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The “Regular Order”: A Perspective

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The “Regular Order”: A Perspective

Many contemporary lawmakers urge a return to “regular order” lawmaking. In general, the regular order refers to a traditional, committee-centered process of lawmaking, very much in evidence during most of the 20th century. Today, Congress has evolved to become largely a party-centered institution. Committees remain important, but they are less important than previously as “gatekeepers” to the floor. This development represents a fundamental “then and now” change in the power dynamics of Capitol Hill.

Regular order is generally viewed as a systematic, step-by-step law making process that emphasizes the role of committees: bill introduction and referral to committee; the conduct of committee hearings, markups, and reports on legislation; House and Senate floor consideration of committee-reported measures; and the creation of conference committees to resolve bicameral differences. Many Members and commentators view this sequential pattern as the ideal or “best practices” way to craft the nation’s laws. Regular order is a lawmaking process that promotes transparency, deliberation, and the wide participation of Members in policy formulation. Significant deviations from the textbook model of legislating—common in this party-centric period—might be called “irregular,” “nontraditional,” “unorthodox,” or “unconventional” law making. The well-known “Schoolhouse Rock” model of legislating still occurs, but its prominence has declined compared with the rise of newer, party leadership-directed processes.

Regular or irregular procedures can successfully be used to translate ideas into laws. They can be employed to enact partisan or bipartisan legislation. Neither is necessarily better than the other as a lawmaking approach. Much depends on contextual (e.g., divided or unified government) and situational factors (e.g., statutory deadlines or national crises). Sometimes, regular order is observed for problem-solving; on other occasions, nontraditional lawmaking may be the best or only way to pass legislation. Or a combination of both could be employed to achieve legislative objectives.

In short, the regular order can be an elusive and changeable concept. People may legitimately contend that there is no such thing as *the* regular order for enacting laws. No legislative process or procedure can ensure that outcome. Moreover, the term is defined neither by the Constitution nor in House and Senate rules. As the U.S. Constitution (Article I, Section 5) authoritatively states, “Each House may determine the Rules of its Proceedings.” Accordingly, lawmakers who muster sufficient support and votes have wide freedom to create or change parliamentary rules, precedents, and norms.

Since at least the mid-1990s, if not earlier (e.g., the early 1980s), nontraditional lawmaking has surged in both legislative chambers. Why? In large measure because a sharper, combative form of partisan and ideological polarization gradually emerged both in Congress and the country. Regular order legislating through bipartisan compromise is often harder to achieve in a polarized legislative environment.

Today, major policy and political disagreements between the two parties are at times so wide and deep on many issues that gridlock can be the result. In response, the majority party may turn to nontraditional processes, in whole or in part, to advance the legislative agenda. Nontraditional processes have their own virtues, such as expedition over deliberation. An oft-used measure of partisan polarization is “party unity”: roll call votes on which a majority of Democrats and a majority of Republicans align against each other. Annually, *CQ Weekly* compiles, analyzes, and publishes the party unity scores. For example, partisan voting in 2019 for the Democratic-controlled House was a record-setting 95% compared with 58% of partisan votes in 1972; for the GOP-controlled Senate, 94% of Republicans in 2019 voted with their party against the other party; in 1972, 62% of votes split Republicans from Democrats.

Congress functions on occasion like a parliamentary or quasi-parliamentary body, where the majority party governs and the minority party opposes. With party unity high, each side might employ any number of procedural

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tactics either to prevail or to stymie action. Parliamentary warfare is often the result, with each party turning to nontraditional procedures (bypassing committee consideration, for example, or limiting floor amendments) to achieve desired results. The centrality of partisan polarization has provoked an adaptive response common to both chambers: set aside regular order legislating as circumstances warrant and employ unorthodox procedures to advance party and policy priorities.

In brief, the broad purposes of this report are to provide various perspectives on the meaning of the “regular order”; to discuss an array of nontraditional procedures that characterize decisionmaking in the contemporary House and Senate; to examine the forces and factors that gave rise to party polarization and wider use of nonconventional legislating; and, lastly, to offer summary observations about the transformation of contemporary lawmaking.

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Introduction

A return to “regular order” lawmaking is a refrain heard quite often in the contemporary House and Senate. When Paul Ryan, R-WI, was Speaker of the House (2016-2018), as an example, he stated that he was working with the two leaders of the Senate to get back to the “regular order.”¹ The term implies a systematic lawmaking process rooted in a committee structure that promotes deliberation, negotiation, and compromise, as well as amendment opportunities for lawmakers of both parties. At its core, remarked a Senator, regular order meant “that everybody gets to participate in the process” through committee activities and floor amendments.² Today, rank-and-file lawmakers have fewer opportunities “to participate in the deliberative work of Capitol Hill” because party leaders have “come to dominate the [policymaking] process.”³

A Capitol Hill veteran with decades of legislative service suggested that the regular order is a *political Rorschach*: a term interpreted differently at different times by “different folks with differing agendas.”⁴ It is a phrase subject to variable interpretations. Various analysts and legislative experts have stated that there is no such thing as “the” regular order. Even so, **Figure 1** provides a general sketch of what many refer to as “regular order” legislating. However, legislative rules and procedure are not inert devices; they change regularly to reflect and respond to new developments and challenges.

During much of the 20th century (roughly 1915-1970), there was general understanding of the “regular order.” Deviations from the sequential, step-by-step approach provide the baseline for examining how legislating has changed from that earlier era to now.⁵ Regular lawmaking during this earlier period was mainly a collegial, decentralized, and largely bipartisan system of “committee government.” Customary procedures largely governed lawmaking. Committee chairs, selected by a rigid seniority system, dominated legislative policymaking. “House and Senate leadership,” wrote two congressional scholars, “resembled confederations of committee chairs, each acting as sovereign over a committee’s jurisdiction.”⁶ An informal but influential conservative coalition of Republicans and southern Democrats supported the chairs’ views and preferences on many issues (e.g., opposition to civil rights).⁷

Regular order and the legislative norms of this period—“to get along, go along”—limited participation by junior lawmakers, blocked liberal-oriented measures, and allowed chairs to act independently of their party. A particularly stark example is what a Rules Committee chair said to

¹ Tamar Hallerman, “A Return to Regular Order?,” *CQ Weekly*, January 4, 2016, p. 18.

² Sen. John Cornyn, “Energy Policy Modernization Act of 2015,” remarks in the Senate, *Congressional Record*, daily edition, vol. 162 (February 3, 2016), p. S540.

³ Lee H. Hamilton, “How Congress Has Changed,” Indiana University Center on Representative Government, April 22, 2020, p. 2.

⁴ Don Wolfensberger, “Regular Order Is a Political Rorschach,” *Roll Call*, May 8, 2013, p. 12. The Rorschach is a psychological test that asks individuals to interpret what they see in a display of inkblot images.

⁵ See, for example, Kenneth A. Shepsle, “The Changing Textbook Congress,” in *Can the Government Govern?* eds. John E. Chubb and Paul E. Peterson (Washington, DC: The Brookings Institution, 1989), pp. 238-266; Donald R. Matthews, *U.S. Senators & Their World* (New York: Vintage Books, 1960); Neil MacNeil, *Forge of Democracy: The House of Representatives* (New York: David McKay, 1963); and Sam Rosenfeld, *The Polarizers: Postwar Architects of Our Partisan Era* (Chicago: University of Chicago Press, 2018).

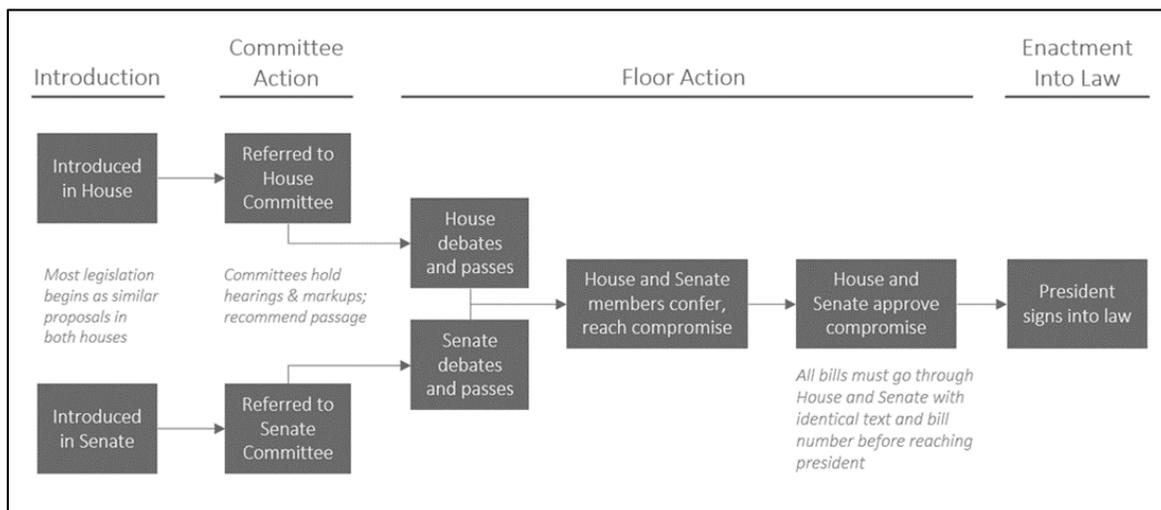
⁶ Steven S. Smith and Christopher J. Deering, *Committees in Congress*, 2nd ed. (Washington, DC: CQ Press, 1990), p. 45. Ranking Members of committees often worked closely with the chairs to shape decisionmaking.

⁷ James T. Patterson, “A Conservative Coalition Forms in Congress, 1933-1939,” *The Journal of American History*, vol. 52, no. 4 (March 1966), pp. 757-772.

his panel colleagues: "You can go to _____. It makes no difference what a majority of you decide; if it meets with my disapproval, it shall not be done; I am the Committee; in me reposes absolute obstructive powers."⁸ Committee oligarchs, wrote an influential Member in 1964, "rule their committees with the assured arrogance of absolute monarchs."⁹ Party leaders lacked the rules and tools to require the autonomous chairs to implement an agenda of party-preferred priorities. Instead, they had to cajole, persuade, and broker deals with the committee chairs, who could deliver the votes to advance policy priorities.

Committees remain important forums for processing legislation and conducting oversight of the executive branch, but they are not as independent of party leadership direction as in previous eras.

Figure I. From Bill to Law



Source: Prepared by Kevin A. Borden, former CRS Section Research Manager, Government and Finance Division.

The Shift to Party Government

Today, majority party leaders exercise centralized management of and major influence over law making (i.e., "party government"). The centralization of power in the hands of the top House and Senate majority leadership occurred gradually for numerous reasons, such as the adoption of chamber and party rules that augmented their authority, as well as through hikes in leadership staff resources. The heightened intensity of electoral competition also fortifies the role of party leaders who, for instance, schedule measures that appeal to their partisan electoral constituencies. In this period of party parity and "unstable majorities," the two parties compete constantly and vigorously to claim majority control of the House and Senate, as the case may be.¹⁰

A compelling argument of majority party leaders to their partisans is at least twofold: they must stick together to win passage of their agenda priorities and do whatever it takes politically and procedurally to retain their majority status. Similarly, minority party leaders may urge their

⁸ Floyd M. Riddick, *Congressional Procedure* (Boston: Chapman and Grimes Publishers, 1941), p. 95. Riddick later served for many years as Parliamentarian of the U.S. Senate.

⁹ Richard Bolling, *House Out of Order* (New York: E. P. Dutton & Co., 1966), p. 70.

¹⁰ Frances E. Lee, *Unstable Majorities: Congress and the Perpetual Campaign* (Chicago: University of Chicago Press, 2006).

law makers to follow the leadership's playbook because it could lead to majority control. Opposition party leaders have their own arsenal of procedural and political resources to stall or foil legislative policymaking, especially in the Senate with its permissive rules and procedures that grant large parliamentary prerogatives to every Senator (e.g., the filibuster).¹¹

Although partisanship has been part of Congress since its beginning, the transition from the committee government era to today's party-centric period has brought with it an often sharper, more frequent, more combative—even excessive—partisanship. Observers can witness such changes as an emphasis on procedural "hard ball" tactics, party line legislating, and nontraditional law making procedures. Party polarization is also evident in the country, as depicted in maps indicating the GOP "red" states and the Democratic "blue" states. As a representative institution, Members often reflect the divergent views and interests of the constituents who reside in these areas, such as the South (largely conservative) and far West (broadly liberal).

As a dynamic institution, Congress adapts to the exigencies of the times. Procedural variation and flexibility in lawmaking, whether in the committee or party eras, are not novel developments. Sometimes legislative and political circumstances warrant traditional lawmaking; at other times, nontraditional processes (or some combination) might better suit the goals and preferences of Members and party leaders. In short, the regular order is not always regular. It is an alterable construct that evolves with the conditions and imperatives of different eras.

Parliamentary processes that appear irregular or unconventional when first used—which can provoke anger or angst among Members and between the two parties when initially employed—may, with repeated use, become accepted as routine features of a "new normal" in lawmaking. They become part of lawmakers' parliamentary toolkit until modified or changed by new developments that produce a "new procedural normal." A historical example from each legislative chamber illustrates the rise of new procedures.

Illustrative Instances: Rise of New Procedures

In 1963, Senator Hubert Humphrey, D-MN, expressed concern that a number of his colleagues were filibustering the motion to proceed to a measure. It is "most unusual for any Senator to object to a motion to consider in this body."¹² Normal procedure, he said, is to "adopt the motion to proceed and then debate the substance of the measure." He later added, "To take up a motion or a bill in a parliament or the Congress is as normal as the Fourth of July, and to deny people the opportunity to even take up a bill for debate and consideration is unusual, abnormal, and the burden of proof rests with those who take that position."¹³ Senator Clinton Anderson, D-NM, added the following: "Now we have established a precedent in this Congress whereby every time the majority leader moves to proceed to the consideration of a measure, an attempt will be made to engage in a 2 or 3 week filibuster. This procedure will come back to plague the Senate."¹⁴

Today, the threat or reality of filibustering the motion to proceed to consider a measure is, as Senator Humphrey noted, "as normal as the Fourth of July." "Normal," too, in the polarized era is the ability of Senators to launch a "double filibuster": on the motion to proceed and then on the legislation itself. Although not as common as filibusters of the motion to proceed, repetitive use

¹¹ See, for example, James I. Wallner, *On Parliamentary War: Partisan Conflict and Procedural Change in the U.S. Senate* (Ann Arbor, MI: University of Michigan Press, 2019), and Matthew Green, *Underdog Politics: The Minority Party in the U.S. House of Representatives* (New Haven, CT: Yale University Press, 2015).

¹² Senate debate, *Congressional Record*, vol. 109 (February 5, 1963), p. 1790.

¹³ Senate debate, *Congressional Record*, vol. 109 (February 5, 1963), p. 1795.

