

8-2014

Is Congress Now the Broken Branch?

Barbara Sinclair

University of California, Los Angeles

Follow this and additional works at: <https://dc.law.utah.edu/ulr>



Part of the [Legislation Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Sinclair, Barbara (2014) "Is Congress Now the Broken Branch?," *Utah Law Review*: Vol. 2014 : No. 4 , Article 1.

Available at: <https://dc.law.utah.edu/ulr/vol2014/iss4/1>

This Article is brought to you for free and open access by Utah Law Digital Commons. It has been accepted for inclusion in Utah Law Review by an authorized editor of Utah Law Digital Commons. For more information, please contact valeri.craige@law.utah.edu.

IS CONGRESS NOW THE BROKEN BRANCH?

Barbara Sinclair*

INTRODUCTION

The Broken Branch: How Congress is Failing America and How to Get It Back on Track by Tom Mann and Norm Ornstein was published in 2006. To be sure, criticism of Congress is a staple of American political discourse—the content varies, but the criticism is ubiquitous. Nevertheless, the volume of criticism has ramped up in the past decade or so, and the fact that two highly respected congressional scholars, Thomas Mann and Norman Ornstein—who are also Washington insiders and known to be sympathetic to Congress—have joined in the criticism needs to be taken seriously.

The most frequent criticism in the mid-2000s was that Congress was “uncivil, . . . too partisan, . . . gridlocked, . . . produce[d] earmarks—‘bridges to nowhere’—but not broad legislation in the public interest.”¹ In addition, expert commentators such as Mann and Ornstein charged that the House of Representatives had become a majority party steamroller, in which the minority was excluded from decision making and the majority flagrantly manipulated the rules for partisan advantage.² The Senate, in contrast, required sixty votes, a supermajority, to do almost anything and so contributed mightily to gridlock.³

At that time, I argued that much of this criticism of Congress was overblown—that commentators mischaracterized history when they looked back to the 1950s as some sort of congressional golden age and failed to take in account the complexity and sometimes contradictory nature of a set of functions we expect Congress to perform.⁴ Although I still believe my points to be well taken,

* © 2014 Barbara Sinclair. Distinguished Research Professor, University of California, Los Angeles. Email: sinclair@polisci.ucla.edu. Article prepared for the symposium *Governing the United States in 2020*, University of Utah, November 7–8, 2013.

¹ Barbara Sinclair, *Question: What’s Wrong with Congress? Answer: It’s a Democratic Legislature*, 89 B.U. L. REV. 387, 387 (2009); see also THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK*, 11 (2006) (“Many of the larger problems plaguing Congress, including partisan tensions, the demise of regular order and growing incivility, began ago . . .”).

² MANN, *supra* note 1, at 7.

³ Sinclair, *supra* note 1, at 387; see also MANN, *supra* note 1, at 10; Barbara Sinclair, *The “60-Vote Senate”: Strategies, Process, and Outcomes*, in U.S. SENATE EXCEPTIONALISM 241, 242, 260 (Bruce I. Oppenheimer ed., 2002) [hereinafter “60-Vote Senate”] (explaining how a sixty-vote Senate allows any “organized partisan minority [to] prevent a majority from working its will”).

⁴ Sinclair, *supra* note 1, at 388–91.

developments in the last five years leave me much less sanguine about the contemporary Congress's capacity to adequately perform its central functions.

I first lay out my arguments as to why I believed much of the mid-2000 criticism to be overly harsh; in Part I, I consider the complexity of the functions we expect Congress to perform, and in Part II, I show why any notions of the 1950s as a golden age are predicated on a misunderstanding of that era and briefly sketch out how and why Congress changed in the succeeding decades. Parts III and IV examine and analyze the current state of affairs, with Part III arguing that polarization does not inevitably lead to gridlock and Part IV contending that the roots of the current dysfunction extend beyond simple partisan polarization. I conclude in Part V by considering whether various proposed reforms can "fix" Congress or if more basic changes in the political system are necessary.

I. WHAT WE EXPECT OF CONGRESS

The criticisms of Congress almost always have some validity, and those of well-informed analysts such as Mann and Ornstein have more than a little. I simply argue that criticisms must be evaluated in the context of what we expect of Congress. What do we ask Congress to do? We ask it to pass legislation that is both responsible (i.e., effective in handling the problem at issue) and responsive to majority sentiment, and to do so through a legislative process that is deliberative and inclusive on the one hand and expeditious and decisive on the other. And we ask Congress to do this in public.

Obviously, Congress will never succeed completely. There are some inherent contradictions here and some tough trade-offs; we cannot have it all. Over its history, Congress has struck different balances, as I discuss briefly below. We can learn a good deal about the character of the trade-offs from analyzing how the chambers have changed over time.

Since we cannot have it all, should we refrain from criticism and from advocating reforms? Not at all. Some institutional arrangements are better than others in terms of fulfilling the various functions. Some people will value particular functions more than others. But we need to remember that it is because we expect so much of Congress that we will inevitably be disappointed.

II. INSTITUTIONAL ARRANGEMENTS AND THE BALANCE STRUCK

Of late, the 1950s Congress has made a comeback, being portrayed as some sort of golden age of effective bipartisan decision making. In fact, Congress in the 1950s was a body controlled by independent and often conservative committee chairs, chosen on the basis of seniority and not accountable to anyone.⁵ "True,

⁵ *Id.* at 390; *see also* RICHARD BOLLING, HOUSE OUT OF ORDER 79–80, 108–09 (1st ed. 1965) (describing a bipartisan conservative group that is generally able to command a clear majority, led by chairmen with seniority).

decision-making was largely bipartisan, with senior committee Democrats and Republicans who had forged close relationships over many years working together. The system gave members incentives and opportunities to develop expertise in their committees' area of expertise—an important asset for a body with limited expert staff.”⁶ And Congress produced some major legislation, including the bill establishing the federal highway system.⁷ But this was also a system that tended to exclude junior members—and often liberals—from meaningful participation, had no means of holding key decision makers accountable to the membership, and consequently blocked much important legislation for which majorities certainly or probably existed—for example, aid to education and major civil rights legislation.⁸

The majority Democratic Party's peculiar composition underlay this “committee government” congressional regime. The party emerged out of the New Deal realignment as a coalition of increasingly conservative southerners and increasingly liberal northerners.⁹ Bolstered by their greater seniority that resulted from their region's lack of party competition, southerners dominated congressional positions of influence and used them to block legislation their northern colleagues wanted.¹⁰ When the balance between the two factions started to shift decisively toward the north beginning with the 1958 elections, reform forces spearheaded by northern liberals began to reshape decision making in both chambers.¹¹

By the late 1970s, a very different Congress had emerged. The internal structure of both chambers had been transformed. The capacity to participate in the making of legislative decisions, which previously centered in committees, was much more widely distributed.¹² Committee chairmen could no longer dominate their committees or block legislation that party majorities wanted to consider. In both chambers, subcommittees became vehicles for policy entrepreneurs, highly active in publicizing problems and promoting policy solutions.¹³ The floor became a far more active decision-making arena in both the House and the Senate; the number of amendments offered on the floor shot up, and bills were more often

⁶ Sinclair, *supra* note 1, at 390; *see also* Bolling, *supra* note 5, at 102–06.

⁷ National Interstate and Defense Highways Act, Pub. L. No. 84-627, 70 Stat. 374 (1956); Sinclair, *supra* note 1, at 390.

