changes are justified, atypical times call for atypical responses.\textsuperscript{161} Previous examples of unique responses to polarization, like BRAC and the JAEC, provide historical examples of useful strategies to overcome gridlock. Indeed, even the failure of the 2011 “Super-Committee” is instructive when considering address stalemate. The “Deficit Reduction Committee” incorporates the strengths of these previous Committees and is crafted to redress their failings. The model Committee is structurally attuned to overcome polarization for three specific reasons: (1) the Committee itself is small; (2) the Committee will utilize “facilitated consensus” methods of mediation; and (3) the Committee will be substantially less transparent then its predecessor.

1. \textit{The Committee Itself is Smaller}

The Joint Select Committee on Deficit Reduction (the “Super-Committee”) consisted of twelve members —and was unable to reach a consensus. This outcome is partially attributable to the size and membership of the Committee. Thus, the model “Deficit Reduction Committee” reduces the membership of the Committee. Research into the optimal size of committee structures has consistently shown that the optimal size of committees is small, with nine members being the optimal.\textsuperscript{162} While nine may be the optimal number, providing one party an

\textsuperscript{161} Binder, Stalemate, supra note 18, at 127.

\textsuperscript{162} See generally, Wayne L. Francis, Legislative Committee Systems, Optimal Committee Size, and The Cost of Decision Making, 44 J. Pol. 882, 829–30 (1982) (finding after a comparative survey of committees in U.S. state legislatures that nine members might be an ideal size of legislative committees;
extra member on the Committee is politically infeasible because it would provide a distinct advantage to that party. The model Committee improves upon previous structures by retaining fewer members. The decision to reduce the overall membership is influenced by contemporary research into the optimal size of deliberative bodies and was also displayed as a “best-practice” by the small size of BRAC.¹⁶³

Limited membership committees represented an ideal balance between the needs to reduce both decisions costs and external costs. Decision costs refer essentially to the time and energy members devote to all aspects of bargaining to reach committee decisions, such as,

taking into account both the internal and external costs of decision making; and depending upon the differing size of legislatures and the use of subcommittees); Sawoong Kang, The Optimal Size of Committee, 9 J. ECON. RES. 217 (2004). For a comparative perspective, “The size of West European legislative committees varies from as few as seven or less to as many as 145 members…. The largest committees, consisting of up to 145 members, are found in the French Assemblee Nationale whereas committees in the Icelandic Althingi consist of seven members at the most; George E. Manners, Jr., Another Look at Group Size, Group Problem Solving, and Member Consensus, 18 ACAD. MGMT. J. 715, 723 (1975) (finding that when the quality of the decision is of primary importance the ideal group size varies between seven to twelve members, but when the degree of consensus is paramount, the ideal group size varies between three to five member).

¹⁶³ Defense Base Closure and Realignment Commission §§ 2902(c), 2912(d)(3). The 2001 amendment increased the number of commission members from eight to nine. Title XXX of the National Defense Authorization Act for Fiscal Year 2002 § 2912(d)(3), 115 Stat. 1342. The Commission odd number of members is less politically intolerable because each Commissioner is appointed by the President. Id. at § 2902.
learning about policy positions and preferences of their colleagues. In contrast, *External* costs refer to the costs attributable to making decisions that lack unanimous consent. As the size of the committee expands, a parallel increase in decision costs will be pared with a decrease in external costs. Increases in committee size increase the time needed to determine the personal policy preferences of the other members but reduces the likelihood of a purely partisan rejection and legislative effort to undermine the policies once enacted. This outcome is limited in a hyperpolarized system because members are incentivized to forgo bipartisanship. Thus, when a strong stimulus that foments coordination behavior among the committee members, the smaller the committee should be.

Reducing the Committee size is suspected to attack on the grounds that such a structure is inherently undemocratic, creating a “crazdom” of legislative interests out of the full representative body, and that a small number of the members were more able to legislate is inconsistent with our representative system. What this concern overlooks is the failings of the traditional legislative process. Gridlock causes inaction. Additionally, hyperpolarization is created by both intense disputes over policy and partisan disagreement. This foments

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164 Francis, *supra* note 162, at 823.

165 *Id.* (“These costs may appear in different forms, retaliation on other policies, rejection at a later stage, verbal harassment and delay, legal challenges in the courts, noncompliance election overturn, or simply the loss of favoritism on future committee assignments.”).