¹⁴ Senate debate, *Congressional Record*, vol. 109 (February 5, 1963), p. 1795.

in recent years of the “nuclear option” to circumvent filibusters on presidential nominations might harbinger its wider use (see the section below, “The “Nuclear Option” Is Detonated (2013, 2017, 2019)”).

As for the House, prior to the early 1880s, it could be difficult to bring measures to the floor, in part because individual lawmakers or the minority party had relatively easy ways to obstruct chamber consideration. For example, two common procedures for taking up measures were unanimous consent and suspending the rules, which required a two-thirds vote of the membership.¹⁵ In 1883, however, a major procedural innovation occurred that fundamentally transformed chamber proceedings.

The House upheld the Speaker’s ruling that the Rules Committee could report procedural resolutions (called “rules,” “special orders,” or “special rules”) that, if adopted by *majority vote*, would allow measures to be taken up for House consideration. “In so doing, the House launched a procedure that has guided its conduct of business to this day.”¹⁶ The Rules Committee now could design, subject to majority party influence and House approval, tailor-made resolutions to govern the conditions (e.g., debate and amendment) for floor consideration of major legislation and other matters. Special rules, therefore, constantly establish a unique “regular order” process to accommodate the procedural and political conditions surrounding a particular measure or series of measures.

Today, Rules is known as the “Speaker’s committee”; the Speaker names 9 of its 13 members (the other 4 are selected by the minority leader). Majority party lawmakers on Rules—and in the House as well—are expected to vote for special rules because they are critical to the advancement of the majority’s priorities. Commonly, special rules limit lawmakers’ debate and amendment opportunities to protect, for instance, vulnerable majority party lawmakers from voting on politically charged amendments that might cause them electoral grief. As a House Parliamentarian wrote, because special orders supersede the standing rules of the House and may be reported on a daily basis, “they have had the pervasive effect of minimizing amendment opportunities—a reversal of tradition on virtually all major measures which had come to be expected as ‘regular order’ in the first 200 years of procedure in the House.”¹⁷

Summing Up

The conduct of parliamentary business in the House and Senate is broadly the story of change. Even so, stability and continuity are also important features of the law making process. Legislators expect some reasonable certainty, predictability, and uniformity regarding various committee and

¹⁵ See, for example, Stanley Bach, “Suspension of the Rules, the Order of Business, and the Development of Congressional Procedure,” *Legislative Studies Quarterly*, vol. 15, no. 1 (February 1990), pp 49-63; and Jason M. Roberts, “The Development of Special Orders and Special Rules in the U.S. House, 1881-1937,” *Legislative Studies Quarterly*, vol. 35, no. 3 (August 2010), pp. 307-335.

¹⁶ U.S. Congress, House Committee on Rules, *A History of the Committee on Rules*, committee print, 97th Cong., 2nd sess. (Washington, DC: GPO, 1983), p. 9. This history is a book-length committee print.

¹⁷ William McKay and Charles W. Johnson, *Parliament & Congress: Representation & Scrutiny in the Twenty-First Century* (New York: Oxford University Press, 2010), p. 196. Hereinafter McKay and Johnson, *Parliament & Congress*. House Parliamentarian Charles W. Johnson has worked in or assisted the chamber’s parliamentary office for nearly 60 years and served as House Parliamentarian for a decade (1994-2004). After almost six decades of House service, Johnson identified an array of major parliamentary changes that occurred from the mid-1960s to 2013, such as wider use of special rules to structure the amendment process; expanded use of suspension of the rules procedure (40 minutes of debate, no freestanding amendments, and two-thirds vote required to pass legislative matters); and a revamped budgetary process, among other procedural alterations.

chamber proceedings (see the section below, "Settled Practice"). Nonetheless, the contemporary lawmaking process has undergone significant alterations from what it was in previous decades to what it is now: an array of "newer and more idiosyncratic [nontraditional] pathways that now characterize lawmaking on Capitol Hill."¹⁸

Unorthodox legislating is Congress's reaction and response to the current intensity of electoral, political, and policy competition between the two legislative parties and their outside allies (e.g., partisan-affiliated interest groups, media outlets, and think tanks). Lawmaking is difficult enough given the constitutional design of separate institutions sharing and competing for power, let alone surmounting procedural obstacles erected by the opposition. Nontraditional procedures facilitate achievement of the majority's governing agenda, as well as fulfill traditional responsibilities of the legislative branch (e.g., funding the government and responding to national disasters).

Both legislative approaches—traditional and nontraditional—have advantages and disadvantages. Lawmaking during the committee governance period witnessed the prevalence of bipartisan compromise, deliberation, negotiation, and participation; today's polarized era features party accountability, unity, adaptability, and procedural inventiveness. Whereas committee governance was largely decentralized (or "bottom up" from standing committees and the general membership), legislating today in both chambers is often subject to centralized ("top down") direction from the majority party leadership. (Party caucuses in each chamber also influence decisionmaking by their top leaders.)

The expansion of leaders' political roles—media spokesperson, outreach to diverse stakeholders, "talking points" formulator for party colleagues, policy designer and negotiator, campaign fundraiser, and legislative and electoral strategist—considerably strengthened their authority. To assist in carrying out these duties, both parties won significant hikes in leadership staff resources. As a House member wrote, while "there was a 35 percent decline in committee staffing from 1994 to 2014, funding over that period for [House] leadership staff rose to 89 percent."¹⁹

Changes in the institutional balance of power—the shift from committee to party government, for example—commonly provoke clashes between those who have power and those who want it. For example, individual lawmakers who urge a return to traditional, regular order lawmaking often want a larger role in policymaking and more autonomy for committees. They often favor a decentralized and deliberative legislative process rather than one that is malleable, less participatory, and hierarchical (largely majority leadership-directed). "Centralization versus decentralization" of decisionmaking, and the balance between the two, are hardy perennials of legislative debate and reform.

Purposes of the Report: A Look Ahead

The broad purposes of this report are to provide diverse perspectives on regular order (traditional) lawmaking and to assess why and in what ways nontraditional procedures came to influence much contemporary legislating.²⁰ The report analyzes major developments that shifted Congress from a "committee dominate" form of legislative decisionmaking to the "party centric" era of today.

¹⁸ C. Lawrence Evans, "Book Reviews: American Politics," *Perspective on Politics*, vol. 17, no. 2 (June 2019), p. 578.

¹⁹ Rep. Bill Pascrell Jr., "Why is Congress so Dumb?," *The Washington Post*, January 11, 2019, p. B1. See also Paul Glastris and Haley Sweetland Edwards, "The Big Lobotomy," *Washington Monthly*, June/July/August 2014, pp. 49-59.

²⁰ See, for example, Charles Tiefer, *The Polarized Congress: The Post-Traditional Procedure of Its Current Struggles* (Lanham, MD: University Press of America, Inc., 2016); and Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress*, 5th ed. (Washington, DC: CQ Press, 2016.)

The first section of the report provides additional background analysis regarding traditional versus nontraditional lawmaking review and some reasons for the emergence of unorthodox lawmaking. In addition, this section provides an example of orthodox and unorthodox policymaking through a mini case representation of each.

Second, the report focuses briefly on a key provision in the U.S. Constitution (Article I, Section 5) that allows each chamber to establish its own rules for making laws. There are many rulemaking statutes (the 1974 Budget Act or trade laws, for instance) that provide special legislative procedures for certain measures. Interpretations of House and Senate rules can provoke political and procedural controversy, as shown by an example from each chamber.

Third, the report discusses “settled practice”—generally noncontroversial procedures and precedents widely accepted for decades as the regular order in the House or Senate. Informal procedural guidelines or practices are also briefly discussed; some become so fundamental to the House or Senate’s lawmaking processes that they are adopted as formal rules with a body of precedents (the “common law” of the chambers) all their own. A Senate example (unanimous consent agreements) highlights this sequential pattern: from informal practice to formal rule.

Fourth, various lawmakers and scholars provide definitions of the “regular order.” The definitions indicate the diversity of views on the basic elements of the regular order. Fifth, several unorthodox lawmaking developments are examined to highlight how unlike they are from the regular order of earlier congressional eras. Sixth, the report analyzes several major social and political developments that contribute significantly to the centrality of nontraditional lawmaking in contemporary Congresses. Lastly, the report concludes with summary observations.

General Background

Overview

Neither the Constitution nor House or Senate rules prescribe a specific procedural pathway that must be observed if ideas are to be enacted into law. A consequence is that the House and Senate—both unique institutions (e.g., size, constituency, term of office, and procedure)—have wide latitude to determine their own policymaking processes. Procedural flexibility is a feature of both chambers, especially in the Senate given its permissive rules and significant reliance on “unanimous consent” to accomplish its business.

The “regular order” of lawmaking is not set in concrete. It changes in response to various conditions and developments (partisan, political, social, etc.) inside and outside Congress. What constitutes regular order legislating can be a moving target. Nonetheless, many lawmakers and informed citizens have expectations about how laws ideally should be made, such as with open procedures and processes that provide fair opportunities for Members of both parties to debate and to amend legislation. This lawmaking pattern requires “goodwill” by both parties to prevent its exploitation for political and electoral purposes.

A publication (*How Our Laws Are Made*) authorized by the Congress since 1953, currently in its 24th edition (2007), provides “a basic outline of our federal law-making process from the source of an idea for a legislative proposal through publication as a statute.”²¹ Many view this repeatable, step-by-step process as the embodiment of “textbook” legislating. Even schoolchildren may learn

²¹ John V. Sullivan, *How Our Laws Are Made* (Washington, DC: GPO, 2007), p. 1. Sullivan, as the House Parliamentarian, prepared this document.

the lawmaking stages by watching the well-known cartoon video series entitled *Schoolhouse Rock*.²² Major deviations from the sequential model imply an unpredictable, convoluted, or malleable lawmaking process. Departures from textbook legislating are sometimes called nontraditional, irregular, unorthodox, or unconventional. (These characterizations are used synonymously in this report.)

Conventional lawmaking diagrams, as Representative Lee Hamilton, D-ID (1965-1999), stated, provide “a woefully incomplete picture of how complicated and untidy the process can be, and barely hints at the difficulties facing any member of Congress who wants to shepherd an idea into law.”²³ Representative Hamilton’s “complicated and untidy” lawmaking frequently means that new and uncommon procedures are utilized to enact an array of measures, such as “must pass” spending bills, emergency measures, or the policy priorities of the majority party.

Complications and untidiness inhere in lawmaking whether the parliamentary method is regular or irregular. Even so, Representative Hamilton highlights the benefits of regular order lawmaking, which many lawmakers would likely endorse. “Different voices get heard through the regular order, opposing views get considered, and our representatives get the chance to ask hard questions, consider the merits of various approaches, propose alternatives, smooth out problems, build consensus, knock out bad ideas, and refine good ideas to make better laws.”²⁴ A Senate GOP leader added that the regular order encourages “some meaningful buy-in” from the minority party. Enacting consequential legislation by relying exclusively on votes from the majority party leads to “instability and strife” in lawmaking.²⁵

During the committee-centric period, liberals and conservatives populated each legislative party. For example, liberal Northern Democrats favored civil rights, conservative Southern Dixiecrats opposed such legislation; Eastern liberal and moderate Republicans supported internationalism, conservative Republicans from the Midwest and rural areas resisted foreign involvements. Overlapping political alignments promoted negotiating across party lines to pass legislation. A seasoned analyst wrote that this period was the “age of bargaining” in Congress, with **Figure 1** policymaking usually the order of the day. “This system,” he added, “did not eliminate conflict between the parties. But it muted and diffused that conflict.”²⁶

Congress gradually moved to a different configuration of internal power. A decentralized committee process that dominated policymaking for much of the 20th century transitioned to a centralized, party-driven system of decisionmaking. Party leaders, not committee chairs, assumed major responsibility for shaping legislative priorities, policies, and procedures. Representative John Dingell, D-MI, the longest serving lawmaker in history (1955-2015), experienced legislative life in both eras, first as a powerful chair of the Energy and Commerce Committee and then as an influential lawmaker during the strong party era. In an apt comment, he captured the basic

²² The cartoon video and jingle, which began in 1975, identified the key lawmaking stages in “I’m Just a Bill.” As a news article explained, “Bill,” portrayed as a piece of legislation, “sits on the Capitol steps and explains to a young boy all the hoops he has to go through, from committee to the House to the Senate to the White House, to become law.” See Paul Kane, “‘Bill’ Could School Ryan on Immigration Proposal,” *The Washington Post*, June 22, 2018, p. A18.

²³ Lee H. Hamilton, *How Congress Works and Why You Should Care*, (Bloomington, IN: Indiana University Press, 2014), p. 56.

²⁴ Lee H. Hamilton, “Why Congress’s Future Should Lie in the Past,” *Center on Congress at Indiana University*, July 25, 2012, p. 2.

²⁵ James Hohmann, “Why Trump and the Republicans Are Suddenly Talking Up Bipartisanship,” *The Washington Post*, January 9, 2018, p. A15.

²⁶ Ronald Brownstein, *The Second Civil War: How Extreme Partisanship Has Paralyzed Washington and Polarized America* (New York: The Penguin Press, 2017), p. 65.

difference between the two periods: "It used to be that the chairman would call the Speaker up and say, 'I want this bill on the floor at this time.' Now it's the opposite."²⁷

Numerous factors precipitated the several-decade transition from committee power to party power. Two are mentioned briefly for illustrative purposes. First, numerous reform-oriented lawmakers won election to Congress (1958 for the Senate and 1974 for the House are classic examples²⁸). Dissatisfied with a seniority system that elevated lawmakers to positions of power regardless of their abilities or policy views, committee chairs, starting in the 1970s, became subject to secret ballot election by their party colleagues. Several House chairs were ousted from their chairmanships. House and Senate Republicans also imposed six-year term limits on their committee leaders, in part to ensure that committee chairs, unlike the seniority leaders of old, could not accumulate independent power to challenge their top party leaders.

Second, a new House rule in 1975 permitted the Speaker to multiply refer measures to more than one committee; single committee referral was the long-standing practice before the change. Multiple referrals reduced the monopolistic control of standing committees over various policy domains and increased the Speaker's ability to coordinate and direct the work of committees. Consider that the jurisdictional mandates of a number of standing committees are outdated. No committee, for instance, has specific authority for cybersecurity. Several committees may claim jurisdictional responsibility for such legislation, provoking intercommittee "turf" battles. To mediate and resolve these disagreements, the Speaker has an array of resources, including the absolute right to refer bills to committee(s). The Speaker is also authorized to impose deadlines for committees to report legislation to the House.

Unorthodox Lawmaking Gains Prominence: A Brief Review

Contemporary legislating is often infused with what some call hyperpartisanship—a more intense, politically charged, highly competitive, and conflict-laden relationship between the two parties; such factors spawned nontraditional lawmaking. Bipartisan lawmaking seems far harder to achieve than previously, even on issues that may enjoy broad legislative and public support (e.g., infrastructure modernization) or are traditional responsibilities of Congress (e.g., timely funding of federal military and health programs). Three contributing factors for consideration follow.