⁸ *See generally* BARBARA SINCLAIR, PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING (2006) (describing how partisan competition affects policy and law making).

⁹ *Id.* at 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² BARBARA SINCLAIR, THE TRANSFORMATION OF THE U.S. SENATE 72 (1989); Lawrence C. Dodd & Bruce I. Oppenheimer, *The House in Transition*, in CONGRESS RECONSIDERED 49–50 (9th ed. 2009).

¹³ SINCLAIR, *supra* note 12, at 73–74.

altered on the floor.¹⁴ “In the Senate, extended debate, which had been infrequently used in the 1950s, became almost routine. Filibusters, actual and threatened, were employed by more members and on a broader range of issues.”¹⁵

Congress became more internally democratic and participatory; it became more open and accessible to groups without establishment ties.¹⁶ Reformers found, however, that a more open and participatory process came at a price. Thus, in the House, floor sessions were stretching on interminably, and compromises carefully crafted in now more representative committees were being picked apart on the floor.¹⁷

An increase in the Democratic Party’s ideological homogeneity and the threat from the Reagan presidency led to a further transformation in the legislative process in the House of Representatives.¹⁸ The 1980s saw the emergence in the House of strong, policy-oriented party leadership that was more involved and more decisive in organizing the party and chamber, setting the House agenda, and determining legislative outcomes.¹⁹ Most of the rule changes that augmented the leadership’s strength in a major way took place earlier, during the reform era.²⁰ These changes granted leaders considerable say over the assignment of members to committees, the power to name the members and chair of the Rules Committee, and influence over the designation of committee chairmen.²¹ What changed in the 1980s was the willingness of the Democratic membership to allow its leadership to fully exploit those new institutional powers.

House rules allow a reasonably cohesive majority to work its will; decisions are made by simple majorities, and opportunities for minorities to delay, much less block, action are exceedingly limited. The Speaker is both the presiding officer of the chamber and the leader of the majority party. When the majority party is homogeneous, its members have the incentive to grant the Speaker significant new powers and resources and to allow her to use them aggressively, because the legislation she will pass through these powers and resources is broadly supported in the party. Reciprocally, stronger leadership with more control over resources gives members a greater incentive to act as team members. By the mid-1980s, majority party members—Democrats at that point—had given their party leadership new authority, and the leadership did, in fact, employ it assertively to

¹⁴ See Sinclair, *supra* note 12, at 79–80; see generally STEVEN S. SMITH, CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND SENATE (1989) (discussing the transformation of Congress since the 1950s in the importance of floor decision making).

¹⁵ Sinclair, *supra* note 1, at 391 (citation omitted)

¹⁶ See BARBARA SINCLAIR, MAJORITY LEADERSHIP IN THE U.S. HOUSE 4–10 (1983).

¹⁷ See BARBARA SINCLAIR, LEGISLATORS, LEADERS AND LAWMAKING 48 (1995).

¹⁸ See *id.* at 44, 49.

¹⁹ See *id.* at 44.

²⁰ See *id.* at 46.

²¹ See *id.* at 71.

pass legislation the members wanted.²² With the Republican takeover of the House in the 1994 elections, the trend only accelerated.²³

The majority party leadership oversees the referral of bills to committee, determines the floor schedule, and controls the drafting of special rules that govern how bills are considered on the floor.²⁴ The leaders can bypass committees or orchestrate postcommittee adjustments to legislation. They can work with (and, if necessary, lean on) the committees to report legislation in a form acceptable to a majority of the party membership and in a timely fashion, deploy the extensive whip system to rally the votes needed to pass the legislation, and bring the bills to the floor at the most favorable time and under floor procedures that give them the best possible chance for success. Recent Republican and Democratic majority leaderships have used their powers aggressively to pass their party's legislative agendas and protect their members.²⁵ Thus, special rules for floor consideration that bar all amendments except those explicitly allowed by the Rules Committee, which is controlled by the leadership, have become routine. The House has become quite efficient at producing legislation that reflects the legislative preferences of its majority party.²⁶ To be sure, the cost is sometimes a shortchanging of deliberation and fairly frequently a lack of minority participation. The problem is that so long as the parties are as ideologically polarized as they are today, the minority will dislike most of the compromises the majority is willing to make.

Partisan polarization changed the individualist Senate of the 1970s and early 1980s as well, but not as much as it changed the House and not with the same results.²⁷ Polarization has made participation through their parties more attractive to senators than it was when the parties were more heterogeneous and the ideological distance between them less.²⁸ "Recent Senate party leaders have sought

²² See BARBARA SINCLAIR, *UNORTHODOX LAWMAKING* 142–44 (2012).

²³ See Barbara Sinclair, *The New World of U.S. Senators*, in CONGRESS RECONSIDERED 1, 10 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 10th ed. 2013) [hereinafter *The New World of U.S. Senators*]; Sinclair, *Orchestrators of Unorthodox Lawmaking: Pelosi and McConnell in the 110th Congress*, *Forum*, 2008, at 4–5 [hereinafter *Orchestrators of Unorthodox Lawmaking*].

²⁴ SINCLAIR, *supra* note 22, at 142–65; *The New World of U.S. Senators*, *supra* note 23, at 7–8; *Orchestrators of Unorthodox Lawmaking*, *supra* note 23.

²⁵ See STEVEN S. SMITH ET AL., *THE AMERICAN CONGRESS* 150 (2013) (noting that Nancy Pelosi was an aggressive majority leader of the House "who set the agenda for her party and showed a willingness to work around committee chairs who were not in sync with her agenda" and that John Boehner has followed in that tradition).

²⁶ *Id.*

²⁷ SINCLAIR, *supra* note 22, at 136–37.

²⁸ Sinclair, *supra* note 1, at 388; see also Alan I. Abramowitz, *Party Realignment, Ideological Polarization, and Voting Behavior in U.S. Senate Elections*, in U.S. SENATE EXCEPTIONALISM, *supra* note 3, at 31, 32.

to provide more channels for members to participate in and through the party.”²⁹ But Senate rules are a great deal more permissive than House rules and give individual members much greater prerogatives; consequently the Senate majority leader lacks many of the institutional tools the Speaker possesses.³⁰ Majorities simply cannot work their will in the Senate the way they can in the House. Often, it is senators acting as a party team who exploit Senate prerogatives to gain partisan advantage and, of course, it is almost always the minority party.³¹ Senate rules do exert some pressure toward bipartisan compromise and certainly give the minority more say, but they also make decisive action difficult.

The increase in both parties’ ideological homogeneity and the expanding distance between them that underlies this change in how Congress functions stems first from party realignment in the South. Between the mid-1960s and the mid-1990s, a massive change in southern voting behavior occurred. White southerners moved from voting heavily Democratic to voting heavily Republican.³² Over this period, fairly conservative southern Democrats were replaced, often when an incumbent retired, by very conservative southern Republicans in Congress.³³ As a result, the congressional Democratic Party became more liberal—by subtraction—and the congressional Republican Party more conservative—by addition.