166 *Id.*

compromise. Thus an optimal committee size addressing hyperpolarization would be smaller than the previous committee in order to maximize the opportunity to compromise.

2. Utilizes Mediation Strategies to Promote Consensus

Reducing the size of the Committee only optimizes the potential for consensus, to truly foster collaborate decision-making, the model Committee relies upon mediation strategies currently used by State legislatures to overcome polarization. Addressing the country’s growing deficit or other significantly polarized issue is amenable to using “facilitated consensus” or other mediation methods.168 Because important policy conflicts are truly nonzero-sum games, a consensus outcome provides gains not only for the majority coalition but also to all participants in the debate.169 Such an outcome would be necessary to sell both the full chamber and their constituents on the deal reach by the model Committee.

168 For a defense of using alternative dispute resolution strategies in the context of public policy, see Hiro A. Aragaki, Deliberative Democracy As Dispute Resolution? Conflict, Interests, and Reasons, 24 OHIO ST. J. ON DISP. RES. 407, 477 (2009) (“[P]olitical legitimacy is not a function of reaching the most deliberatively defensible judgments in the face of profound differences and disagreements. Instead, it is measured by our success at reaching pragmatic settlements that help us contain the most destructive forms of conflict.”); Joshua A. Douglas, Election Law and Civil Discourse: The Promise of ADR, 27 OHIO ST. J. ON DISP. RESOL. 291,319 (2012) (arguing that ARD-type processes will not completely eliminate partisanship, they certainly can reduce it); But cf. Howard Bellman, A Response to ‘The Promise of ADR’, 27 OHIO ST. J. ON DISP. RESOL. 321,322 (2012) (“I would not offer mediation as a reliable antidote for pervasive incivility in American politics, especially if doing so implies that parties who enter that process may be overcome by its powers despite their own intentions and contrary behavior…. [M]ediation potential … correlates with the parties desire to realize such benefits.”)

The major failing of the 2011 “Super-Committee” was that by failing to reach any consensus or produce any proposal, it reached the same stalemate the entire chamber would have reached. The model “Deficit Reduction Committee” stresses using “facilitated consensus” methods to ensure that conflict policy proposals reach consensus. “Facilitated consensus” methods of mediation are an increasingly popular mechanism in state legislatures. At least seventeen states have created offices to promote the use of conflict resolution in their state legislatures.

This method of conflict resolution involves the use of a neutral mediation helping to bring legislators to a consensus. The inclusion of a neutral mediator usually entails: (1)

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170 BINDER, STALEMATE, supra note 18, at 125. There are a myriad of other mediation strategies that can utilized to promise consensus on a complex and highly polarized issue. Tom Melling identified three procedural strategies stemming from alternative dispute resolution theory that parties have used to overcome legislative gridlock to reach cooperative decision-making: (1) unanimity rules, (2) bargaining in private, and (3) mediation by politicians. See Tom Melling, Dispute Resolution Within Legislative Institutions, 46 STAN. L. REV. 1677, 1715 (1994). See also, LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES (1987) (advocating a “consensual approach); Brett A. Williams, Consensual Approaches to Resolving Public Policy Disputes, 2000 J. DISP. RES. 135, 135 (2000).


172 BINDER, STALEMATE, supra note 18.

173 Id. at 128.
helping the competing factions identify their basic interests; (2) helping to identify overlapping interests; and (3) discussing options for obliging those interests. Utilizing a mediator is simply a means of facilitating the legislative process, taking away the initial roadblock of entrenched views. The mediator serves as a neutral voice during the debate, instead focusing on the process of reaching consensus. State legislatures have used “facilitated consensus” methods most successfully when “communication was at an impasse, the issue was a recurring one that had gone unresolved for several sessions, [and] when the issue was a negotiable one.” 174

Hyperpolarized issues, like deficit reduction, are issues with long histories spanning numerous sessions that have reached an impasse (i.e. the failure of the old Super-Committee).

There are certain conditions that encourage cooperation. 175 The opportunity for cooperation is improved if the factions have “common goals or marked differences in priorities across issues.” 176 While the parties have differing opinions on the methods of reducing the deficit, or the specifics of other hyperpolarized issue, the goal of reducing the deficit itself is common. 177 Thus, relying upon a method of facilitating consensus and compromise ensures that the model Committee proposes a policy prescription.