First, the two parties are more ideologically unified and polarized than before, as reflected in their widely divergent policy preferences and Members' party-line voting records. As a legislative scholar explained, ideological "polarization is defined by [Members'] consistency across issues [i.e., party unity]; ideological polarization in the public is defined by consistency in responses across survey data [liberal or conservative views on issues such as climate change, same-sex marriage, or health care]."²⁹

²⁷ Paul Glastris and Haley Sweetland Edwards, "The Big Lobotomy," *Washington Monthly*, June/July/August 2014, p. 57.

²⁸ See Michael Foley, *The New Senate: Liberal Influence on a Conservative Institution* (New Haven, CT: Yale University Press, 1980); and John A. Lawrence, *The Class of '74: Congress After Watergate and the Roots of Partisanship* (Baltimore, MD: Johns Hopkins University Press, 2018).

²⁹ Alan I. Abramowitz, *The Disappearing Center: Engaged Citizens, Polarization, and American Democracy* (New Haven, CT: Yale University Press, 2010), p. 35. Worth a brief mention is an ongoing debate in political science about the source of ideological polarization. Professor Abramowitz of the University of Georgia is a lead proponent of the view that congressional polarization reflects polarization among the politically engaged citizenry. A contrary perspective is by Stanford University Professor Morris Fiorina, who argues that the mass public is not polarized but "elites" are—the party activists, elective officeholders, and so on. Stated differently, moderate voters hold relatively

For example, the average party unity scores (partisans voting together) demonstrate that “both representatives and senators exhibit far more [party] loyalty to their parties than they did in the past. In the 1950s, 1960s and 1970s, the typical member of Congress voted with his [or her] party on party-dividing questions just 60% of the time; in the 1980s, over 70% of the time; and in the 1990s, over 80% of the time.”³⁰ The 2000s have witnessed party unity scores in the 90s, where it remains today. A Senate President pro tempore observed, “[M]ost Democrats are ... left, most Republicans are to the right, and there are very few [centrists] in between.”³¹

Problem-solving in this environment can be challenging, especially on contentious issues that divide the two parties (e.g., gun control, abortion, taxation, climate change). Partisan clashes and quarrels can be so profound that they provoke policy paralysis. Compounding the difficulty of ending gridlock through cross-party negotiations is that “the political parties each depend on [many] voters who [oppose] the very notion of compromise.”³² Compromises are hard to reach because the “deep ideological divide that exists between Democrats and Republicans in Washington ... is itself based on deep divisions within American society.”³³

Further, many voters intensely dislike the other party, a development that contributes in elections to straight party ticket voting. Straight-ticket voting is influenced, too, by the party label of the President. Many voters know the “team” they are on and cast their ballot accordingly. An analyst noted, “In the 1970s and ‘80s, an average of around 30 percent of voters split their tickets, for congressional and presidential candidates of different parties. Today, [the] corresponding number is around 10 percent.”³⁴ In short, an “us versus them” outlook has seeped into peoples’ political attitudes and behavior. This perspective is also evident in Congress.

Second, there is the occurrence at times of British-style, one-party governance. The European parliamentary model, however, is incompatible with the American constitutional system of “separation of powers” and “checks and balances.” Moreover, most measures enacted by Congress are accomplished with bipartisan support. “When majority parties succeed on their agenda priorities,” wrote two legislative scholars, “they usually do so with support from a majority of the minority party in at least one chamber and with the endorsement of one or more of the minority party’s top leaders.”³⁵

Neither party, of course, has a monopoly on wisdom and thoughtfulness. Minority party lawmakers can spotlight weaknesses in majority party initiatives and promote a wider range of diverse policy ideas that might improve legislation. Still, as a congressional scholar noted, today’s

moderate views, but the parties have become more polarized. See, for example, Fiorina’s book entitled *Culture War? The Myth of a Polarized America* (New York: Pearson Longman, 2007).

³⁰ Frances E. Lee, “How Party Polarization Affects Governance,” *Annual Review of Political Science*, vol. 18 (2015), pp. 263-264. Party unity scores have been compiled by *CQ Weekly* since 1956. For a compilation, see *CQ Weekly*, February 24, 2020, p. 42.

³¹ Quoted in Kathy Kiely and Wendy Koch, “Committees Shaped By Party Ties,” *USA Today*, October 5, 1998, p. 2A.

³² Lee H. Hamilton, “We Need To Embrace Compromise, Not Insult It,” *The Center on Congress at Indiana University*, May 16, 2011, p. 2.

³³ Alan I. Abramowitz, “Beyond Confrontation and Gridlock: Making Democracy Work for the American People,” in *Solutions to Political Polarization in America*, ed. Nathan Persily (New York: Cambridge University Press, 2015), p. 198.

³⁴ Peter Grier, “D.C. Decoder: ‘All Politics is Local’? Not Anymore,” *Christian Science Monitor Weekly*, September 10, 2018, p. 11.

³⁵ James M. Curry and Frances E. Lee, “Non-Party Government: Bipartisan Lawmaking and Party Power in Congress,” *Perspectives on Politics*, vol. 17, no. 1 (March 2019), p. 47.

"House especially seems more and more willing to pass major bills with the support of only the majority party."³⁶

Two recent examples of one-party governance in the House and Senate are the Democratic-authored Patient Protection and Affordable Care Act (2009, 2010) and the GOP-sponsored Tax Cuts and Jobs Act (2017). Both measures passed on party-line votes. In both instances, there was unified government (one party in charge of the elective branches) and cohesive party majorities. As the Senate majority leader said in January 2017, "The only way you can achieve success in [a polarized] environment like now, where there's not much bipartisanship, is for us [Republicans] to have our act together and to work out our differences among ourselves."³⁷ One-party law making is generally infrequent, however, because of factional and policy disputes within the majority party, the frequency of divided government, and the Senate's permissive rules (e.g., the filibuster).

Public laws usually require finding common ground through bipartisan compromises involving the House, the Senate, the White House, and the two political parties more broadly.³⁸ Today's partisan polarization also encourages the two parties to prepare "messaging" bills and amendments—measures that unite one party and divide the other. They are part of the "permanent campaign" where the goal is often less on improving or making laws through bipartisan deliberations and more on energizing electoral supporters and drawing sharp contrasts with the other party.

Third, today's closely divided and deeply polarized Congress has witnessed the emergence of a pattern of lawmaking different from the traditional, committee-centric regular order. Increasingly, House and Senate party leaders turn to nontraditional procedures for two key reasons: to implement their governing agenda and to foil the opposition's obstructive tactics. Unorthodox procedures include, among other things, drafting legislation behind closed doors in leadership offices and minimizing the use of conference committees to resolve bicameral differences. Unconventional procedures are also utilized with the bipartisan support of each party; they can be the best pathway for legislative decisionmaking, such as in crisis circumstances.

If minority party lawmakers take issue at what they perceive as the majority's heavy-handed procedural actions, they have their own arsenal of available parliamentary tools to stall the legislative process. They may try to delay or defeat the majority's proposals by forcing floor votes, raising parliamentary objections, or appealing rulings of the chair. A frequent result:

³⁶ Green, *Underdog Politics*, p. 187.

³⁷ *The Hill* Staff, "How the Trump Tax Law Passed: Bipartisanship Wasn't An Ingredient," *The Hill*, September 27, 2018, online edition. The Speaker and the Senate Majority Leader assumed major responsibility for shepherding the Affordable Care Act into law with party-line voting the order of the day in both chambers. However, as Senator John McCain, R-AZ, noted, the health measure was considered at length in committee and then debated and amended on the Senate floor for 25 days. Most of the roll call votes in the chamber were party-line. Senator McCain concluded: "[T]his was one of the most hard-fought and fair, in my view, debates that has taken place on the floor of the Senate in the time I have been here." See Senate debate, *Congressional Record*, vol. 159 (September 24, 2013), p. S6841. Senator McCain's comments underscore that a polarized legislative environment does not foreclose adherence to various aspects of regular order legislating.

³⁸ There are occasions when the majority party believes, based on experience, that opposition party support for measures is unlikely. As a lawmaker stated, "It would be wonderful to have [opposition party] votes. But we don't start with that as a working assumption. We have to write something [that majority party members] agree with." Ezra Klein, "4 Senate Dems Shaping the Future of Health Policy Explain What They Are Thinking," *Vox.com*, August 28, 2019, p. 3.

interparty procedural (“tit for tat”) warfare. An example from the Senate about procedural retaliation applies equally well to the House.

In today’s Senate, each party assumes that the other will fully exploit its procedural options: the majority party assumes that the minority party will obstruct legislation, and the minority assumes that the majority will restrict its opportunities to offer amendments. Leaders are expected to fully exploit the rules. Senators of both parties are frustrated by what has happened to their institution.³⁹

The Textbook Model

It bears repeating that the textbook model has not disappeared in either chamber. Measures are developed in committee and considered on the floor in a bipartisan manner. Every bill or issue does not arouse legislative clashes between two ideologically polarized parties. The two parties and their Members do collaborate to make policy. Cross-party coalitions are forged on measures where there is shared consensus. And most bills pass the House and Senate with bipartisan majorities. As a congressional scholar determined, “Minority party support for enacted legislation seldom falls below 70 percent in the Senate or 60 percent in the House.”⁴⁰

Senator Lamar Alexander, R-TN, made an observation about the Senate that applies broadly to the other chamber. The Senate, he said, operates basically on a two-track system. One track is filled with conflict and controversy; the other is a legislative process replete with compromise and cooperation. As he said,

Think of Washington, DC as a split screen television. Let’s take the 30 days between September 4 and October 6, [2018].... On one of the screens there was as much acrimony as you could ever expect to see in the U.S. Capitol—protestors, Senators upset, Judge Kavanaugh upset. It was a very difficult situation. That was on one side of the screen. But on the other side of the television set was one of the most productive 30 days we have ever had in the U.S. Senate, with 72 Senators working together—half Democrats, half Republicans—to pass landmark opioids legislation to deal with the largest health crisis we have today.⁴¹

The bottom line is this: lawmakers of diverse partisan and ideological viewpoints have the capacity and competence to address national problems. Each chamber is “quite capable of overcoming the differences among its members on measures of significant import without descending into an endless debate characterized by ideological partisanship and irreconcilable gridlock.”⁴² Lawmaking may not happen as soon as some people want because it can be a convoluted, lengthy, chaotic, and uncertain process. The end result might even be policy stalemate, a virtue perhaps rather than a vice if bad ideas are blocked from becoming law. Fundamentally, Senator Alexander’s observation highlights how legislating gets done with compromise and cooperation between Members and the two parties.

³⁹ Steven S. Smith, *The Senate Syndrome: The Evolution of Procedural Warfare in the Modern U.S. Senate* (Norman, OK: The University of Oklahoma Press, 2014), p. 18.

⁴⁰ Frances Lee, “Why Parties That Control Congress Can’t Always Deliver,” *The Washington Post*, July 23, 2017, p. B2.

⁴¹ Sen. Lamar Alexander, “Senate Accomplishments,” remarks in the Senate, *Congressional Record*, daily edition, vol. 164 (November 14, 2018), pp. S6954-S6955.

⁴² James I. Wallner, *The Death of Deliberation: Partisanship and Polarization in the United States Senate* (Lanham, MD: Lexington Books, 2013), p. 4.

A Sketch of Two Measures

Two traditional elements of legislating are opportunities for lawmakers of both parties to debate and to amend bills. Typically, conventional lawmaking embraces both ingredients. Consider the annual National Defense Authorization Act (NDAA), authored by the House and Senate Armed Services Committees with input from numerous entities (e.g., the Defense Department). Like Congress itself, the work and role of the two military panels are shaped by numerous contemporary developments, such as the end of the Cold War and the wider influence of congressional party leaders.⁴³ Consideration of the NDAA exemplifies what many would view as conventional lawmaking by each chamber.

Consideration of the NDAA in both chambers typically follows the regular order: committee hearings and markups, floor debates and amendments by Members of both parties, the formal convening of conference committees to resolve bicameral differences, and presidential consideration (signature or veto). A Member of the House Armed Services Committee stated that consideration of the NDAA in both chambers followed an "open and regular order process from start to finish."⁴⁴ A chair of the committee underscored that the work of the panel is governed by the principles of "regular order, transparency, and bipartisanship."⁴⁵ On occasion, some of the parliamentary steps may be missed or abbreviated. Intense partisan and policy disagreements occur, but since the early 1960s, the NDAA so far has been enacted into law 58 consecutive times. The success of the legislation can be attributed to various factors, such as its vital mission (the nation's security), "must pass" character, and long history of bipartisanship that usually suffuses committee and chamber consideration of the NDAA.

A classic example of nontraditional lawmaking—sparked by a national emergency—occurred during the Great Depression of the 1930s. Five days after President Franklin Delano Roosevelt's inaugural address, a special session of Congress was convened on March 9, 1933. The new Administration had sent Congress a bill to deal with the banking crisis, the panicked withdrawal by customers of their bank deposits, which was triggering nationwide bank failures. As one account noted, the banking bill was "read to the House at 1 p.m." following its noon convening.

[S]ome new representatives were still trying to locate their seats. Printed copies [of the bill] were not ready for its members. A rolled-up newspaper symbolically served. After thirty-eight minutes of 'debate,' the chamber passed the bill, sight unseen, with a unanimous shout. The Senate approved the bill with only seven dissenting votes ... and the president signed the legislation into law at 8:36 [that] evening.⁴⁶

Unsurprisingly, emergencies, crises, pandemics, deadlines, or other compelling circumstances have long triggered the use of nontraditional lawmaking procedures.⁴⁷

⁴³ See Chuck Cushman, "Defense and the Two Congresses," eds. Colton Campbell and David P. Auerswald (Washington, DC: Georgetown University Press, 2015), pp. 113-126.

⁴⁴ Rep. Bradley Byrne, "Providing for Consideration of the Conference Report on H.R. 2810, National Defense Authorization Act for Fiscal Year 2018, remarks in the House, *Congressional Record*, daily edition, vol. 163 (November 14, 2017), p. H9191.

⁴⁵ Andrew Clevenger, "Undeterred by Pandemic, Lawmakers Ready their NDAA Proposals," *CQ News*, April 30, 2020.

⁴⁶ David M. Kennedy, *Freedom From Fear: The American People in Depression and War, 1929-1945* (New York: Oxford University Press, 2015), pp. 135-136.