The second part of the story is not one of arithmetic. The Republican Party outside the South moved right as well. This is a complicated story and one on which there is far from total expert consensus, so I can only list some of the major factors involved. In the mid-to-late 1970s, evangelical Christians became active in national politics. Their grievances placed them on the far right of the political spectrum, and they entered the Republican Party in droves.³⁴ In response to liberal legislative victories on issues such as environmental and consumer protection, business became more active in politics, and a number of conservative think tanks were founded or revamped.³⁵ The seeming failure of Keynesian economics in 1970s with stagflation gave an opening, and then credibility, to conservative economists and economic thinkers of the *Wall Street Journal* editorial page type.³⁶ And, of course, cultural change and, recently, the very severe Great Recession

²⁹ Sinclair, *supra* note 1, 393; *see also* Bruce I. Oppenheimer, *Let’s Begin with the Senate: An Introduction to U.S. Senate Exceptionalism*, in U.S. SENATE EXCEPTIONALISM, *supra* note 3, at 3, 10.

³⁰ Sinclair, *supra* note 23, at 2.

³¹ Sinclair, *60-Vote Senate*, *supra* note 3, at 251.

³² EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* 205–06 (2002).

³³ *Id.* at 206.

³⁴ SINCLAIR, *supra* note 8, at 37.

³⁵ *Id.* at 58–60.

³⁶ *Id.* at 41.

affected ordinary voters directly and amplified voter angst.³⁷ Add in the rise of right-wing media, and the result is highly polarized parties—not only in Congress and among activists, but also, if to a somewhat lesser extent, among voters.³⁸

III. THE CONSEQUENCES OF POLARIZATION: GRIDLOCK IS NOT INEVITABLE

“Polarization leads to policy gridlock” has been a frequent critics’ refrain.³⁹ Though this was often heard during the Bush presidency, that judgment is questionable. The Congresses of 2001 through 2006 produced some highly significant legislation; two huge tax cut bills in 2001 and 2003, the Prescription Drug/Medicare bill in 2003, and all of the post 9/11 legislation.⁴⁰ While this may have been bad legislation in the view of many, it was not the product of a gridlocked or ineffectual Congress. Furthermore, it was the ideologically homogeneous Republican Party in Congress that made many of these legislative victories possible. Republican congressional margins were narrow, and much of the legislation was controversial; yet the party contingents managed to maintain sufficiently high cohesion to prevail.⁴¹

The 111th Congress, the first of the Obama presidency, makes an even stronger case against the proposition that polarization always leads to gridlock. That Congress enacted the Patient Protection and Affordable Care Act (ACA), which provided health-care access to most Americans, fulfilled an aim of the Democratic Party since at least the 1940s and was unarguably landmark legislation.⁴² The 111th Congress also enacted the Dodd-Frank financial services regulation reform and the huge stimulus bill. It further enacted

³⁷ Barbara Sinclair, *Doing Big Things: Obama and the 111th Congress*, in *THE OBAMA PRESIDENCY: APPRAISALS AND PROSPECTS* 198, 217–19 (Bert A. Rockman et al. eds., 2012).

³⁸ See generally ALAN I. ABRAMOWITZ, *THE POLARIZED PUBLIC? WHY AMERICAN GOVERNMENT IS SO DYSFUNCTIONAL* (2012) (discussing the polarization of the parties in Congress).

³⁹ See, e.g., THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM XIII–XIV* 31–81 (2012).

⁴⁰ Sinclair, *supra* note 1, at 389; see also Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 594 (2002); Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001); Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

⁴¹ Sinclair, *supra* note 1, at 388–89, 393–94.

⁴² Sinclair, *supra* note 37, at 201–03, 207–17.

other significant legislation . . . including the Lilly Ledbetter Fair Pay Act, a major change in the student loan program to free up more money for loans; food safety and child nutrition bills; a credit card regulation bill; legislation to allow the FDA to regulate tobacco; an expansion of the hate crimes covered by federal law; and repeal of “Don’t Ask Don’t Tell.”⁴³

The Democratic Party’s considerable ideological homogeneity and strong and skillful congressional party leadership, made possible by the Democratic membership’s basic like-mindedness, were keys to this legislative success.⁴⁴ Both were necessary. The House and Senate leaders had to use all their procedural powers and persuasive abilities to pass what was often highly controversial legislation. The parties are more homogeneous than they were in the past, but they are by no means monolithic, and the impact of complex, far-reaching legislation such as health care reform was likely to vary by region, by urban versus rural, and by income, with the result that divergent interests and views within the Democratic congressional membership were inevitable. Yet leaders do have more carrots and sticks, and being in the good graces of one’s party colleagues is important to advancement within the chamber (and to a pleasant Capitol Hill life as well), and that requires sticking with the team whenever possible.⁴⁵

But no matter how skillful, democratic leaders cannot lead if they lack reasonably willing followers. The constituency-based increase in ideological homogeneity was key to producing those reasonably willing followers.⁴⁶ The deals that leaders made, and the side deals they agreed to, would simply not have been sufficient had those members not been desirous of “getting to yes.”

For all of the 111th Congress’s accomplishments, ominous signs were evident. Despite a big popular-vote win for the new President following an issue-based campaign and large congressional seat margins, passing major bills was very difficult for the Democratic majorities in Congress.⁴⁷ To be sure, passing nonincremental legislation, such as the ACA, is never easy. Recent pundits’ stories of how President Johnson smoothly and painlessly engineered passage of Great Society legislation are nine-tenths myth. Nevertheless, in most of the post-World War II period, circumstances similar to those of the 2008 elections did buy new presidents and their agendas some limited deference from the opposition party

⁴³ Barbara Sinclair, *The President and the Congressional Party Leadership in a Hyperpartisan Era*, in *RIVALRY FOR POWER: PRESIDENTIAL-CONGRESSIONAL RELATIONS* 113, 118–19 (James A. Thurber ed., 5th ed. 2013).

⁴⁴ *Id.* at 117, 124.

⁴⁵ *Id.* at 114–15.

⁴⁶ *Id.* at 120–21, 124.

⁴⁷ *Id.* at 121, 207–13.

based on a sense that the people had spoken (and, implicitly, that the people might be angry and take it out on members who did not pay attention to their message).⁴⁸

In the 111th Congress, in contrast, minority Republicans opposed the Democrats' agenda from the beginning.⁴⁹ We now know that key members met on inauguration eve to plot a strategy of all-out opposition.⁵⁰ President Obama's attempts at conciliation—for example, his inclusion of significant tax cuts in the stimulus bill—were rebuffed.⁵¹ No House Republican voted for the stimulus bill when it came to the House floor on January 28, 2009, during a period of economic crisis and only a few days after President Obama's presidential inauguration.⁵² Again, no House Republican voted for the conference report.⁵³ On the four most important House votes on the ACA (passage, motion to concur in Senate amendment on the initial bill, and passage and motion to concur on the reconciliation bill), there was a total of one GOP vote in favor: Joseph Cao, elected from a majority-black Louisiana district over an incumbent enmeshed in a serious corruption scandal, voted for passage of the initial bill, but only after its passage was certain.⁵⁴ On the Dodd-Frank financial regulatory reform bill, no House Republicans voted for passage, while only three voted for the conference report.⁵⁵

Because House rules allow a reasonably cohesive majority to prevail, Republican votes were unnecessary. The situation was, however, different in the Senate. Since the mid-1990s, the Senate minority party has aggressively used its prerogative of extended debate to block or extract concessions from the majority. On average, 51% of major measures subject to a filibuster confronted some sort of filibuster-related problem from the mid-1990s through the mid-2000s; in the newly Democratic-controlled 110th Congress (2007–2008), the figure was 76%.⁵⁶ With the parties more ideologically homogeneous, the Senate minority leader found it easier to keep his members unified in opposition to majority party attempts to impose cloture; seldom was it possible during these years for the majority party to

⁴⁸ Barbara Sinclair, *The President as Legislative Leader*, in *THE CLINTON LEGACY* (Colin Cambell & Bert A. Rockman eds., 1999).