174 *Id.* (countering that highly charged ideological issues, such as the debates surrounding abortion, are less likely to be negotiation issues).

175 Quirk, *supra* note 169, at 913.

176 *Id.* (arguing this explains how polarized factions were able to agree to a 1983 bill that eliminated the Social Security deficit but failed to agree to measures that to substantially reduce the federal deficit); *see also* Bellman, *supra* note 168, at 322.

177 For illustrative benefit, other contentious and political decisions utilize ADR strategies. The Federal Elections Commission (FEC) has an Alternative Dispute Resolution Program that utilizes interest-based
3. Less Transparency to Address the Dilemma of Gridlock

To ensure that members who are inherently amenable to compromise do not suffer electorally from compromising on their party’s policy line, the model “Deficit Reduction Committee” will be far less transparent than its predecessors. Electoral retribution is a legitimate concern. Every Republican member of the old Super-Committee was a signatory of Grover Norquist’s Taxpayer’s Protection Pledge.178 If tax increases were a component of deficit reduction, which is almost invariable a requisite decision to reduce the deficit179, Republican members would bear the full brunt of partisan dissatisfaction. They may face a primary challenge from a candidate avowing to never turn his back on the Pledge.

Under the model “Deficit Reduction Committee” structure, members will be insulated from the “dilemma of gridlock” through formal and informal mechanisms. Formally, the committee will hold meetings away from the public eye and C-SPAN’s request to cover hearings negotiation strategies and mediation to resolve complaints under the Federal Election Campaign Act and regulations. See Douglas, supra note 168, at 310.


179 Orszag, supra note 38.
will be denied. Informally, the members must be convinced to hesitate going to the media with different proposals.

Research into the decision-making in committee systems has found, contrary to the standard account of openness in government and public debate producing political consensus, that secretive procedures may be preferable. This is seemingly incongruent with the general move towards transparency in government. But, when describing optimal committees, studies have indicated “secretive procedures may be better than transparent one.” Describing the

180 David Stasavage, Polarization and Publicity: Rethinking the Benefits of Deliberative Democracy, 69 J. Polit. 59, 60–61 (2007) ("[C]oncluding that public decision making may do less than private decision making to reduce polarization of opinions in society").


perceived lack of transparency used by the 2011 “Super-Committee,” Rep. Elijah Cummings articulated the primary reason secrecy is important, [i]t's because they feel that they can be more effective and efficient in what they're doing. I know that they're getting phenomenal pressure.”

The protection provided by a shroud of secrecy covering the Committee’s deliberations reduces pressure and creates an environment conducive to reaching a compromise.

Still, other elements of the decision making process can limit the added benefit of secretive procedures, particularly if the outcome is one requiring a supermajority to change the status quo or reverse an action previously favored. Thus, transparency is “only beneficial if it is optimal to minimize these other effects.” The Deficit Reduction Committee is modeled to deal with an intransigent polarized issue rather than overturning the status quo. The benefits of providing political cover for the Committee members to encourage negotiation far outweighs the limited benefits of providing transparency —which is more likely to hinder the process rather than facilitate productive resolution.

This effort has one significant drawback: secret meetings will not boost the public’s view of Congress. With Congress’s public image plummeting, resorting to a “profoundly


184 Stasavage, supra note 180, at 61.

185 Id.

186 BINDER, STALEMATE, supra note 18, at 131 (“Relaxing sunshine requirements that require open legislative meetings and reducing television coverage might very well help members to reach agreement without the scrutiny of the press and lobbyists.”).

187 Horowitz, supra note 21 (“A greater percentage of Americans approve of polygamy than the United States Congress, according a set of polls.”).
conservative and anti-Democratic entity” instead of improving the public’s perception of Congress’ ability to pass important policy proposals. This concern misinterprets the rationale for using the Deficit Reduction Committee model to address partisan hyperpolarization. The model Committee is not to be used until numerous legislative attempts have been made to address the issue. Without the secretary involved in proceedings providing the political cover necessary to negotiate and the reliance upon a fraction of members of each chamber to reach a compromise is condition precedent to removing the obstacles compromising. Instead of undermining democracy, the “Deficit Reduction Committee” acts to preserve democratic legitimacy by restoring the public’s confidence that Congress can reach consensus. This increase in public support associated with bipartisanship should restore the public confidence in Congressional legislative ability.