⁴⁷ Worth noting is that the House and Senate use expedited procedures that constitute the regular order for certain measures. Many statutes provide expedited procedures (e.g., debate and amendment restrictions) for the consideration of measures deemed important for so-called "fast track" consideration, such as trade bills. See Molly E. Reynolds,

Summing Up

A one-size-fits-all lawmaking process is not suitable to the panoply of issues that comes before the House and Senate. The regular order and an irregular order, or some hybrid of the two, are hardly lawmaking perennials. Complexities and complications abound in either of these approaches, especially on major legislation that engages numerous actors and groups inside and outside Congress. Case studies of lawmaking reveal that it can be a confusing and controversial process, involving both traditional and nontraditional procedures.⁴⁸ Representative Hamilton observed, "The legislative process is far from mechanical or automatic. Instead, it is dynamic, fluid, and unpredictable, with the outcome very much affected by the players: their goals, skills, ingenuity, and temperament."⁴⁹

Procedural improvisations are common to lawmaking. Departures from the regular order occur frequently to meet unexpected challenges and to achieve policy results. A proposed law might "hitch a ride" as a floor amendment to "must pass" legislation headed to the White House; be buried in omnibus legislation hundreds or thousands of pages in length; or added to a conference report with scant discussion or notice by most lawmakers.⁵⁰ Regular order might be followed during floor consideration of a measure even though it was never referred for committee review. A Senator called this type of nontraditional lawmaking "regular-order lite."⁵¹ Another Senator pointed out, "If you want to get something done ... you have to figure out how to get there. Sometimes it's not a straight line. Sometimes it's a circuitous path."⁵²

Selected Constitutional Provisions

Article I, Section 5 of the U.S. Constitution states, "Each House may determine the Rules of its Proceedings." Fundamentally, this means that legislative rules and procedures are alterable. The broad grant of constitutional authority to the House and Senate to write or rewrite their rules is subject to few restraints. House and Senate rules cannot "violate fundamental rights," as the U.S. Supreme Court said in the 1892 case of *United States v. Ballin* (144 U.S. 1). Moreover, there should be a "reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to determination" by the House or Senate. In addition, said the Supreme Court, the "power to make rules is not one which once exercised is exhausted. It is a continuous power,

Exceptions to the Rule (Washington, DC: Brookings Institution Press, 2017).

⁴⁸ See, for example, Jeffrey M. Birnbaum and Alan S. Murray, *Showdown at Gucci Gulch: Lawmakers, Lobbyists and the Unlikely Triumph of Tax Reform* (New York: Vintage, 1988); Ronald E. Elving, *Conflict and Compromise: How Congress Makes Laws* (New York: Simon & Schuster, 1995); Steven Waldman, *The Bill* (New York: Viking, 1995); Charles and Barbara Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* (Washington, DC: Seven Locks Press, 1985); Paul C. Light, *Forging Legislation* (New York: W.W. Norton & Co., 1992); and Robert G. Kaiser, *Act of Congress: How America's Essential Institution Works, and How It Doesn't* (New York: Alfred A. Knopf, 2013). The Birnbaum and Murray book is about passage of the 1986 Tax Reform Act; Elving's book is about the Family and Medical Leave Act; the Whalen book's title says it all; Waldman's examines the creation of a national service law; Light's book focuses on the creation of the Department of Veterans Affairs; and Kaiser's study analyzes enactment of the Dodd-Frank financial reform legislation.

⁴⁹ Hamilton, *How Congress Works and Why You Should Care*, p. 58.

⁵⁰ Andreu Casas, Matthew Denny, and John Wilkerson, "More Effective than We Thought: Accounting for Legislative Hitchhikers Reveals a More Inclusive and Productive Lawmaking Process," July 12, 2018, available at <https://ssrn.com/abstract:3098325>.

⁵¹ Joe Williams, "Resolving DACA No Easy Lift for Senate," *Roll Call*, February 12, 2018, p. 9.

⁵² David Nather, "Daschle's Soft Touch Lost in Tough Senate Arena," *CQ Weekly*, July 20, 2002, p. 1921.

always subject to be exercised" by the two legislative chambers.⁵³ A House Parliamentarian offered his view of the exercise of "continuous power":

There is no static set of procedural settings called "the regular order" in the House. The Constitution contemplates that the House may make its own rules. The House chooses initially to adopt special rules [from the Rules Committee] that can vary those settings. There is nothing irregular about those variances. One might earnestly believe that unbounded debate under a five-minute rule and an unbridled amendment process are essential to procedural regularity in perfecting legislative text. But that doesn't make those procedural settings 'the' regular order, nor does it make other settings irregular. Openness might be an inherent good that deserves to be reflected in the default procedural settings of the House. But that does not make it an exclusive prescription for procedural regularity, nor does it make a less than fully open process irregular.... The most essential attribute of regularity in the legislative practice of the House is its layered use of its Constitutional authority to make its own rules.⁵⁴

Each legislative chamber determines their procedural rules: a majority vote is sufficient in both bodies, but a two-thirds vote in the Senate might first be required to invoke cloture (closure of debate) on proposals to amend chamber rules. Moreover, each house has thousands of formal precedents to guide legislative decisionmaking when formal rules or rulemaking statutes lack clarity or fail to address specific parliamentary controversies that arise during chamber proceedings. Two former House Parliamentarians stated, the great majority of the "rules of all parliamentary bodies are unwritten law; they spring up by precedents and customs; these precedents and customs are this day the chief law of both Houses of Congress."⁵⁵ Informal norms and guidelines can also influence the actions and deliberations of the two chambers.

A limited number of provisions in the Constitution address decisionmaking procedures in the two chambers. For example, treaties are subject to the advice and consent of the Senate, "provided two-thirds of the Senators present concur" (Article II, Section 2); measures raising revenue shall originate in the House, "but the Senate may propose or concur with Amendments as on other Bills" (Article I, Section 7). The Constitution states that "a Majority of each [House] shall constitute a Quorum to do Business" (Article I, Section 5). The Framers did not define what constitutes "business" for purposes of a quorum. "Business," like many other constitutional provisions, was left for each chamber to decide.

The brevity of constitutional provisions regarding legislative procedure requires the two chambers to revise and update their rules, precedents, and practices to accommodate new

⁵³ The Ballin case concerned a major obstructive House tactic of the 19th century called the "disappearing quorum." At the time, the constitutional requirement that a majority "shall constitute a Quorum to do Business" was determined by counting the number of Members actually voting. Thus, if a sufficient number of Members present in the chamber refused to vote, they could block the conduct of public business. In 1889, Speaker Thomas Reed, R-ME, ruled successfully that Members present in the chamber who refused to vote would be counted to determine the presence of a quorum. Speaker Reed's ruling provoked three days of parliamentary tumult. However, the Justices in Ballin decided that since the Constitution did not prescribe a method for determining a majority quorum, "it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain that fact." For more on Speaker Reed's historical ruling, see Ronald M. Peters Jr., *The American Speakership* (Baltimore, MD: The Johns Hopkins University Press, 1990), pp. 62-75; and William A. Robinson, *Thomas B. Reed, Parliamentarian* (New York: Dodd, Mead, 1930), pp. 182-186.

⁵⁴ This view of the regular order was provided to the author by Charles W. Johnson, a House Parliamentarian. The statement itself was prepared by John V. Sullivan, another House Parliamentarian.

⁵⁵ Quoted in *Deschler-Brown Precedents of the United States House of Representatives*, vol. 1 (Washington DC: GPO, 1976), p. iv.

contingencies and developments.⁵⁶ Every two years, for instance, following the biennial congressional elections, the House on the opening day of the new Congress adopts its formal rules. Most of the rule book of the previous Congress is adopted anew, but amendments to the rules of the House are regularly adopted, usually by a party-line majority vote. The House can amend its rules at any time during the two-year life of a Congress.

For example, the House amended its rules on May 15, 2020, to allow remote voting during the Coronavirus Disease 2019 (COVID-19) pandemic. A temporary rule—45 days but renewable—authorized two major procedural changes: virtual committee proceedings, and, for the first time in the House’s history, proxy voting during floor votes is permitted. “Any member attending a House vote [can] cast as many as 10 votes on behalf of [absent] colleagues who have authorized those votes by letter to the House clerk.”⁵⁷ The remote voting rule provoked lawsuits over its constitutionality—whether an official quorum of the House can be established by counting only Members who are physically present and those who might be virtually present, as the new rule allows. The remote voting rule applies only to this declared health emergency due to the novel coronavirus. In a larger sense, the temporary rule spotlights the long-standing issue of how the House can function in person during national emergencies, such as terrorist attacks or pandemics.

Unlike the House, the Senate does not readopt its rule book at the start of every new Congress. Senate Rule V states, “The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.” The Senate considers itself a “continuing body” because only one-third of the chamber’s membership competes for reelection every two years. This means that the Senate can muster the majority quorum required by the Constitution (Article I, Section 5) to conduct official business. Nonetheless, the Senate can revise its rules and procedures at any time whenever enough Senators agree to the proposed revision(s). Both chambers, as noted earlier, can exercise their constitutional rulemaking authority to enact laws that revamp their respective parliamentary procedures (e.g., the Congressional Budget and Impoundment Control Act of 1974).

Procedural alterations occur for various reasons. For instance, some rules may require clarification or elimination. Presidents who challenge the Article I prerogatives of Congress, such as its power of the purse, can provoke the House and Senate to establish new budgeting processes. National crises, the election of reform-oriented lawmakers, a growing workload, and broader changes in society (e.g., use of technology) also can spur legislative change.

Interpretative Disagreements

Just as constitutional provisions can arouse controversy, each chamber’s formal rules and precedents can be interpreted differently by individual Members and the two political parties. Rules and precedents that appear plain in their practical or specific meaning might still provoke disagreements—especially in high-stakes, party-charged situations—if they contravene past practices and norms to achieve partisan objectives. Contemplate this specific case concerning clause 4 of House Rule XX: “The minimum time for a record vote ... shall be 15 minutes.”

⁵⁶ For a detailed review of House and Senate parliamentary reference sources, see CRS Report RL30787, *Parliamentary Reference Sources: House of Representatives*, by Gail E. Baitinger; and CRS Report RL30788, *Parliamentary Reference Sources: Senate*, by Gail E. Baitinger.

⁵⁷ Mike DeBonis, “House Adopts Historic Changes Allowing Remote Voting,” *The Washington Post*, May 16, 2020, p. A6. See also Nicholas Fandos, “231 Years In, a Need To Redefine ‘Present’,” *New York Times*, May 16, 2020, p. A23.

On November 22, 2003, during House consideration of the Republican majority's top domestic priority—expanding Medicare to provide senior citizens with prescription drug coverage—GOP leaders kept the vote open nearly three hours. An early ballot (216 ayes, 218 nays) demonstrated that Republicans were losing their priority measure. The result was GOP leaders spent almost three hours lobbying party colleagues, urging several to switch their initial vote from nay to yea. Their persuasive skills led to House passage of the prescription drug conference report.⁵⁸

Did the three-hour vote constitute "regular order" or was it "irregular order"? The two political parties came to different conclusions. Democrats viewed the three-hour vote as procedural abuse, a nontraditional action that violated the rules and norms of the House. The vote was held open far beyond a reasonable time, exclaimed many Democrats, for the sole purpose of pressuring certain GOP lawmakers to change their vote so the majority party could win enactment of the prescription drug measure. The Democratic House leader offered a privileged resolution to declare the three-hour vote "one of the lowest moments in the history of this august institution."⁵⁹ The privileged resolution was tabled (killed) on a party-line vote.

In contrast, Republican lawmakers contended that the three-hour vote complied with House rules. They pointed out that House Rule XX establishes a minimum—not a maximum—time limit for the conduct of votes. "The Speaker did not violate a rule of the House," said a Republican lawmaker. "The Speaker is entitled to take as much time as he wishes for a vote. And in this case, in this case, the stakes were high, the cause was great."⁶⁰ Another GOP lawmaker stated, "No question. It was a long vote. And it did inconvenience Members." However, the needs of senior citizens were "urgent and immense," and we "could not abandon our responsibility to pass real prescription Medicare drug reform.... And so, yes, we allowed ourselves to be masters of time."⁶¹

Another "master of time" was Speaker Jim Wright, D-TX (1987 to mid-1989), who made a decision that reverberated into 2003 and beyond. Speaker Wright held a vote open on October 28, 1987, for about 30 minutes to successfully lobby a Democratic colleague to change his vote to pass a bill. Republicans were angry, perhaps none more than Minority Whip Dick Cheney of Wyoming. He was scathing in his criticism of Speaker Wright's action, calling it "the most arrogant, heavy-handed abuse of power I have ever seen in the ten years I have been here."⁶² The House Parliamentarian, who was present in the chamber for both Speaker-ordered voting extensions, stated that the 1987 controversy laid the groundwork for what occurred in 2003 and in analogous circumstances thereafter.

⁵⁸ "Medicare Revamp Cuts It Close," *CQ Almanac*, 2003, vol. LIX (Washington, DC: Congressional Quarterly, Inc., 2004), pp. 113-118. President George W. Bush signed the prescription drug benefit measure into law.

⁵⁹ Speaker of the House Nancy Pelosi, "Privileges of the House—Circumventing the Will of the House by Holding Votes Open Beyond a Reasonable Period," remarks in the House, *Congressional Record*, daily edition, vol. 149 (December 8, 2003), p. H12846. Questions of the privileges of the House (Rule IX) involve such matters as the integrity of chamber proceedings. The Democratic resolution denounced the three-hour vote and urged the Speaker "to take such steps as necessary to prevent any further abuse."

⁶⁰ Rep. Jim Greenwood, "Privileges of the House—Circumventing the Will of the House by Holding Votes Open Beyond a Reasonable Period," remarks in the House, *Congressional Record*, daily edition, vol. 149 (December 8, 2003), p. H12849.

⁶¹ Rep. Nancy Lee Johnson, "Privileges of the House—Circumventing the Will of the House by Holding Votes Open Beyond a Reasonable Period," remarks in the House, *Congressional Record*, daily edition, vol. 149 (December 8, 2003), p. H12847.

⁶² McKay and Johnson, *Parliament & Congress*, p. 218.