⁴⁹ ROBERT DRAPER, *DO NOT ASK WHAT GOOD WE DO: INSIDE THE U.S. HOUSE OF REPRESENTATIVES*, at xviii–xix (2012).

⁵⁰ *Id.* at xv.

⁵¹ Barbara Sinclair, *Partisan Polarization and Congressional Policy Making* (2013) (unpublished manuscript) (on file with the author) (paper prepared for delivery at the Conference on Congress and Policy Making in the 21st Century at the University of Virginia, June 3–4, 2013).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 153* (4th ed. 2012).

entice enough minority party senators to vote for cloture to get to sixty without striking a deal with and so making concessions to the minority leader.⁵⁷

During the 111th Congress, Democrats had fifty-eight to sixty members.⁵⁸ When the Democratic Caucus in the Senate was below sixty, Republican filibusters were a constant problem; even when they had sixty, Republicans were still able to use Senate rules to delay.⁵⁹ Republicans forced Democrats to amass a supermajority of sixty votes on the stimulus bill.⁶⁰ Negotiations and concessions brought three Republicans on board (winning cloture, passage, and the conference report with their votes); all other Republicans opposed the bill.⁶¹ Passing the ACA required Democrats to win five cloture votes, and they were not able to get to a passage vote until Christmas Eve morning.⁶² Democrats had to hold every one of their sixty members because Republicans provided no votes at any stage of the process.⁶³ On Dodd-Frank, Senate Republican opposition was almost as monolithic. When Republican Scott Brown was elected to Senator Ted Kennedy's seat, Democratic membership fell under sixty, which forced Senate Democrats to make concessions to pick up GOP votes in order to cut off the GOP filibuster.⁶⁴ On the third try, cloture was invoked with three Republicans joining all the Democrats; on passage, one more Republican voted in favor. Only the initial three voted for cloture on the conference report and for passing the report.⁶⁵

In the 111th Congress, Democrats confronted filibuster-related problems on 73% of major measures and on a number of nominations as well.⁶⁶ In a number of these cases, getting the sixty votes to impose cloture required significant concessions—to more conservative Democrats on ACA and to Republicans on the

⁵⁷ *Id.* at 164.

⁵⁸ David Cramer, *Achieving Fairness in United States Senate Succession Laws: A Uniform Proposal*, 35 SETON HALL LEGIS. J. 443, 452 (2011); Sinclair, *supra* note 43, at 117.

⁵⁹ Sinclair, *supra* note 43, at 125.

⁶⁰ Sinclair *supra* note 37, at 204–05; Sinclair, *supra* note 43, at 120.

⁶¹ Sinclair, *supra* note 37, at 205; Sinclair, *supra* note 43, at 120–21.

⁶² Sinclair, *supra* note 37, at 212; Sinclair, *supra* note 43, at 122.

⁶³ See Sinclair, *supra* note 37, at 212; see also Sinclair, *supra* note 43, at 122 (“Reid, however, knew that he would need sixty votes just to get the bill to the floor and then sixty again to get a vote on final passage; at this point, he also knew that getting any Republican votes would be exceedingly difficult.”).

⁶⁴ See Sinclair, *supra* note 37, at 214–15; see Sinclair, *supra* note 43, at 123–24 (“The loss of the sixtieth vote in the Senate made the normal ways of resolving differences between the chambers politically impossible because any compromise product would be filibusterable in the Senate.”).

⁶⁵ See Michael Greenberger, *Closing Wall Street's Commodity and Swaps Betting Parlors: Legal Remedies to Combat Needlessly Gambling Up the Price of Crude Oil Beyond What Market Fundamentals Dictate*, 81 GEO. WASH. L. REV. 707, 734 (2013) (discussing the legislative history of Dodd-Frank).

⁶⁶ See Sinclair, *supra* note 43, at 125 (“Over 70 percent of major legislation encountered a filibuster-related problem in the Senate.”).

stimulus and Dodd-Frank.⁶⁷ Congress failed to enact some important legislation despite the Democrats commanding a majority—most notably the Dream Act.⁶⁸ Yet, because the Democrats had such a large majority, the minority party was not able to kill the signature bills or gut them via concessions. Clearly, however, an unusually large Senate majority was essential.

IV. THE CONSEQUENCES OF POLARIZATION: “PERILS OF PAULINE” POLICY MAKING

Republicans made huge gains in the 2010 elections, reducing the Democratic Senate membership to fifty-four (counting the two independents) and taking control of the House by a significant margin.⁶⁹ Under those circumstances, one would expect increased conflict between the President and the opposition party and little to no chance that further nonincremental liberal legislation would pass. In fact, lawmaking in the 112th (2011–2012) and continuing into the 113th Congress proved to be a sequence of “perils of Pauline” episodes centering on “must pass” legislation. In the serial that everyone knows and no one still alive has seen, poor Pauline is tied to the railroad track with a locomotive bearing down on her; there is a last-second reprieve, but it is only temporary.⁷⁰ Of late, the U.S. government has played the role of Pauline, while a government shutdown, a threatened default on the debt, and the fiscal cliff have played the locomotive; so far, there has usually—but not always—been a last-minute reprieve, but there are no guarantees.⁷¹

Much of Congress’s legislative workload is discretionary; thousands of bills are introduced, but Congress need not even consider, much less pass, most of them. And this is true of much major legislation and legislation at the top of the President’s agenda, as well as of the myriad minor bills. Some legislation is, however, considered “must pass”; when a consensus or near consensus exists that doing nothing is too costly to bear, the legislation is perceived as such.⁷² Some catastrophic change in the environment—the near collapse of the financial system in the wake of the failure of Lehman Brothers, for example—may create that perception.⁷³ More frequently, this perception results from legislation that expires at a certain date and leaves not the status quo ante, but some much less preferred

⁶⁷ See Sinclair, *supra* note 23, at 16.

⁶⁸ See Elisha Barron, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 625 (2011) (discussing the congressional support of the Dream Act); Sinclair, *supra* note 43, at 125.

⁶⁹ See Sinclair, *supra* note 37, at 218; Sinclair, *supra* note 43, at 125.

⁷⁰ Sinclair, *supra* note 43, at 133, 135.

⁷¹ Sinclair, *supra* note 43, at 135 (“Characteristic of policy making in the 112th Congress, a fiscal cliff deal was reached and approved by Congress only hours before the deadlines . . .”).

⁷² See Sinclair, *supra* note 23, at 20.

⁷³ *Id.*

and possibly catastrophic outcome—default on the national debt or no funding for most government functions, most prominently.⁷⁴

Since Republicans took back control of the House of Representatives, they have used their power to block such must-pass legislation to attempt to extract policy concessions from the Democratic-controlled Senate and the President.⁷⁵ “Hard-ball” bargaining is nothing new to Washington, but the Republicans’ stance has gone well beyond the norm; their demands have been extraordinary, and they have seemingly been quite willing to carry out their threats—by shutting the government down or refusing to raise the debt ceiling, defaulting on the government debt.⁷⁶

The 112th Congress’s first order of must-do business was passing appropriations to fund the government’s operations. A filibuster had prevented Democrats from passing an omnibus appropriations bill during the lame-duck session of the 111th in December 2010.⁷⁷ After passing two short-term continuing (appropriations) resolutions (CRs), each passed on the eve of the drop-dead date, Congress reached an agreement on a bill for the remainder of the fiscal year two hours before the shutdown deadline at midnight on April 8, 2011.⁷⁸ All three of the bills included spending cuts.⁷⁹ For government departments and agencies, such uncertainty over funding makes efficient policy implementation almost impossible.