VI. CONCLUSION

Hyperpolarization is an enduring problem in American politics. This malaise is predicated upon structural and historical changes in American democracy and reinforced by a continuing purification of our political party’s values leading to ideological polarization. It is likely that hyperpolarization is a lasting common feature of our political process. “Partisan and ideological conflict is inherent in democratic political systems, of course, and governing is often a messy process. But this level of dysfunction is not typical. And it is not going away in the near future.” If hyperpolarization is a fixture within our political process, strategies are needed to


189 Ornstein, supra note 29.
address its harmful consequences.\textsuperscript{190} “Those consequences—unified government without meaningful checks and balances, and divided government that is paralyzed—fare quite differently from those the Constitution’s designers anticipated.”\textsuperscript{191} This is our hyperpolarized reality, beset by gridlock and immobilized by intractable partisan differences. Making matters worse, very few responses to hyperpolarization have been offered in the literature, and the few that have seek to cure polarization—not to address gridlock.\textsuperscript{192} This puts the cart before the horse. Polarization will endure; so legislative strategies must strive to encourage compromise in order to pass important and necessary policy—in spite of hyperpolarization.

This Article elucidated the story of the Debt Ceiling Crisis of 2011 to illustrate the consequences of hyperpolarization. Stalemate reduced the public’s perception of government, ground the legislative process to a halt, and led the country to the brink of economic catastrophe. Attempting to address this issue, the 2011 “Super-Committee” was created as an escape hatch to polarization. While the Committee failed to produce a plan to address deficit reduction, its failure provides the framework upon which further efforts to overcome hyperpolarization should stem.

Using the “Super-Committee” model, relying upon examples of “best-practices” learned from previously successful “Super-Committee” type entities, and addressing the structural reasons the 2011 “Super-Committee” failed, this Article proposes a model “Deficit Reduction Committee” that can serve as a ‘relief valve’ to circumvent hyperpolarization and cure gridlock.

\textsuperscript{190} Pildes, \textit{supra} note 10, at 333 (“If we cannot effectively address the causes of polarization, we need to reflect more on addressing the consequences.”).

\textsuperscript{191} \textit{Id.} at 333.

\textsuperscript{192} \textit{See supra} note 26.
The model Committee should be used only to address hotly polarized issues that have faced partisan gridlock and which have exhausted the traditional methods of legislating. Practically, the Committee would act as a lever to release the pressure of hyperpolarization by recusing initial decision-making from the legislative branch. In these rare circumstances, the model Committee is specifically attuned to address hyperpolarization by encouraging the selection of Committee members with the political clout to weather attacks from their own party. Next, the Committee is smaller than previous entities to maximize the optimal size of deliberate bodies, reduces transparency of Committee meetings to provide political cover, and uses alternative dispute resolution methods to facilitate consensus building. In addition, once a proposal is agreed upon, the plan receives fast-track procedures before the full chamber of Congress and failure to approve of its proposals triggers draconian cuts equally as painful to our economy as a debt default. Motions to change or amend the proposals require significant support in both chambers. These measures ensure that if Committee compromise is achieved, gridlock itself will insulate the recommendations from partisan politics or “poison-pill” amendments.

It would be ideal if hyperpolarization were a passing trend on the political landscape with the Obama Administration ushering in an era of post-partisan compromise. That has not occurred. Our politics has become increasingly more polarized. Instead, strategies need to be developed to circumvent hyperpolarization, mitigate the harmful consequences of modern partisan gridlock, and facilitate compromise. The “Super-Committee” structure offers one viable means by which Congress, after exhausting the traditional legislative approaches, can make government work more effectively and produce necessary legislation. As Professor Richard Pildes has said, “[s]mall changes in institutional design … often do have surprisingly powerful
ramifications.” The reconceived “Super-Committee” is cognizant of the enduring nature of hyperpolarization and is crafted to instead assist in the creation of policy not fix polarization — curing gridlock but not partisanship. While not a panacea for polarization, the “Super-Committee” model is best antidote on the market.

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