In short, a general 15-minute period for voting prior to 1987 gave way to an irregular order of longer voting times—if that was necessary—to win passage, for instance, of majority party-preferred priorities. The House Parliamentarian at the time wrote the following:

[O]bserving the consistently more egregious relaxation of the fifteen-minute minimum vote requirement [since the Speaker Wright] occasion, [one] could conclude that the partisanship of contemporary Congresses has influenced the process to the point where rules and traditions, which have as their basis a respect for comity among Members, [have] become subservient to the [majority party's] political determination to win votes and to minimize Minority party options.⁶³

Settled Practice

Despite the clashes that occur regularly over procedural rules and how they are interpreted and applied, there are many rules, precedents, and practices that are often taken for granted and remain in continuous effect as “settled practice.” After more than 200 years of evolution, Congress and its Members have retained, discarded, modified, or created diverse parliamentary processes to address the constancy of change. Senator Robert C. Byrd, D-WV (1959-2010), made a relevant observation, which also applies to the House:

The day-to-day functioning of the Senate [and House] has given rise to a set of traditions, rules, and practices with a life and history of their own. The body of principles and procedures governing many [legislative] obligations [e.g., attendance, quorums, or voting] is not so much the result of reasoned deliberation as the fruit of jousting and adjusting to circumstances in which the Senate [and House] found itself from time to time.⁶⁴

Procedures and practices prove durable if they promote and serve a variety of important purposes, such as fostering efficiency; providing predictability, stability, and orderliness in chamber proceedings; protecting minority rights; and resolving conflicts. A noteworthy observation by former Representative Clarence Cannon, D-MO—who served as the official House Parliamentarian and then, during his electoral career, chaired the Appropriations Committee during periods of the 1940s, 1950s, and 1960s—makes the following point:

A well-established system of procedure is essential to expedition.... The time of the House [and Senate] is too valuable, the scope of its enactments too far-reaching, and the constantly increasing pressure of its business too great to justify lengthy and perhaps acrimonious discussion of procedures which have been authoritatively decided in former sessions.⁶⁵

Procedural Routines: House

Sometimes people use the phrase “regular order” to mean well-established procedures. Two procedures underscore this point. House Members understand that the suspension of the rules procedure—with its 40-minute limit on debate, prohibition on freestanding amendments, and two-thirds vote for passage—expedites chamber action of broadly supported bills. This procedure is in order on Mondays, Tuesdays, and Wednesdays and sometimes on other days. Like so many parliamentary rules, this procedure has been revised over the years, such as expanding the number

⁶³ McKay and Johnson, *Parliament & Congress*. McKay and Johnson were decades-long Parliamentarians, respectively, of the British House of Commons and the U.S. House of Representatives. Worth mention is that the House authorizes shorter voting times, such as five minutes or two minutes.

⁶⁴ Senate proceedings, *Congressional Record*, vol. 127, part 5 (April 8, 1981), p. 6871. Senator Robert C. Byrd is the longest serving Senator in history (1959-2011).

⁶⁵ Rep. Clarence Cannon, *Cannon's Procedure in the House of Representatives* (Washington, DC: GPO, 1959), p. iii.

of suspension days. Yet its fundamental purpose and procedural framework have broadly stood the test of time.

Major and controversial measures take a different route to possible floor consideration. They obtain a "special rule"—drafted as a resolution, H. Res.—from the Rules Committee. If approved by the House, special rules achieve two key things, among others: (1) they provide an avenue for major and controversial bills to be taken up that could not pass by unanimous consent or attract the two-thirds vote required by the suspension procedure; and (2) they establish the conditions for debating and amending (if allowed) measures.

In short, all roads lead to the Rules Committee for consequential and contested legislation. Moreover, the procedural pattern for considering special rules is familiar to lawmakers. For example, there is commonly one hour of debate on the special rule equally divided between the parties. Adoption of the special rule is followed by consideration of the measure made in order and under the procedures specified in the special rule, such as a period of time for "general debate" of the legislation. (The character of special rules has undergone significant change over the decades, a topic to be discussed later in this report.⁶⁶)

Noteworthy is that the House has a rule (XIV) titled "Order and Priority of Business," but most of its nine provisions are not obligatory requirements. In fact, only the first three occur every legislative day: a Prayer to open the House (since 1789); approval of the constitutionally required *Journal* (Article I, Section 5), the official record of daily proceedings; and the Pledge of Allegiance to the Flag (a 1995 rule). The other six⁶⁷ have been supplanted by different formal rules and precedents that allow measures to be taken up with the concurrence of the House. Is the daily order of business the "regular order"? The first three provisions of Rule XIV are but not the other six, for these reasons.

Rule XIV also states that the order and priority of business can be "varied by the application of other rules" and by "matters of higher precedence." Other rules permit, for example, "business in order on special days," such as the aforementioned suspension of the rules procedure. "Matters of higher precedence" include procedural resolutions reported by the Rules Committee; they are agreed to by majority vote of the House. These resolutions are widely used to interrupt the daily order of business defined in Rule XIV.⁶⁸

In addition, the Committee on Rules has jurisdiction over the "order of business of the House" and the authority "to report [procedural resolutions] at any time." These procedural resolutions, if agreed to by the House, interrupt the regular order of business (i.e., Rule XIV) to allow the chamber to consider a specific measure(s) under debate and amendment procedures defined in the special rule. The fundamental point is this: privileged interruptions of the order of business in the House—by "rules" from the Rules Committee—have supplanted much of Rule XIV's order of

⁶⁶ Stanley Bach and Steven S. Smith, *Managing Uncertainty In the House of Representatives: Adaptation and Innovation in Special Rules* (Washington, DC: The Brookings Institution, 1988).

⁶⁷ The basics of the other six are the following: Correction of reference of public bills; Disposal of business on the Speaker's table; Unfinished business; The morning hour for the consideration of bills called up by committees; Motions that the House resolve into the Committee of the Whole; and Orders of the day.

⁶⁸ The first House rule on the order and priority of business was in 1811 (see the *House Manual* for the 116th Congress, H.Doc. No. 115-177, p. 678). "The rule was amended frequently to arrange the business of the House to give the House as much freedom as possible in selecting for consideration and completing the consideration of the bills it deems most important. The basic form of the rule has been in place since 1890." The technical use of the term "regular order" was evident following its initial adoption. When a lawmaker in 1822 offered a motion to resolve the House into the Committee of the Whole to consider appropriations for the military, another legislator objected that the motion was not in the regular order of business. See *Annals of Congress*, vol. 38 (January 3, 1822), p. 625.

business. The parliamentary reality is that two procedures dominate decisionmaking in the House: "special rules" for major legislation and suspension of the rules for less controversial measures.

Procedural Flexibility: Senate

The Senate is an institution quite unlike the House. House rules, precedents, and practices allow a majority, however constructed (partisan or bipartisan), to govern. In contrast, the Senate's rules, precedents, and practices grant one Senator, a small group, or the minority party significant parliamentary prerogatives under the chamber's permissive rules and procedures. "The Senate is a place where political minorities and individual members hold great power, resting on authority drawn from Senate rules and more than two hundred years of related precedents and traditions."⁶⁹ Senator Tom Coburn, R-OK (2005-2015), added,

The magic number in the Senate is not 60, the number needed to end debate and it is not 51, a majority. The most important number in the Senate is one—one Senator. The Senate has a set of rules that gives each individual member the power to advance, change or stop legislation.⁷⁰

Given these features of the Senate, what constitutes settled practice for legislating can be difficult to determine. Senate Democratic leader Harry Reid of Nevada (1987-2015) once said, "[W]e as a body can do anything we want to do. That is the way the Senate operates. We have the ability to change the rules in a [matter] of minutes and move on to change what is before this body."⁷¹ Even so, there are long-standing "settled practices" observed in the Senate. They are employed to call up most bills for Senate consideration.

First, there is an informal "wrap-up" period where numerous noncontroversial measures or matters are called up by unanimous consent, often at the end of daily sessions, and enacted with minimal debate or none whatsoever. Senators are consulted in advance through an informal process that "clears" the passage of these measures by unanimous consent.⁷² Second, major bills follow a different route to the floor for debate and amendment. One way is if the Senate agrees by unanimous consent to take up a bill or resolution for floor consideration. The other way is by adoption of a "motion to proceed" (MTP) to consider a measure. If a majority of the Senate votes yes on that motion, then the measure is before the Senate for debate and amendment. Because the MTP is debatable, 60 votes could be required to invoke a time-consuming procedure called cloture (closure of debate). Filibuster-threatened measures are often set aside by party leaders, who might wait until fulsome Senate support is available to adopt the MTP.

There is a "technical" definition of regular order that merits brief mention. It concerns the right of any Member to enforce certain rules and precedents of the chamber. Members who advocate a return to the regular order are not referring to this technical form, as illustrated by the following example. A Senator who proposes a unanimous consent agreement (UCA)—a request that dispenses with many of the chamber's formal procedural rules (e.g., the filibuster) to permit greater expedition and predictability in decisionmaking—might immediately hear a colleague say, "Reserving the right to object."

⁶⁹ Martin B. Gold, *Senate Procedure and Practice* (Lanham, MD: Rowman & Littlefield Publishers, 2004), p. xii.

⁷⁰ Stephen Dinan and S.A. Miller, "Coburn Rankles Reid Once More Before Leaving Senate," *The Washington Times*, December 18, 2014, p. A6.

⁷¹ Senate debate, *Congressional Record*, vol. 162 (July 13, 2016), p. S5048.

⁷² See, for example, David Lerman and Lindsey McPherson, "Senate Tries to 'Hotline' Small-Business Fund Fix," *CQ News*, May 21 2020.

Typically, the Senator who reserves wants to learn more from the requestor about the purpose and intent of the consent request. Although Senate precedents state that UCAs are not debatable, it is settled practice for the Senate to allow some time for an exchange of views between or among Senators. As Senate precedents states, "[I]t is the custom or practice of the Senate to indulge in a reasonable interchange of views in hopes of reaching an agreement before calling for the regular order."⁷³ If a Senator demands the "regular order," the Member who reserved generally has two choices: voice a dissent ("object") or assent to the UCA. (A comparable House example is provided in this footnote.)⁷⁴

Informal Chamber Guidelines

Legislating in each chamber occurs in a vortex of numerous formal rules, precedents, and laws, as well as informal practices, customs, protocols, norms, and traditions. These informal processes might be called "informal guidelines." They could influence decisionmaking for certain issues, time periods, or political parties. They might remain in effect until no longer enforced because of changed circumstances.

One such guideline was the so-called "Hastert Rule," named after former Speaker Dennis Hastert, R-IL (1999-2007). This guideline could influence decisionmaking when Republicans control the House. Proclaimed in 2003, Speaker Hastert said the following: "The job of the [GOP] Speaker is not to expedite legislation that runs counter to the wishes of the majority of his majority.... I do not feel comfortable scheduling any controversial legislation unless I know we have the votes on our side first."⁷⁵

A consequence of the "majority of the majority" governing philosophy is to minimize the role of the minority party, unless its Members might provide votes vital to the passage of consequential legislation. For instance, the House minority leader was "called on repeatedly to deliver the majority of votes during [GOP Speaker John] Boehner's tenure for debt-ceiling increases and bipartisan spending deals."⁷⁶ Factional dissent within GOP ranks meant that a partisan majority could not be mobilized to enact such significant legislation.⁷⁷ Splits in Republican ranks could recast the Hastert Rule as a "minority of the majority" that influences GOP legislating.

A top aide to Speaker Hastert explained why the guideline at the time was important to the GOP leadership. The aide wrote that the job of the Speaker "is not to preside over [a committee-centric] regular order... [Hastert] learned that the secret of staying in the Speaker's chair is to

⁷³ Floyd M. Riddick and Alan S. Frumin, *Senate Procedure: Precedents and Practices* (Washington, DC: GPO, 1992), p. 1336. Hereinafter Riddick and Frumin, *Senate Procedure*.

⁷⁴ An example of technical regular order in the House was provided to this report's author by a House Parliamentarian. He wrote:

When Representative A asks unanimous consent to insert a letter in the [*Congressional Record*] Representative B may reserve the right to object and thereby seek recognition from the Chair. When recognized under that reservation of objection, B may interrogate, or comment on the letter, or whatever. But if B grows tiresome, any Representative may demand regular order, at which point B may no longer reserve the right to object. B must either object or not unless A withdraws his request.

The chamber's time is too vital a resource to allow a reservation to continue ad infinitum.

⁷⁵ Speaker Dennis Hastert, "Reflections on the Role of the Speaker in the Modern Day House of Representatives," *The Cannon Centenary Conference: The Changing Nature of the Speakership* (Washington, DC: GPO, 2004), p. 62.

⁷⁶ Burgess Everett, John Bresnahan, and Seung Min Kim, "Behind the Secret Budget Deal That Drove Conservatives Mad," *Politico Pro Budget and Appropriations*, October 30, 2015, p. 5.

⁷⁷ Matthew Green, *Legislative Hardball* (New York: Cambridge University Press, 2019).

understand that you must please the majority of your majority or risk losing the confidence of your members."⁷⁸

Subsequent GOP Speakers generally tried to follow the "majority of the majority" guideline. They were not always successful given the aforementioned combination of fissures in GOP ranks and the imperative of adopting "must pass" legislation. Observance of the "Hastert Rule" could prevent issues from being subject to floor consideration, even if supported by a bipartisan majority.⁷⁹

The Senate has its own informal guidelines or customs. One is sometimes called the "Thurmond Rule" after Senator Strom Thurmond, R-SC, when he chaired the Judiciary Committee (1981-1987). Occasionally, it is invoked on judicial nominations by majority party Senators. Thurmond's controversial "admonition holds that in presidential election years, the Senate should stop processing judicial nominations around the time of its summer recess, perhaps with limited exceptions for clearly noncontroversial nominees."⁸⁰ Sharp controversies can erupt in the chamber if the informal Thurmond "rule" is invoked during periods of acute partisanship and divided government (the Senate and White House controlled by different parties).⁸¹

Unanimous Consent Agreements: From Informal Practice to Formal Rule

The House and Senate have wide latitude to apply, modify, interpret, waive, or ignore procedural practices and rules. Sometimes there is a pattern to parliamentary change: from informal practice to formal rule of the House or Senate, as the case may be. A Senate example highlights the "from practice to rule" transition concerning UCAs.

Recall that UCAs are a fundamental feature of Senate decisionmaking. Typically negotiated by party leaders and other interested Senators, UCAs dispense with the Senate's cumbersome formal rules, which permit extended debate (the filibuster) and the offering of nongermane amendments. Instead, the Senate agrees to a tailor-made procedure, outlined in the UCA, for the consideration of a specific measure or matter (e.g., limiting debate and identifying the amendments that are in order). UCAs are commonly propounded on the floor by the majority leader. A single objection

⁷⁸ John Feehery, "The Myth of Regular Order," *The Hill*, October 6, 2015, p. 21.

⁷⁹ Ashley Parker and Jonathan Weisman, "After Deriding GOP on Immigration Bill, Boehner Shifts His Aim to Obama," *New York Times*, April 30, 2014, p. A16.

⁸⁰ Russell Wheeler, *The 'Thurmond Rule' and Other Advice and Consent Myths*, The Brookings Institution, May 25, 2016, p. 1. Another example of an informal guideline or custom concerns the Senate Judiciary Committee's so-called "blue slip" policy—a blue form sent by Judiciary chairs to home-state Senators soliciting their views of district and circuit court judicial nominees from their state. The thrust of the custom, implemented differently by Judiciary chairs, allows Senators either to assent or to oppose judicial nominees from their home state by whether they return (yea) or do not return (nay) their blue slip to the Judiciary Chair. In this partisan era, the Judiciary Committee has scheduled action on these nominees even if neither home-state Senator returned a blue slip. Senate Majority Leader McConnell and President Trump made swift Senate approval of judicial nominees a high priority. For further information about the blue slip, see, for example, Mitchel A. Stollenberger, "The Blue Slip: A Theory of Unified and Divided Government, 1979-2009," *Congress & the Presidency*, May-August 2010, pp. 125-156; and CRS Report R44975, *The Blue Slip Process for U.S. Circuit and District Court Nominations: Frequently Asked Questions*, by Barry J. McMillion. A somewhat related custom is called "senatorial courtesy," which dates from the George Washington era. In general, it means that home-state Senators of the President's party would recommend to him candidates for federal positions in their state. Presidents, as a matter of "courtesy," would often—but not always—nominate that person to the Senate.