The next big showdown was over raising the debt ceiling. This too went down to the wire and threatened the still-shaky recovery. After months-long efforts to reach a “grand bargain,” followed by frantic negotiations on a smaller deal, Congress reached a Rube Goldberg-esque agreement.⁸⁰ The Budget Control Act (BCA) passed on August 1, 2011, just before the August 2 deadline.⁸¹ Among other provisions, the BCA included an automatic across-the-board spending cut (sequestration) if the Joint Select Committee on Deficit Reduction set up by the Act could not reach a deal on equivalent cuts.⁸²

The final enormous showdown over must-pass legislation of the 112th Congress was over the “fiscal cliff.”⁸³ The President Bush tax cuts were set to expire at the end of 2012, and the big sequestration spending cuts were scheduled to go into effect on January 1, 2013.⁸⁴ After many false starts, both chambers

⁷⁴ *Id.*

⁷⁵ Sinclair, *supra* note 43, at 127.

⁷⁶ See Sinclair, *supra* note 43, at 127 (noting that it seemed “difficult” for the “grid-locked Congress [to] pass some legislation simply to keep the government functioning”).

⁷⁷ Sinclair, *supra* note 43, at 127.

⁷⁸ *Id.* at 128.

⁷⁹ *Id.*

⁸⁰ *Id.* at 130–32.

⁸¹ Budget Control Act, Pub. L. No. 112-25, 125 Stat. 240 (2011).

⁸² *Id.* § 365; Sinclair, *supra* note 43 at 132–33.

⁸³ Sinclair, *supra* note 43, at 134–35.

⁸⁴ See *id.*

reached an agreement on New Year's Eve and approved it the next day.⁸⁵ It made permanent the Bush tax cuts for everyone with an income below \$400,000; increased some other taxes on the well-off; and extended benefits for the long-term unemployed.⁸⁶ The BCA also postponed the sequester until March 1, 2013.⁸⁷ However, Congress could reach no deal to replace the sequestration cuts, so cuts designed to be so "stupid" that members would have to come to an agreement to replace them went into effect.

The 113th Congress thus carried on where the 112th had left off. In fall 2013, House Republicans attempted to force Democrats to defund the ACA by attaching the provision to a continuing resolution funding the government.⁸⁸ When that failed, they shut down the government.⁸⁹ They also threatened to force the U.S. government into default by refusing to raise the debt ceiling.⁹⁰

How do we explain this pattern of "perils of Pauline" decision making? Divided control of the branches or chambers is far from rare in recent American history, and although it generally results in heightened conflict and particularly so since 1980, periods of divided control have not been characterized by this sort of extreme brinkmanship.⁹¹ To be sure, the Republican-controlled 104th Congress (1995–1996) shut down the government in its attempt to force its agenda on President Clinton.⁹² Yet even this Congress, which was the first totally Republican-controlled Congress in fifty years and was led by the aggressive Newt Gingrich, never seriously threatened to allow the U.S. government to default on its debt if it did not get its way.⁹³

The parties are even more polarized now than they were in the mid-1990s.⁹⁴ And Republicans interpreted their big 2010 electoral victory as giving them a mandate (as did Republicans after their even more significant 1994 victory). The American people, the new Republican majority believed, had charged them with cutting spending drastically and reversing the policies of the Obama

⁸⁵ *Id.* at 135 ("[A] fiscal cliff deal was reached and approved by Congress hours before the deadline . . .").

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Jonathan Weisman & Jeremy W. Peters, *U.S. Government Is Shutting Down In Fiscal Impasse*, N.Y. TIMES, Oct. 1, 2013, A1.

⁹⁰ *Id.*

⁹¹ See SINCLAIR, *supra* note 22, at 158.

⁹² Kara Brandeisky, *How Clinton Handles His Debt Ceiling Crisis Better than Obama*, NEW REPUBLIC (Aug. 2, 2011), <http://www.newrepublic.com/article/politics/93043/obama-clinton-debt-ceiling-crisis>.

⁹³ *Id.* ("The most crucial difference between Clinton's debt limit battle and the current crisis is that, in 1996, the Republicans were bluffing. No Republican seriously considered defaulting on the debt to be a viable option.")

⁹⁴ See Thad Hall, *Is Boehner's GOP More Conservative than Gingrich's?*, MISCHIEF OF FACTIONS (Oct. 14, 2013, 11:49 AM), <http://mischiefsoffaction.blogspot.com/2013/10/is-boehners-gop-more-conservative-than.html>.

administration. The greater the distance between the parties' policy preferences, the more difficult it is to reach a deal because an outcome that is better for both parties than no deal is less likely to exist. And a membership that perceives itself to be mandated tends to believe it is less obliged to meet its opponents halfway. Yet President Obama's reelection and the Democrats' good showing in the 2012 congressional elections did little to change the approach of congressional Republicans. And the legislation at issue is not discretionary; the result of not acting is much more drastic than simply a continuation of the status quo.

From the beginning of the 112th Congress, Speaker John Boehner and Senate Minority Leader Mitch McConnell quite clearly believed that legislation funding the government, and even more so that raising the debt limit, must pass; were they to fail, the Republican Party's reputation would be damaged.⁹⁵ But a significant number of their members, especially in the House, did not. The Republican Party's median policy preference has migrated far to the right, and many of its members are suspicious of mainstream expertise and take their cues from different sources. Consequently, a significant number really do not believe that allowing must-pass measures to lapse will lead to results as catastrophic as the former consensus posited; basically they believe that going over the cliff is "no big deal."⁹⁶

The change in the Republican Party is often attributed to the Tea Party, but in fact, it precedes the Tea Party's emergence. Some of the "Gingrich" freshmen in the 104th Congress exhibited the tendency to rely on Rush Limbaugh as the source of their facts,⁹⁷ showering him with awards and making him an honorary member of the class.⁹⁸ However, the initial House vote on passage of the legislation establishing TARP (Troubled Asset Relief Program authorized in the Emergency Economic Stabilization Act of 2008) provides a starker example and a preview of the problems that change in the Republican Party would create for congressional legislating.⁹⁹ With a financial crisis looming menacingly after the failure of Lehman Brothers and the near failure of huge insurer AIG (American International Group), Secretary of the Treasury Henry Paulson on September 19, 2008 called on Congress to pass rescue legislation immediately. A small bicameral and bipartisan group of congressional (party and committee) leaders and President Bush's White House negotiators hammered out a plan in closed-door meetings over the course of

⁹⁵ See Sinclair, *supra* note 43, at 115, 127–28, 130.

⁹⁶ *Id.* at 130; Brad Plumer, *Many Republicans Think Hitting the Debt Ceiling Is No Big Deal. They're Wrong*, WASH. POST WONKBLOG (Oct. 8, 2013, 11:54 AM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/08/its-terrifying-what-some-top-republicans-believe-about-the-debt-ceiling/?tid=pm_business_pop.

⁹⁷ See Robin Toner, *The 1994 Campaign: Broadcaster; Election Jitters in Limbaughland*, N.Y. TIMES, Nov. 3, 1995, at A29 ("Republicans in Congress and in the campaign committees conduct 'mass faxing' operations to radio talk show hosts around the country, with talking points and updates on floor action on Capitol Hill.")

⁹⁸ Katharine Q. Seelye, *Republicans Get a Pep Talk From Rush Limbaugh*, N.Y. TIMES, Dec. 12, 1994, at A16.

⁹⁹ SINCLAIR, *supra* note 22, at 104.

a week, and a bipartisan vote seemed likely.¹⁰⁰ “This is a national crisis,” said House Republican Leader John Boehner at one of the early meetings. “We need to rise above politics and show the American people we can work together.”¹⁰¹ Speaker Boehner soon discovered that many of his members disagreed. Spearheaded by the Republican Study Group, made up of the most hard-line conservatives, many House Republicans vociferously objected to bailing out the big banks.¹⁰² On September 29, 2008, when the bill came to a House vote, it failed 205 to 228, with Republicans voting against it 133 to 65.¹⁰³

Why did House Republicans vote so heavily against the bill? Certainly electoral considerations factored into the no votes. Public opinion was running overwhelmingly against bailing out greedy banks seen as responsible for the financial mess; phone calls and e-mail messages to Capitol Hill were running strongly against the bill—particularly before the stock market dive after the first vote.¹⁰⁴ Additionally, even though the President was a member of their party, a majority of Republicans felt no responsibility for governing now that they were in the minority.¹⁰⁵ But probably more important, many Republicans did not believe catastrophe loomed; they largely dismissed the conclusions of a Republican Secretary of the Treasury, a Republican-appointed chairman of the Federal Reserve who was also a distinguished academic economist, and numerous other highly credentialed experts.¹⁰⁶ That such expertise would carry so little weight was a sign of how far the Republican Party had moved outside what had been the broad mainstream of American politics.

From 2011 forward, Speaker Boehner has led a party that includes a considerable contingent of members who see the world in a different way from the mainstream consensus. They mostly come from safe Republican districts, where the activists and many of the ordinary voters they see reinforce their views.¹⁰⁷ The size of the group is difficult to establish because its members differ from most other House Republicans not in policy preferences as much as in perceptions of the consequences of going over the various cliffs. It is the basic ideological agreement as much as fears of a primary challenge that kept more pragmatic Republicans from turning on their kamikaze brethren.¹⁰⁸

¹⁰⁰ *Id.*; see also ROBERT G. KAISER, ACT OF CONGRESS: HOW AMERICA’S ESSENTIAL INSTITUTION WORKS, AND HOW IT DOESN’T 12–14 (2013).

¹⁰¹ KAISER, *supra* note 100, at 12.

¹⁰² *Id.* at 13.

¹⁰³ *Id.* at 14.

¹⁰⁴ See Adriel Bettelheim, *Stormy Seas for Financial Rescue*, CQ WEEKLY, Sept. 26, 2008, at 2590–95; Benton Ives & Alan K. Ota, *Financial Rescue Becomes Law*, CQ WEEKLY, Oct. 6, 2008, at 2692–99.

¹⁰⁵ Bettelheim, *supra* note 104; Ives & Ota, *supra* note 104.

¹⁰⁶ Bettelheim, *supra* note 104; Ives & Ota, *supra* note 104.

¹⁰⁷ Bettelheim, *supra* note 104; Ives & Ota, *supra* note 104.

¹⁰⁸ Bettelheim, *supra* note 104; Ives & Ota, *supra* note 104.

Until fall 2013, Speaker Boehner managed to pass bills funding the government and raising the debt ceiling before a government shutdown or default occurred.¹⁰⁹ Yet, despite significant concessions from President Obama, especially in 2011, getting the votes was often difficult, and a considerable number of House Republicans refused to vote for the deals struck. Thus, in spring 2011, fifty-nine House Republicans refused to vote for the omnibus appropriations bill that cut \$39 billion because they were convinced their leaders had compromised too much.¹¹⁰ On the deal that averted default in August 2011, sixty-six House Republicans voted nay.¹¹¹ The “fiscal cliff” compromise reached on New Year’s Eve could not even command a majority of House Republicans; they opposed it 151 to 85.¹¹² Majority Leader Eric Cantor and Majority Whip Kevin McCarthy voted no.¹¹³ Raising taxes on anyone in any guise was anathema to most Republicans. To pass the measure, Speaker Boehner had to violate the so-called “Hastert rule” by bringing to the floor a bill that more than a majority of his membership opposed.¹¹⁴ Early in the 113th Congress, he would do so again on the Hurricane Sandy relief bill and on the reauthorization of the Violence Against Women Act.¹¹⁵ In all three cases, Speaker Boehner allowed the Senate to push him into bringing the measure to the floor because the alternative would have severely damaged the party’s reputation.

Not only did Speaker Boehner end up having to rely on Democrats in a number of these cases, to get Republican votes, he also regularly had to promise a harder line in the future. For example, on the initial omnibus appropriations bill, he promised that the party would hang tougher on the upcoming debt ceiling fight.¹¹⁶ After the fiscal cliff deal, he promised the hardliners a budget that balanced in ten years without any new tax revenue, no new taxes under any circumstances, and no compromise on sequestration.¹¹⁷ Speaker Boehner’s recurrent promises only make his future path more difficult.

Those chickens came home to roost in fall 2013. Prodded by Senator Ted Cruz and far-right outside groups like Heritage Action, a significant number of House Republicans insisted on tying funding the government to defunding Obamacare.¹¹⁸ Republican leaders and many senior Republicans, especially in the

¹⁰⁹ Sinclair, *supra* note 43, at 128–29.

¹¹⁰ *Id.* at 130–35.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Memorandum from John Boehner, House Speaker, to House Republicans (Mar. 28, 2013), available at <http://www.washingtonpost.com/blogs/post-politics/wp/2013/03/28/in-message-to-house-republicans-boehner-quotes-lincoln/>.

¹¹⁸ See Steven T. Dennis & Matt Fuller, *Talk of Shutdown Blooms, Despite Boehner’s Best-Laid Plans*, ROLL CALL (Sept. 18, 2013, 6:14 PM), <http://www.rollcall.com/news/talk>

Senate, knew this was a foolish strategy with no chance of success, but Speaker Boehner went along. The alternative was splitting his membership and perhaps losing his speakership. The results comprised a government shutdown that lasted sixteen days; a big hit to the Republican Party's reputation; and, in the end, a deal brokered by Senate Majority Leader Harry Reid and Minority Leader McConnell to reopen the government and raise the debt ceiling that represented almost total capitulation by Republicans.¹¹⁹ House Republicans voted against the deal 144 to 87.¹²⁰

V. WHAT TO DO

Accurate diagnosis is essential to the prescription of effective remedies. When we say partisan polarization is the problem, we need to remember there are two components of polarization—political parties that are internally ideologically homogeneous *and* that are far apart in their policy preferences. That the parties have become more ideologically homogeneous than the incoherent parties of the 1950s is not by itself a problem. Would we really be better off with parties that lacked a core internal like-mindedness? The basic problem is that the distance between the parties has increased so greatly, which is the result of the extreme rightward movement of the Republican Party. This is not a matter of both sides being equally to blame. When Democrats took back the House majority in 2006, they battled President George W. Bush on innumerable issues on which they held very different policy preferences than he did.¹²¹ But on a stimulus bill in early 2007 and crucially on TARP, they cooperated.¹²² Although it would have been popular with their base, they did not attempt to defund the Iraq war nor threaten a debt default.