⁸¹ In February 2016, Supreme Court Justice Antonin Scalia died. Soon thereafter, President Barack Obama nominated Merrick Garland to fill the vacancy. No hearings or floor consideration occurred on the Garland nomination despite the urgings of the President, Senate Democrats, and others. The Senate majority leader stated that America's voters should play the decisive role in this matter by their choice in November for President and party control of the Senate. In 2017, President Donald Trump nominated and the GOP Senate confirmed Neil Gorsuch to fill the open Supreme Court seat.

("I object") blocks adoption of the UCA. However, once the Senate approves the UCA, it is bound by its parliamentary features, unless they are changed by another UCA. To summarize, a UCA "changes all Senate rules and precedents that are contrary to the terms of the agreement"; these agreements are "designed to suit each individual situation."⁸²

It is not clear when the Senate actually began to employ UCAs to limit debate or to establish a time for a vote on a measure.⁸³ Two congressional scholars state that by the 1870s, UCAs "were being used with some frequency."⁸⁴ However, these informal "gentlemen's agreements" produced a number of parliamentary controversies that led to the adoption in 1914 of a formal Senate rule. Many of the controversies occurred because the early UCAs were viewed "as an arrangement simply between gentlemen" and could, as a President pro tempore said, be "violated with impunity by any member of the Senate."⁸⁵ The many controversies associated with these informal agreements concerned questions such as the following:

- Could a UCA be changed or modified by another UCA?
- Are presiding officers authorized to enforce these accords?
- If Senators are absent when a UCA was proposed, could a colleague object on their behalf?
- If a Senator in the chamber was momentarily distracted and failed to offer a timely objection to a UCA, is the agreement valid?

To resolve such ambiguities and the controversies they evoked, the Senate on January 16, 1914, adopted a formal rule (XII) to address some of these issues. The focus of the debate surrounding the change was whether these compacts could be modified by another UCA. Senator Henry Cabot Lodge, R-MA, argued that to permit any subsequent changes to UCAs would only lead to delays in expediting the Senate's business. Another Senator, Charles Thomas, D-CO, argued successfully that it is "the most illogical thing in the world to say that the Senate of the United States can unanimously agree to something and by act deprive itself of the power to agree unanimously to undo it."⁸⁶ The new rule made two key changes: (1) UCAs are binding orders of the Senate, and the presiding officer is charged with enforcing their terms; and (2) the Senate, by unanimous consent, can modify or undo an existing UCA. Today, there are numerous precedents that govern how UCAs "are to be interpreted and applied to various situations."⁸⁷

⁸² Riddick and Frumin, *Senate Procedure*, p. 1311.

⁸³ The first use of a unanimous consent agreement (UCA) may have occurred in 1846. Senator William Allen, D-OH, pointed out that the Senate had been debating a joint resolution concerning the Oregon Territory for two months. He noted that it was the Senate's habit to have a "conversational understanding that an end be put to protracted debate at a particular time." See *Congressional Globe*, vol. 15 (March 24, 1846), p. 540. A Senate colleague suggested that Senator Allen delay making such a request. Finally, on April 13, 1846, a consensus had developed among Senators that a final vote on the joint resolution should occur three days later. On April 16, after spending 65 days debating the matter, the Senate enacted the joint resolution.

⁸⁴ Gerald Gamm and Steven S. Smith, "Last Among Equals: The Senate's Presiding Officer," in *Esteemed Colleagues: Civility and Deliberation in the U.S. Senate*, ed. Burdett A. Loomis (Washington, DC: Brookings Institution Press, 2000), p. 124.

⁸⁵ Senate debate, *Congressional Record*, vol. 21, part 9 (August 26, 1890), p. 9144.

⁸⁶ Senate debate, *Congressional Record*, vol. 51, part 2 (January 16, 1914), p. 1757. By a 51 to 8 vote, the Senate adopted Rule XII.

⁸⁷ Riddick and Frumin, *Senate Procedure*, p. 1312.

Regular Order: Multiple Perspectives

Prelude

Whether traditional, nontraditional, or a hybrid approach to lawmaking is utilized, the end result could still be gridlock, deadlock, or defeat of legislation. No procedural method guarantees lawmaking success. A Senator lamented, "We've gotten back to regular order [on some bills], but we still have gridlock."⁸⁸ Even so, lawmakers might prefer the regular order if that approach serves their objectives, such as mobilizing broad Member and public support for legislation. Contrarily, party leaders may have little choice but to set aside regular order and employ unconventional lawmaking to deal with emergencies or to advance their agenda priorities if they are stymied by the implacability of the opposition.

Selected Definitions

The diverse interpretations of the regular order offered by congressional experts reveal several commonalities, such as an emphasis on an orderly, deliberative, and participatory policymaking process that affords Members of all views and from all parts of the country broad opportunities to participate in the policymaking process. Pressures of time (deadline lawmaking) or global and national crises are factors that can upend the regular order. Implicit in the definitions is that how Congress makes decisions can be as important as the policies themselves.

- *Senate Majority Whip.*

We are going to have committees consider legislation. We are going to have hearings to figure out how to pass good legislation, which is going to be voted on in the committee before it comes to the Senate so that we can see what pieces of legislation have bipartisan support and thus might be able to be passed by the Senate. In the Senate we call this regular order, but all it means is that everybody gets to participate in the process ... [and] to debate and offer amendments both in committee and on the floor.⁸⁹

- *Former Staff Director, House Rules Committee.* The "regular order can be defined as those rules, precedents and customs of Congress that constitute an orderly and deliberative policymaking process."⁹⁰
- *A House Democratic Leader.* "Regular order gives to everybody the opportunity to participate in the process in a fashion which will effect, in my opinion, the most consensus and best product."⁹¹
- *Former House Armed Services Chair.* "Over half the members here now don't know what a regular order is. They don't know you're supposed to pass a budget [resolution] and then 12 appropriation bills, and the Senate is supposed to [do the

⁸⁸ Peter Kasperowicz, "We Need A New Senate of Urgency on Debt," *WashingtonExaminer.Com*, January 11, 2016, p. 33.

⁸⁹ Sen. John Cornyn, "Energy Policy Modernization Act of 2015," remarks in the Senate, *Congressional Record*, daily edition, vol. 162 (February 3, 2016), p. S540.

⁹⁰ Don Wolfensberger, "Regular Order Is a Political Rorschach," *RollCall.com*, May 8, 2013, p. 12.

⁹¹ Tory Newmyer, "Pelosi's Restless Team Seeks Voice," *Roll Call*, February 5, 2009, p. 21.

same], and have conferences and work those out, and get the president to sign [the appropriations bills], all before Oct. 1."⁹²

- *A Democratic Senator.*

The truth is that we stopped following regular order. A lot of us only heard about regular order. We have never actually governed by it.... This is what regular order is supposed to look like. After receiving the President's budgets ... Congress is supposed to respond with our view of what the budget should look like. Then we work through [the] appropriations committees and their subcommittees to develop 12 separate appropriations bills. The entire body should then consider each individual bill and make sure they meet the demands of our constituents while staying within the means of our set budget [resolution]. We need to do that 12 separate times.⁹³

- *A Senate GOP Chair.* "By 'regular order,' I mean [the measure] came to the floor, it had an open amendment process, all 100 Senators had a chance to participate in it, instead of just the 30 on the Appropriations Committee, and it was eventually voted on and approved."⁹⁴

- *Senate Majority Leader.*

Here is what we mean when we talk about returning to the regular order. We mean working in committee and allowing Senators from both sides to have their voices heard. We mean bringing bills to the floor and empowering more Members to offer suggestions they think might make a good bill even better. We mean working through hours of debate and deliberation, processing amendments from both sides, and then arriving at a final bill that actually passes.⁹⁵

There are also procedurally detailed definitions of what constitutes regular order legislating. An example is this six-part proposal to amend House rules. It was offered on the opening day of the Democratic-controlled 110th House (January 4, 2007). The sponsor was GOP Representative David Dreier of California, the ranking lawmaker on the Rules Committee and the panel's previous chair. Representative Dreier entitled his recommendation "Regular Order for Legislation." Its fundamental aim was to alter House rules to protect and strengthen minority rights during this hyperpartisan period. Reflect, for instance, on this recommendation: "Legislation shall generally come to the floor under a procedure that allows open, full, and fair debate consisting of a full amendment process that grants the minority the right to offer its alternatives, including a substitute [amendment]." It is usual, regardless of which party is in the minority, for opposition lawmakers to propose amendments to the House rule book on the first day of a new Congress. Invariably, as in this case, the majority party rejects minority-sponsored amendments to the chamber's rule book, in part because they are viewed as dilatory and obstructive procedures.

⁹² Pat Morrison, "For 'Buck' McKeon, It's Syria or the Sequester," *LATimes.com*, September 18, 2013, online edition.

⁹³ Sen. Joe Manchin, "Omnibus and Tax Extenders Legislation," remarks in the Senate, *Congressional Record*, daily edition, vol. 161 (December 17, 2015), p. S8739.

⁹⁴ Sen. Lamar Alexander, "Energy and Water Development and Related Agencies Appropriations Act, 2016," remarks in the Senate, *Congressional Record*, daily edition, vol. 162 (May 12, 2016), p. S2729.

⁹⁵ Sen. Mitch McConnell, "The Appropriations Process," remarks in the Senate, *Congressional Record*, daily edition, vol. 162 (May 17, 2016), p. S2833.

Regular Order Can Provoke Irregular Order

Ironically, regular order can provoke nontraditional procedures and processes. For example, newly elected House Speakers—from at least the mid-1990s speakership of Newt Gingrich, R-GA, going forward—pledged to operate the House in a fair and open manner, unlike when the other party was in charge.⁹⁶ However, with the escalation of procedural partisanship, promises of fairness and openness are difficult to keep, in part because of the divergent policy views of the two parties. Brief examples highlight the clash between openness and timely policymaking, one involving GOP control of the House, the other with Democrats in charge.

GOP Control

In November 1994, Republicans won a historic mid-term election, capturing majority control of the 104th House (1995-1996). After 40 straight years (1955-1995) in the minority, many viewed Republicans as the “permanent minority.”⁹⁷ Gerald Solomon, R-N.Y., the new chair of the Rules Committee, proclaimed that the GOP House would function in a more open, fair, and deliberative manner compared with when Democrats were in charge. He reported that in the previous 103rd Congress, Democrats adopted closed or restrictive special rules that limited or prevented amendments 70% of the time. Chairman Solomon pledged instead that “we are going to have 70 percent open and unrestricted rules, if we possibly can.”⁹⁸

Republicans soon experienced the downside of open rules, the ever-present tension between debate and decision: balancing the right of all interested lawmakers to have a say in policymaking against the governing party’s desire to advance its agenda priorities. For instance, after two weeks of debating and amending the Unfunded Mandates Reform Act (H.R. 5), which was considered under an open rule, Republicans began to have second thoughts about openness.

During the 1994 mid-term election, Republicans promised that the House would act on their top 10 policy priorities (called the “Contract with America”) during the first 100 days of the new Congress. Granted the opportunity to offer numerous floor amendments, the Democratic minority employed a filibuster-by-amendment strategy to foil the GOP’s 100-day plan. At this development, Rules Chairman Solomon said, “It looks like we’re going to have to increasingly [report restrictive rules] if the Democrats won’t cooperate.”⁹⁹ Gradually, rules that limited Members’ amendment opportunities became the “new normal” in subsequent Congresses.

Democratic Control

When Democrats reclaimed control of the House (2007-2010), they encountered similar difficulties with open rules. The Majority Leader stated the following: “[W]e went from open rules which we started out with, to structured rules [restrictions on the amending process] because, frankly, it was our perception that what we were having is filibuster by amendment—

⁹⁶ Donald R. Wolfensberger, *Changing Cultures in Congress: From Fair Play to Power Plays* (New York: Columbia University Press, 2018), pp. 1-7.

⁹⁷ William F. Connelly Jr. and John J. Pitney Jr., *Congress’ Permanent Minority? Republicans in the U.S. House* (Lanham, MD: Littlefield Adams, 1994).

⁹⁸ House debate, *Congressional Record*, vol. 141, January 5, 1995, p. H137.

⁹⁹ Jonathan Salant, “Under Open Rules, Discord Rules,” *Congressional Quarterly Weekly Report*, January 28, 1995, p. 277. See also Mary Jacoby, “Three Quarters ‘Open,’ or Two-Thirds ‘Closed’? Parties Can’t Agree on How to Define Rules,” *Roll Call*, April 13, 1995, p. 7.

amendment after amendment after amendment—from [the minority] side of the aisle.”¹⁰⁰ “Regular order,” in short, provoked an “irregular order.” As a House Member once said, “I believe in regular order, but I believe in sane regular order where members aren’t just given the ability [to offer numerous amendments] for purely political reasons.”¹⁰¹

In today’s partisan-charged environment, majority party promises of openness and fairness are hard to keep. Intense partisan polarization suggests that a return to regular order legislating becomes problematic without substantial procedural and political forbearance and comity between the two parties. Trade-offs, bargains, and compromises—hallmarks of collective problem-solving—require the accommodation of disparate views. As a former top Senate and White House aide pointed out, “Bipartisanship is not the absence of partisanship; it is partisans coming together to reconcile their competing political and policy objectives.”¹⁰²

Nontraditional Lawmaking: Several Advantages

The process of “coming together” is difficult today. Partisan polarization—the ideological distinctiveness of the two parties—is a prime reason. Its impact is evident in numerous legislative proceedings: the intensity of the Senate’s confirmation process; the irregularity of congressional budgeting and appropriating; or the parliamentary struggles to legislate on many issues. Unconventional processes are sometimes the only way to achieve policy results. Consider the procedural and political advantages of nontraditional lawmaking, such as these three.