So if the extreme rightward shift of the Republican Party is the problem, is there anything we can do about it—either directly or to mitigate its effects? The shift in the Republican Party is not primarily a Washington phenomenon nor is it only about political gamesmanship, as the media sometimes portray it.¹²³ As I

_of_shutdown_blooms_despite_boehners_best_laid_plans-227726-1.html#disqus_thread; Matt Fuller, *Cruz-led Conservatives Put Boehner in Double Bind*, ROLL CALL (Oct. 15, 2013, 6:43 PM), <http://blogs.rollcall.com/218/cruz-led-conservatives-put-boehner-in-a-double-bind/>; Niels Lesniewski, *Ted Cruz Likens Government Shutdown to Extended Weekend (Updated)*, ROLL CALL (July 30, 2013, 2:44 PM), <http://blogs.rollcall.com/wgdb/ted-cruz-likens-government-shutdown-to-extended-weekend/>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ SINCLAIR, *supra* note 22, at 1.

¹²² *Id.*

¹²³ Marc Fisher, *GOP Platform Through the Years Shows Party's Shift From Moderate to Conservative*, WASH. POST (Aug. 28, 2012), http://www.washingtonpost.com/politics/gop-platform-through-the-years-shows-partys-shift-from-moderate-to-conservative/2012/08/28/09094512-ed70-11e1-b09d-07d971dee30a_story.html.

alluded to earlier, it is constituency based; over the past several decades, Republican activists and, to a lesser extent, ordinary Republican identifiers have moved right. Republican activists in particular have become much more conservative and disinclined to compromise. Further, because they always vote, often give their money and their time, and make sure their elected officials know their views, they have outside influence.¹²⁴ Members of Congress tend to come from the activist base and share their views.¹²⁵

Given these facts, tinkering with congressional procedure is at best likely to mitigate the problem. Furthermore, we must always remember that “reforms” can have unanticipated effects that may create new problems. As the House has been the most visible stumbling block to compromise since Republicans retook control, it is tempting to focus on House procedure. Should we make it easier for a non-party-based majority to prevail? That is, should we loosen the majority party leadership’s control over the floor agenda? In fact, there are procedures for bypassing leadership control, but they require that at least some majority party members be willing to cross their leadership, and in this era of high partisan polarization, few members have been willing to do so.¹²⁶ They may fear some retribution from the leadership, but they fear opprobrium from their colleagues and the consequent harm to their within-House ambitions even more. In addition, we need to remember that, given the size of the House of Representatives, organization and leadership are essential if the body is to function. Transient majorities cannot provide that and, of course, cannot be held accountable.

Before the 2010 elections, reform efforts were focused on Senate procedure and specifically on extended debate. As I discussed earlier, Senate minorities have increasingly forced the majority to muster sixty votes to pass anything.¹²⁷ Even the big Democratic majority in 2009–2010 struggled under this impediment and had it not been for Democrats actually having sixty members for a part of the Congress, the ACA would not have passed. Though the House fracas has overshadowed these problems in the media, minority filibusters have continued to present problems for the majority in subsequent years.

Senators are leery of changing filibuster rules, majority party senators realize they could soon be in the minority, current rules give all senators considerable power, and many senior members look back on a time when the prerogative was used with restraint. Such wariness has prevented most significant reforms.¹²⁸

¹²⁴ SINCLAIR, *supra* note 8, at 29–30.

¹²⁵ *Id.*

¹²⁶ See Matt Fuller, *Republican Centrists Plot Revolt to End Government Shutdown*, ROLL CALL (Oct. 2, 2013, 6:12 PM), <http://blogs.rollcall.com/218/gop-moderates-plot-revolt-to-end-to-government-shutdown/> (highlighting an example of a “revolt” that never materialized).

¹²⁷ Sinclair, *60-Vote Senate*, *supra* note 3, at 260.

¹²⁸ Niels Lesniewski & Humberto Sanchez, “Nuclear Option” Averted Again, CQ WEEKLY, July 22, 2013, at 1276–77; Niels Lesniewski, *Senate Opens With Filibuster Changes*, CQ WEEKLY, Jan. 28, 2013, at 216. *But see* Adriel Bettelheim, *Senate Goes*

Despite the hankering after a former—and mostly mythical—golden age, the “filibuster everything” genie cannot be put back into the bottle. When Democrats were in the minority from 1995 through 2006, they too used extended debate to block and extract concessions.¹²⁹ Although they did not do so to the same extent that Republicans have since, it is hard to believe that were they to lose the Senate, they would not do so. To make it possible for a unified government to function, extended debate rules will have to be significantly reformed. Yet even major filibuster reform is no panacea for the problems besetting our system.

Ironically, earmarks have reappeared on the reform agenda. A number of commentators have argued that Speaker Boehner’s inability to keep his membership united is the result of his lack of earmarks to entice members to stick with him.¹³⁰ Of course, not long ago, earmarks were seen as the problem rather than the solution. And, in fact, earmarks did get out of hand in the 1990s; they exploded in number, and members spent far too much of their time seeking these particularized benefits for their districts.¹³¹ When the ban-earmarks fever gripped Capitol Hill, political scientists warned of unanticipated consequences.¹³² Members of Congress need to be able to explain their votes to their constituents.¹³³ A local project obtained via an earmark can sometimes provide a member with an explanation for supporting a necessary but unpopular bill.

Still, the notion that Speaker Boehner would be able to get the anticompromising right wing members of his party to follow his lead if he could promise them earmarks is laughable. For most of these members, earmarks are a badge of shame—remember the “Cornhusker Kickback” or the attacks on McConnell for the dam and lock project authorization in the CR passed in October 2013?¹³⁴ These members’ strongest supporters would pillory them for “bringing home the bacon.”

Nuclear, CQ WEEKLY, Dec. 2, 2013, at 1984 (showing a contrary example where Democrats did reduce the number of votes required to impose cloture on most presidential nominations to a simple majority).

¹²⁹ *The New World of U.S. Senators*, *supra* note 23, at 10.

¹³⁰ See Michael J. Teter, *Congressional Gridlock’s Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1144.

¹³¹ *Earmark Reform: Understanding the Obligation of Funds Transparency Act: Hearing: Hearing Before the Fed. Fin. Mgmt., Info., and Int’l Sec. Subcomm.*, 109th Cong. 18–19 (2006) (statement of Scott Lilly, Senior Fellow, Ctr. for Am. Progress).

¹³² Sinclair, *supra* note 1, at 395.

¹³³ See JOHN W. KINGDON, CONGRESSMEN’S VOTING DECISIONS 46–53 (Alvin A. Abbott ed., 1973); RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS 136–68 (2d prtng. 1978).

¹³⁴ Kevin Robillard, *Conservatives Accuse Mitch McConnell of “Kentucky Kickback” in Spending Deal*, POLITICO (Oct. 16, 2013, 8:04 PM), <http://www.politico.com/story/2013/10/conservatives-mitch-mcconnell-kentucky-kickback-spending-deal-98428.html>.

Proposals purporting to attack the problem of polarization directly have focused on electoral arrangements.¹³⁵ Because most House Republicans and almost all members of the hardest-right contingent represent districts that are safe Republican, the process of redistricting has been singled out as a culprit; gerrymandering is the problem, many pundits have claimed, and nonpartisan redistricting is the solution.¹³⁶ Primary rules have also been singled out; closed primaries in which only registered partisans can vote leads to the most extreme partisans choosing the party's candidate, and in a safe district, the extremist chosen will win the general election, the argument goes.¹³⁷ The solutions advocated include open primaries or even the top-two system in which candidates of all parties run in one primary, and the top two regardless of party move on to the general election.¹³⁸ Because less partisan and more moderate voters will participate in choosing candidates, the result will be more moderate candidates elected.

The problem is that multiple studies by political scientists have invalidated almost every chain in these arguments. Neither redistricting in general nor gerrymandering specifically accounts for the increase in partisan polarization.¹³⁹ Certainly gerrymandering does occur but, because of the requirement of effectively equal district size and the fact that redistricting is done state by state, it does not even yield the "winner" many extra seats in the House on a national basis.¹⁴⁰ When Democrats won more popular votes but Republicans won the majority of seats in the House in the 2012 elections, many commentators attributed it to gerrymandering.¹⁴¹ Yet, in fact, the geographical distribution of Democratic and

¹³⁵ See Noah Litton, *The Road to Better Redistricting: Empirical Analysis and State-Based Reforms to Counter Partisan Gerrymandering*, 73 OHIO ST. L.J. 839, 839 (2012).

¹³⁶ Michael B. Marois, *California Nonpartisan Districting Ousts Life Incumbents*, BLOOMBERG.COM (March 19, 2013), <http://www.bloomberg.com/news/2013-03-20/california-nonpolitical-districting-ousts-life-incumbents.html> (noting that the "only real solution" to polarization is independent redistricting committees).

¹³⁷ John Sides, *Reforming Primary Elections Won't Make Government Better*, WASH. POST (Oct. 18, 2013, 2:52 PM), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/10/18/reforming-primary-elections-wont-make-government-better/>.

¹³⁸ Thad Kousser et al., *Reform and Representation: Assessing California's Top-Two Primary and Redistricting Commission* 13, 16 (Aug. 27, 2013) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2260083.

¹³⁹ Doug Ahler et al., *Can California's New Primary Reduce Polarization? Maybe Not*, THE MONKEY CAGE (March 27, 2013), <http://themonkeycage.org/2013/03/27/can-california-new-primary-reduce-polarization-maybe-not/>; see also Kousser et al., *supra* note 138, at 28, 32.

¹⁴⁰ See John Sides & Eric McGhee, *Redistricting Didn't Win Republicans the House*, WASH. POST WONKBLOG (Feb. 17, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/17/redistricting-didnt-win-republicans-the-house/> (demonstrating the notable complexity of redistricting and its unclear effect on elections).

¹⁴¹ See generally Kousser et al., *supra* note 138 (answering the question, "Can electoral reforms such as an independent redistricting commission . . . lead to better legislative representation?").

Republican identifiers was the primary cause.¹⁴² Because Democratic identifiers tend to live in dense urban areas, in which most of their neighbors are also Democrats, redistricting blind to partisanship will produce many districts that are 80% or more Democratic.¹⁴³ Republicans are more likely to live in suburban, exurban, and rural areas where pockets of Democrats exist, so a blind redistricting will produce few 80% plus Republican districts.¹⁴⁴ The geographical distribution of identifiers is important because it speaks to the extent to which nonpartisan redistricting methods can in fact produce competitive districts. A few more competitive districts may be attainable, but unless community interest and compactness are ignored, the increase is likely to be marginal.

Studies show that primary reforms do not fare any better as solutions for the problem of polarization. A recent comprehensive study of state legislatures found that allowing independents to vote in primaries does not result in the election of more moderate legislators.¹⁴⁵ Although the California top-two system is relatively new, studies using different methods strongly suggest it is not producing more moderate legislators.¹⁴⁶ As Thad Kousser and his coauthors conclude, “we show that California’s electoral experiments did not bring their hoped-for effects. If anything, legislators strayed further from their district’s average voter in 2012.”¹⁴⁷

If, as I have argued, the roots of polarization and of congressional Republicans’ sharp rightward movement are constituency based, the dearth of simple fixes is hardly surprising. Spurred on by their like-minded activists, the most extreme members not only hold policy preferences far outside what was until recently the mainstream, but they also largely reject mainstream expertise and take their cues from different sources; consequently, many believe that shutting down the government or even defaulting on the government debt is “no big deal.” Such members are hardly likely to be deterred by the defeat Republicans suffered in fall 2013 or even by the threat to their more electorally marginal colleagues, and so at least potentially to their House majority. More pragmatic House Republicans who do see danger to their party in continuing this course may, however, be more willing to assert themselves. A relatively small proportion of the pragmatists are from marginal districts; many more are concerned about the party’s reputation and the fate of their narrow House majority. Whether Speaker Boehner, under pressure from the pragmatists, will be willing to abandon his far right and so be forced to

¹⁴² See *id.* at 8 (noting that where people live is an important indicator of their politics).

¹⁴³ See *id.* (“Existing research has shown that place in which people live . . . is an important predictor of their core political attitudes” (citations omitted)).

¹⁴⁴ See *id.* (making the general proposition that geography is an indicator of political leanings).

¹⁴⁵ Eric McGhee et al., *A Primary Cause of Partisanship? Nomination Systems and Legislator Ideology* 26 (May 1, 2013) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1674091.

¹⁴⁶ Ahler et al., *supra* note 139; Kousser et al, *supra* note 138, at 32.

¹⁴⁷ Kousser et al., *supra* note 138, at abstract.

rely on Democratic votes is an open question. He did so for the budget deal worked out by Budget Committee Chairs Paul Ryan and Patty Murray in December 2013 and on the resulting omnibus appropriations bill funding the government for the remainder of fiscal year 2014. But how long will his right flank allow him to do so? Over sixty House Republicans voted against each of these measures.¹⁴⁸ Of course, even the hardest-right Republicans have constituents who, although very conservative, do not approve of their brinkmanship. If these nonactivists could be mobilized, they might well change their members' behavior. Unfortunately, how to convert ordinary folks into activists is a riddle that has not been solved.

Furthermore, even if the House majority retreats from "perils of Pauline" decision making, a pattern of productive bipartisan compromise on legislation aimed at the major problems facing the country is unlikely to follow. Hard-line and pragmatic Republicans are split on strategy and tactics, not on policy preferences. The pragmatists are not moderates and, in terms of policy preferences, Democrats and Republicans are very far apart. Extreme partisan polarization meshes very badly with the U.S. system of government when the branches or chambers are not unified.

¹⁴⁸ Emma Dumain, *House Passes \$1.1 Trillion Omnibus*, ROLL CALL (Jan. 15, 2014, 4:23 PM), <http://blogs.rollcall.com/218/house-passes-1-1-trillion-omnibus-prewrite/> (noting that lawmakers voted 359–67 on the bill); Paul Kane, *Boehner Attacks Tea Party Groups as House Approves Budget Deal*, WASH. POST (Dec. 12, 2013), http://www.washingtonpost.com/politics/boehner-escalates-feud-with-conservative-groups-as-vote-on-budget-bill-looms/2013/12/12/3986871c-634f-11e3-91b3-f2bb96304e34_story.html.