First, nontraditional procedures work. They can produce policy results unachievable through the “regular order.” This reality provides an incentive for their wider use. A congressional scholar calculated that there is a relatively high success rate for major measures that employ one or more unconventional procedures, such as bypassing committee review of legislation. “When the legislative process on a bill in the House includes two or more special procedures or practices,” said the scholar, “that legislation is considerably more likely to pass the House [96 percent] than if it includes one [81 percent] or none [77 percent]. The same relationship holds in the Senate [72 percent for no special procedures; 90 percent for two or more].” Furthermore, of “measures subject to two or more special procedures and practices in both chambers, 80 percent were successful; at the other extreme, if subject to none in either chamber, only 61 percent were successful.” The scholar concluded, “legislation is more likely to complete the legislative process successfully if that process includes these special procedures and practices.”¹⁰³

Second, unconventional procedural pathways can be more expeditious than traditional law making. Time is a critical element of law making and often in short supply. Committee or party leaders want to use it in ways they deem advantageous and productive. They may decide, for instance, to avoid committee consideration (hearings and markups) of a measure. Why? They do not want to provide the opposition with two opportunities—in committee and then again on

¹⁰⁰ Rep. Steny Hoyer, “Legislative Reform,” remarks in the House, *Congressional Record*, daily edition, vol. 162 (June 16, 2016), p. H3954.

¹⁰¹ “High Hopes for ‘Regular Order’ End In Yet Another Midwinter Omnibus,” *CQ Almanac, 2014* (Washington, DC: CQ Roll, 2015), pp. 2-3.

¹⁰² John Hilley, *The Challenge of Legislation: Bipartisanship In A Partisan World* (Washington, DC: Brookings Institution Press, 2008), p. xi.

¹⁰³ Barbara Sinclair, *Unorthodox Lawmaking*, 2nd ed. (Washington, DC: CQ Press, 2000), p. 223. The special procedures and practices identified by the author include for the House, “multiple referral, omnibus legislation, legislation that was the result of a legislative-executive summit, the bypassing of committees, post-committee adjustments, and consideration under a complex or closed rule; for the Senate, all of the above except consideration under a complex or closed rule.”

the floor—to frustrate the majority and to showcase their political messages and policy priorities. During committee proceedings, said a chair, opposition Members “get to offer all kinds of embarrassing amendments and stuff in committee, and why do it twice. Do it once.”¹⁰⁴

The strategic value of time, such as whether to move slowly or swiftly in lawmaking, is well understood by party leaders. They understand that “legislative timing [of floor action] plays a big role in whether a bill will pass because support can be fleeting;”¹⁰⁵ or the majority leadership might decide to use “end game” law making as a way to achieve party and policy objectives. An example would be the difficulties Congress encounters in trying to enact individually the 12 annual appropriations bills by the start of the fiscal year (October 1).

Unable to meet appropriating timetables because of conflicts between and among the parties, chambers, and White House, party leaders assemble omnibus spending bills consisting of several outstanding appropriations measures. These bills can be hundreds of pages in length. As an analyst explained, “What usually happens [when the October 1 fiscal deadline approaches] is a high stakes game of chicken, with the result a huge omnibus bill, negotiated by a few leadership aides and representatives from the White House, in a small room, with the threat of a government shutdown looming over the horizon.”¹⁰⁶ Omnibus spending bills may be “the wrong way to do business,”¹⁰⁷ stated Senator John McCain, R-AZ, but they might be the only way in the current partisan environment for Congress to carry out its constitutional appropriating responsibility. In sum, legislating without allowing Member participation is faster than conventional policymaking.

Third, the secrecy generally associated with nontraditional processes can facilitate law making. Closed-door sessions have certain advantages over public meetings. For example, they enable Members to raise creative or “trial balloon” ideas without worry of public condemnation from partisan commentators for subverting party principles. A congressional aide said, “Regular order is too messy and it’s covered instantly in the media and it can create lawmaking problems,” such as the disintegration of Member support for a measure.¹⁰⁸

In contrast, the presumption embedded in the “regular order” is the formal requirement for transparency during committee and floor proceedings. Consider that C-SPAN (the Cable Satellite Public Affairs Network) provides coverage of numerous committee sessions and virtually all floor (gavel to gavel) proceedings. Today’s 24/7 media environment is replete with journalists, analysts, and lobbyists who monitor and publicize Capitol Hill proceedings.

Nearly 100 years ago, a House lawmaker made an observation about legislative secrecy that remains relevant to this day: “Behind closed doors compromise is possible; before spectators it is difficult.”¹⁰⁹ Recall from history, the many compromises reached during closed door proceedings of the Constitutional Convention of 1787.¹¹⁰

¹⁰⁴ Fawn Johnson, “Democrats Bypass Committee on Minimum Wage Bill,” *National Journal Daily*, January 8, 2014, p. 5.

¹⁰⁵ Susan Ferrechio, “Congressional Leaders Right Against Posting Bills Online,” *Washington Examiner*, October 6, 2009, p. 14.

¹⁰⁶ John Feehery, “A Spending Solution,” *The Hill*, October 6, 2016, p. 21.

¹⁰⁷ Senate debate, *Congressional Record*, vol. 162 (March 9, 2016), p. S1370.

¹⁰⁸ This quotation is from an analysis of the regular order by James M. Curry and Frances E. Lee, “What is Regular Order Worth? Partisan Lawmaking and Congressional Processes,” paper presented at the Congressional Rules & Procedures Conference, University of Georgia, Athens, GA, May 17-19, 2018, p. 21.

¹⁰⁹ Robert Luce, *Legislative Procedure* (Boston: Houghton Mifflin Co., 1922), p. 151.

¹¹⁰ After the 1787 Federal Convention, James Madison stated the following: “Had the members committed themselves publicly at first ..., consistency [would have] required them to maintain their ground, whereas by secret discussions no

Features of "New Normal" Legislating

The two legislative parties are more ideologically distinct and internally united than they have been in decades for reasons discussed at greater length in the next section ("The Rise of Partisan Polarization"). That the two legislative parties disagree profoundly at times about what is best for the country is no surprise. Nor is it unexpected that majority party leaders, if frustrated in advancing their governing agenda, would use nontraditional procedures to enact their party's priorities. After all, it might be in the political interest of the minority party, regardless of party, to use a "block and blame" strategy: foment policy gridlock and then blame the majority party for its lack of performance (a "do nothing Congress").

In seeking to advance their collective interests of winning elections and wielding power, legislative partisans stir up controversy. They impeach one another's motives and accuse one another of incompetence and corruption, not always on strong evidence. They exploit the floor agenda for public relations, touting their successes, embarrassing their opponents, and generally propagandizing for their own party's benefit. They actively seek out policy disagreements that can be politically useful in distinguishing themselves from their partisan opponents.¹¹¹

The challenges of modern-day governance have triggered significant legislative and procedural changes. A brief review spotlights several of the most consequential parliamentary transformations. They include changes to (1) the committee system; (2) "special rules" reported from the Rules Committee; (3) Senate floor procedures (filibuster, cloture, the "nuclear option," and "filling the amendment tree"); and (4) the role of conference committees to resolve bicameral differences on legislation.¹¹²

Congressional Committees

Committees are important in both chambers because they play a large role in processing the business of Congress. Most measures are referred to committee; these panels may hold hearings, conduct markups, and issue reports; and they oversee executive branch performance. Still, in this polarized period, "an increasing proportion of legislation has reached the House and Senate floors without undergoing markups." During the 2009-2011 period, over 40% of "all House bills and 80% of all Senate bills were deliberated outside committee."¹¹³ To further illustrate committee changes in recent decades, this section discusses three developments: the increase of measures considered by the House that were unreported by the committee(s) of jurisdiction; Senate Rule XIV that permits any Senator to bypass the reference of legislation to committee; and the use of

man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument." Cited in Adrian Vermeule, "The Constitutional Law of Congressional Procedure," Public Law and Legal Theory, Working Paper no. 39, University of Chicago Law School, February 2003, p. 39.

¹¹¹ Frances E. Lee, *Beyond Ideology: Politics, Principles, and Partisanship in the U.S. Senate* (Chicago: The University of Chicago Press, 2009), p. 4.

¹¹² The congressional budget process has also undergone major changes from what it was like during the committee-centric period. Scores of books, articles, legislative hearings, and more have assessed how budgeting has changed (e.g., omnibus appropriations bills) and what revisions might improve fiscal decisionmaking. For a useful summary of Member concerns with congressional budgeting, see U.S. Congress, House Committee on the Budget, *Legislative History of the Joint Select Committee on Budget and Appropriations Process Reform*, committee print, 115th Cong., 2nd sess., December 19, 2018, 115-15 (Washington, DC: GPO, 2018).

¹¹³ William Bendix, "Bypassing Congressional Committees: Parties, Panel Rosters, and Deliberative Processes," *Legislative Studies Quarterly*, vol. 41, no. 3 (May 2016), pp. 690-691.

ad hoc legislative groups to assume the traditional policy formulation role of the standing committees.

Unreported Bills Considered in the House

The 13-Member Rules Committee, as noted earlier, is the "Speaker's committee" because he or she effectively names the nine majority party lawmakers, including the chair. Accordingly, the Rules Committee is responsive to requests of the Speaker to forward to the floor bills not reported from committee. During the committee-centric period, hearings, markups, and reports usually preceded floor consideration. Even in the early 1990s, "only about 9 percent of the bills with special rules were unreported" from the committee(s) of jurisdiction.

Fast forward to the 2010s. Unreported measures accounted "for 30 percent of all bills with special rules," and most of those were considered by the House with rules that prohibited floor amendments. An expert on House procedure concluded, "More bills are being brought to the floor without the benefit of committee hearings, amendments, or reports, primarily because they are party-driven." He added that although more than two-thirds of major measures are reported from committee, "the deviations from regular order that do occur tend to exacerbate partisan warfare and diminish committee authority."¹¹⁴

Recognition that committees required strengthening, advocated by change-oriented Members, led to adoption of new chamber rules (H.Res. 6) at the start of the 116th Congress (2019-2021). Section 103(i) of H.Res. 6 is entitled "Requiring Committee Hearing and Markup on Bills and Resolutions." For example,

it shall not be in order to consider a bill or joint resolution pursuant to a special order of business reported by the Committee on Rules that has not been reported by a committee; or has been reported by a committee unless the report includes a list of related committee and subcommittee hearings and a designation of at least one committee or subcommittee hearing that was used to develop or consider such bill or joint resolution.

One reason departures from committee review might occur is if the legislative branch, for instance, must respond swiftly to address national or global emergencies, such as the COVID-19 pandemic. For instance, the House in 2020 enacted the \$3 trillion Health and Economic Recovery Omnibus Emergency Solutions Act (Heroes Act) to address the coronavirus' effect on the economy, state and local governments, and other matters. The measure was unreported from committee, considered under a closed rule (no amendments), contained controversial changes, and, not unexpected for a bill of this significance, passed the House on May 15, three days after it was introduced.¹¹⁵ There are other reasons why measures are taken up without committee review: for instance, they passed the House in the previous Congress, or they are party priorities.

¹¹⁴ Don Wolfensberger, "Weak Committees Empower the Partisans," *Roll Call*, November 8, 2011, p. 11. Wolfensberger, a former staff director of the Rules Committee and a 30-year veteran of the House, is now a congressional scholar and author affiliated with the Bipartisan Policy Center in Washington, DC.

¹¹⁵ Urgent times, such as the pandemic, beget urgent measures. Another example is a special rule (H.Res. 1017) that was adopted by the House on June 25, 2020. One rule made in order six separate bills for House consideration under a closed rule. Upon the rule's adoption, it also self-executed to House passage several leadership amendments, "avoiding the need for separate floor votes." Moreover, the special rule substituted for one of the six bills, "a 154-page Rules Committee print that bundled another 23 bills under the same bill number—eight of which had been previously reported from committee as separate bills and 16 others that had not been reported by any committee." See Don Wolfensberger, "Floor Procedures Tightened in Pandemic's Wake," *The Hill*, June 28, 2020.

Senate Rule XIV: Bypassing Bill Referral to Committee

Senate Rule XIV permits any Senator to employ the relatively easy process specified in the rule to place a bill, at the time of introduction, directly on the legislative calendar of business—bypassing any referral to committee.¹¹⁶ There is no guarantee that a Rule XIV measure pending on the calendar would reach the floor. Although Rule XIV is not used for the vast majority of measures, it has increased in use over time—from 3 in the 103rd (1993-1994) Congress to a record-setting 57 in the 110th (2007-2008). The chamber's agenda is set by the majority leader, and, in most cases, the majority leader (or a designee) executes the Rule XIV process.

The majority leader may utilize Rule XIV to bypass committee referral for a number of reasons, such as the lack of time for committee consideration or because the party leader wants an issue on the legislative calendar that the leader can propose to the Senate at a time of his or her choosing. Committee chairs, for their part, are not always happy when their panels are bypassed. A Senate Finance chair once said, "Circumventing the committee process allowed this bill to come to the floor full of many unanswered questions. Avoiding the committee process quashes any [real] chance to improve this bill."¹¹⁷ Even so, bypassing committee review also can occur with the committee majority's approval.

Ad Hoc "Gangs"

Partisan and policy conflicts may prevent standing committees, even party leaders, from forging legislative agreements on major measures. If both committee and party leaders are stymied in policymaking, bipartisan groups of lawmakers (sometimes called "gangs" by the media) may come together to draft compromise legislation. This development represents an innovative response to institutional stalemate. As a political analyst wrote, "With polarization increasingly clogging the conventional paths to agreement (either at the committee level or through leadership), [lawmakers] convene a coalition of the willing to chart a bypass."¹¹⁸ Bipartisan groups may not be successful in creating law, but the theory is that they may have a better chance than polarized committees to produce compromise bills that can pass the House or Senate.

In 2013, for example, a bipartisan group of Senators—the "Gang of 8"—came together to write a comprehensive reform bill on a controversial topic: immigration. Four Senate Democrats—Charles Schumer, NY; Michael Bennet, CO; Richard Durbin, IL; and Robert Menendez, NJ—joined four Senate Republicans—John McCain, AZ; Jeff Flake, AZ; Lindsay Graham, SC; and Marco Rubio, FL—to draft a bill designed to win the support of the Senate. Their measure (S. 744) was referred to the Judiciary Committee, which reported the bill (13 to 5) on May 21 after five days of markup. After several weeks of floor debate, S. 744 passed the Senate on June 27 by a 68 to 32 vote, with the strong support of the Gang of 8. Senator Schumer stated, "Our pledge to one another is not that we pledge to vote the same on [floor] amendments but that we keep the core of the bill intact and don't let attacks from one side or the other undo that."¹¹⁹ A similar

¹¹⁶ Because the Senate has no general germaneness rule for amendments, a Senator could offer, for example, a school education amendment to a solar research bill pending on the floor. The school education amendment might be equivalent to a comprehensive bill never considered by any Senate committee. A germaneness requirement for amendments can be imposed in the Senate in four ways: by a unanimous consent agreement; by statutory requirement; if cloture is invoked; and by Senate Rule XVI for general appropriations bills. See also Nicholas O. Howard and Mark E. Owen, "Circumventing Legislative Committees: The U.S. Senate," *Legislative Studies Quarterly*, July 2020, pp. 495-526.

¹¹⁷ Sen. Max Baucus, "Marketplace Fairness Act," remarks in the Senate, *Congressional Record*, daily edition, vol. 159 (April 22, 2013), p. S2829.

¹¹⁸ Ronald Brownstein, "Gangmen Style," *National Journal*, May 11, 2013, p. 9.

¹¹⁹ "Senate Passes Immigration Overhaul," *Congressional Quarterly Almanac, 2013* (Washington, DC: CQ Roll Call,

House group of four Democrats and four Republicans also tried to fashion a bipartisan immigration reform bill acceptable to a majority of their colleagues. They were unsuccessful. The House never took up S. 744.¹²⁰

Creative "Rules" of the House Rules Committee

During much of the 20th century, the Rules Committee issued two basic rules: "open" (generally germane amendments are in order) and "closed" (no amendments are in order). There were other variations: rules waiving points of order or modified rules making some amendments in order but not others. Most rules were open during this congressional era. For example, from 1935 to 1947, there was "an average of only three closed rules per Congress." During the 80th Congress (1947-1949), nine measures "were brought to the floor under closed rules," the highest "in any Congress since the 73rd [1933-1935] when ten closed rules were granted, eight of which came during the famous first one hundred days of the [Franklin Delano] Roosevelt presidency."¹²¹ Between 1939 and 1960, "there were 1128 open rules and 87 closed rules granted by the committee."¹²² Tax measures, with infrequent exceptions, have long been brought to the floor under closed rules. A key reason: concern that an open process would lead to the adoption of numerous special interest amendments that would unravel the tax code. The complexity of the tax code also discourages an open amendment process.

Today, closed or "structured" rules govern floor procedures on major legislation. Structured rules limit floor amendments to those approved by the majority party; they are then specified in the special rule itself or in the report of the Rules Committee accompanying the special rule. Open rules are in steep decline because they allow, in the view of the majority leadership, too many opportunities for the minority party to offer amendments designed to undermine the majority's policy priorities. Closed and structured rules ensure certainty and predictability in floor proceedings, prevent spontaneous and troublesome floor amendments, block unwanted minority party proposals, and protect vulnerable majority Members from casting electorally challenging "November" votes.

Whether the majority is Democratic or Republican, each party at times has been "intent on restricting debates and minimizing undesirable votes, rather than following established general rules or practices. In fact, the circumvention of ... standing rules and practices in furtherance of time and issue certainty has itself become established practice, regardless of the political majority."¹²³ "Rules" that permit an open amendment and deliberative process are sometimes discouraged by lawmakers who favor a high degree of certainty in the floor schedule because of the many demands on their time (e.g., legislative and constituency).

In five recent Congresses, the percentage of open versus restrictive (closed and structured) special rules is as follows:¹²⁴

- 111th Congress (2009-2010): 1% open, 99% restrictive
- 112th Congress (2011-2012): 18% open, 82% restrictive

2014), pp. 9-8.

¹²⁰ Alec MacGillis, "The Gang That Failed," *The New York Times Magazine*, September 18, 2016, pp. 53-57, 70, 80.

¹²¹ The quoted material is from *A History of the Committee on Rules*, p. 95.

¹²² Lewis A. Froman Jr., *The Congressional Process: Strategies, Rules, and Procedures* (Boston: Little, Brown and Co., 1967), p. 55. See also James A. Robinson, *The House Rules Committee* (Indianapolis, IN: Bobbs-Merrill, 1963).

¹²³ McKay and Johnson, *Parliament & Congress*, p. 429.

¹²⁴ The data source is Donald Wolfensberger, resident scholar, Bipartisan Policy Center, Washington, DC.

- 113th Congress (2013-2014): 8% open, 92% restrictive
- 114th Congress (2015-2016): 5% open, 95% restrictive
- 115th Congress (2017-2018): 0% open, 100% restrictive

Wider use of restrictive rules reflects the top-down, leadership-directed legislating common to the contemporary House. Restrictive rules can also upset rank-and-file lawmakers of the majority party. They, too, are barred from offering their freestanding amendments.

- *Self-executing rules*—include substantive, even nongermane, changes in the legislation made in order for floor consideration by the special rule. Adoption of the special rule automatically makes these policy changes in the bill without any opportunity for rank-and-file lawmakers to debate or to amend the “self-executed” provisions. These rules also remove the need for the Rules Committee to cite potentially embarrassing waivers of House rules in its report to accompany the special rule. This procedural technique, wrote a House Parliamentarian, “has taken hold more frequently in contemporary Congresses as measures emerging from committees are sometimes extensively rewritten, often with additional and nongermane matter, merely by vote on the special order of business resolution and not by the traditional presentation and vote on separate amendments following the standing committee stage.”¹²⁵
- *Queen-of-the-Hill rules*—make several (e.g., three or four) major amendments, the functional equivalent of separate bills, in order for House consideration. All are voted on, but the one that wins is the “top vote getter.” If there are tie votes, the last one voted upon is the winner.¹²⁶
- *Compound rules*—provide that in one special rule, two or more different bills are made in order for House consideration. The single rule specifies an open, structured, or closed amendment process for each discrete measure. This procedure allows the majority leadership to save the time of the House by reducing the number of special rules. Otherwise, a separate rule for each bill expends an hour of debate time, excluding accompanying votes. These rules also eliminate multiple “previous question” votes, which would otherwise occur under a “one bill, one rule” construct.¹²⁷

¹²⁵ McKay & Johnson, *Parliament & Congress*, p. 428.

¹²⁶ A recent article pertaining to the Queen-of-the-Hill rule is Dara Lind, “Queen of the hill”: the Obscure House Rule that Could Force the House to Take up Immigration Bills,” *Vox.com*, April 19, 2018. The “Queen” rule was a response to a Democratic innovation during the early 1980s: the “King of the Hill” rule. One of the features of this rule was permitting the House to vote on an array of major policy alternatives—so-called substitutes that are equivalent to new measures—that are voted upon one after the other. No matter the outcome, the special rule stipulated that only the vote on the last substitute—the majority party’s preference—counted for purposes of accepting or rejecting a national policy. In the minority, Republicans disliked this rule, in part because it provided political cover to majority party lawmakers to vote however they wanted to satisfy constituency interests and then vote for their party’s policy preference on the last vote in this procedural scenario. When the Republicans won control of the 104th House (1995-1997), they dropped the “King of the Hill” and replaced it with their own preferred option: the “Queen of the Hill” procedure.

¹²⁷ Special rules are debated under the chamber’s one-hour rule. Thirty minutes are allocated to each party with the Rules chair, or his or her designee, always in charge of offering the “previous question” motion. Its adoption by majority vote of the House stops all debate, prevents the offering of amendments, and brings the House to an immediate vote on the main question—the rule itself. Minority party lawmakers often highlight in advance of the vote on the previous question motion that, if the motion is rejected, they plan to offer proposals that are attractive to many voters but also likely to create policy fissures and electoral discomfort within majority party ranks.

- *Time-Structured rules*—establish an overall time limit (e.g., four or five hours) for debating and amending the bill made in order by the special rule. The rule itself might be called “open,” but everything counts against the overall limit, such as debating amendments, voting on amendments, making points of order, or responding to parliamentary inquiries. This type of rule indirectly restricts the amending process.

New and innovative special rules are responses by the Rules Committee to changing institutional circumstances.¹²⁸ As the Speaker’s committee, the Rules Committee’s mission generally is to advance and advantage the majority party’s legislative agenda. This mission has varied over the decades, but it is of major significance today and parallels a comparable perspective of a Speaker from another historical era. In 1888, Speaker Thomas Brackett Reed, R-ME—one of the most influential Speakers ever and a strong advocate of majority party governance—said, “If the majority do not govern, the minority will.... [House] rules, then, ought to be so arranged as to facilitate the action of the majority.”¹²⁹

The Senate

To reemphasize, the Senate is an institution unlike the House, a majoritarian body. House rules, practices, and precedents allow a majority, however constructed (partisan or bipartisan), to govern. Recall that one Senator, a small group, or the minority party has formidable parliamentary prerogatives given the Senate’s permissive rules and procedures. In brief, the “majority often struggles to govern at all,” declared a Senate expert.¹³⁰ A Senator stated, “[J]ust to be clear, the only way the Senate functions and the only way the Senate has ever functioned is if you deviate from what [law makers] call regular order.” He added, “We need unanimous consent on a daily and sometimes hourly basis to allow the Senate to function,” which means “waiving of the rules on a regular basis.”¹³¹

The combination of individual procedural prerogatives, partisan polarization, and the chamber’s permissive rules underscores the policymaking challenges that confront the Senate. Bipartisan collaboration and compromise are especially difficult to forge in an era of heightened partisanship where the two parties compete vigorously to hold or take institutional power. The use of nontraditional procedures by both political parties is common practice, so much so that many are

¹²⁸ Special rules that limit the amendment process can mean that decisionmaking on contentious issues occurs behind-the-scenes by party leaders, rather than through separate and public floor consideration by the wider membership. Worth noting is that the Rules Committee may grant majority floor managers the authority “to ‘en bloc’ consideration of amendments screened by [Rules] into one or more ‘managers’ amendments which are not amendable or divisible into separate parts.” See MacKay and Johnson, *Parliament & Congress*, p. 428. Managers’ amendments are packages of discrete measures that are commonly considered under the terms set by the special rule. The special rule to govern consideration of major transportation legislation (H.R. 2) in June 2020 is a good example of the wider use of the en bloc procedure. As the Rules Committee’s floor manager of the special rule (H.Res. 1001) explained, “The rule self-executes a manager’s amendment offered by [T]ransportation Chair DeFazio, makes in order six en bloc amendments in total, and makes in order three further amendments.” Rep. Joe Morelle, “Providing for Consideration of H.R. 2, Investing in a New Vision for the Environment and Surface Transportation in America Act,” remarks in the House, *Congressional Record*, daily edition, vol. 166 (June 30, 2020), p. H2683. En bloc provisions can be viewed as time-saving and expediting procedures.

¹²⁹ William A. Robinson, *Thomas Reed: Parliamentarian* (New York: Dodd Mead, 1930), p. 182.

¹³⁰ Martin B. Gold, *Senate Procedure and Practice*, p. xii.

¹³¹ U.S. Congress, House Committee on the Budget, *Legislative History of the Joint Select Committee on Budget and Appropriations Process Reform*, committee print, 115th Cong., 2nd sess., December 19, 2018, 115-15 (Washington, DC: GPO, 2018), p. 85..

acknowledged as significant new features of contemporary law making. Several major examples are included below.

Filibusters

Filibusters, cloture, and 60 votes are three key interlocking components of Senate Rule XXII. Consider the filibuster, perhaps the most famous feature of the Senate. Numerous books and articles have been written about the filibuster, its history, diverse purposes, pros and cons, and so on.¹³² Hollywood glamorized the filibuster in the 1939 movie classic *Mr. Smith Goes to Washington*. The round-the-clock filibuster by a single Senator, as portrayed in the movie, has almost disappeared from present-day Senate proceedings. The time demands and pressures on the Senate—to consider numerous bills and nominations—and on individual Senators (campaigning, constituency service, and so on) are so large that no longer is a so-called “war of attrition” (i.e., exhaustion) employed to end filibusters.¹³³

Instead, the threat of a filibuster is often viewed today as equivalent to its exercise. In short, it is not necessary to talk or take other actions on the floor to conduct a filibuster (a “silent filibuster”). A former Senate Parliamentarian explained, “There is very little distinction between a filibuster and a threat to filibuster. Any credible threat to filibuster is treated as if it were a filibuster because the Majority Leader, who has limited time to move his party’s agenda, must regard it as such.”¹³⁴ Senators understand that filibuster threats provide them with bargaining leverage to influence legislative policymaking; outside groups also encourage senatorial allies to threaten filibusters as a way to prevent unwanted Senate actions. Threats to filibuster are especially potent during certain times, such as the end-of-session rush to adjourn. (Filibuster threats are somewhat akin to a long-standing Senate practice called “holds,” which Senators of either party might use to block or delay floor consideration of measures or nominations.¹³⁵)

Cloture

For over a century, the Senate had no formal way to end talkathons. However, filibusters were infrequent, and majorities usually could be mustered to pass legislation. The norms and culture of the times militated against using prolonged debate to frustrate or prevent Senate action on measures or matters. Senators recognized that debates for dilatory purposes would occasionally be used, but “they were not used frequently enough to give the Senate any trace of the notoriety which the filibuster later attached to the Upper Chamber.”¹³⁶

¹³² See, for example, Richard A. Arenberg and Robert B. Dove, *Defending the Filibuster* (Bloomington, IN: Indiana University Press, 2012); Sarah A. Binder and Steven S. Smith, *Politics or Principle? Filibustering in the United States Senate* (Washington, DC: Brookings Institution Press, 2001); Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate* (Chicago, IL: University of Chicago Press, 2011); and Gregory J. Wawro and Eric Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate* (Princeton, NJ: Princeton University Press, 2006).

¹³³ See Bruce I. Oppenheimer, “Changing Time Constraints on Congress: Historical Perspectives on the Use of Cloture,” in *Congress Reconsidered*, 3rd ed., eds. Lawrence C. Dodd and Bruce I. Oppenheimer, (Washington, DC: Congressional Quarterly, Inc., 1985).

¹³⁴ Robert B. Dove, “Senate Rule XXII: The Good, the Bad, and the Ugly,” *Roll Call*, November 13, 2003, p. 20.

¹³⁵ A hold permits any Senator to block (sometimes temporarily, sometimes permanently) chamber consideration of legislation or nominations. As a Senator explained, a hold is “a notice by a Senator to his or her party leader of an intention to object to bringing a bill or nomination to the floor for consideration.” Senate debate, *Congressional Record*, vol. 148 (April 17, 2002), p. S2850.

¹³⁶ Roy Swanstrom, *The United States Senate, 1787-1801*, S. Doc. 99-19 (Washington, DC: GPO, 1985), p. 210. An

In 1917, with World War I underway, the Senate adopted Rule XXII. The rule was provoked by a filibuster of 11 Senators who blocked President Woodrow Wilson's proposal to arm U.S. merchant ships against German submarine attacks. Responding to this outcome, President Wilson demanded successfully that the Senate adopt a new rule (Rule XXII) that could bring debate to a close.

Rule XXII provided that extended debate could be ended by invoking cloture (closure of debate) by a supermajority vote. Since 1975, the vote required to invoke cloture has been 60 of 100 Senators duly sworn and chosen; the support of two-thirds of those voting—usually 67—is required to end debate on proposals to change Senate rules. Cloture is also a time-consuming process that can extend over several days—Day 1, file cloture on a pending matter; Day 2, layover period; Day 3, vote on cloture. If cloture is invoked, Rule XXII permits a maximum of 30 hours of post-cloture consideration of the matter. A challenge for majority party leaders is time management. If cloture's multiday process is employed, then less time is available for the Senate to consider other measures or to engage in lengthy consideration of a consequential measure.

With its supermajority requirement, cloture was invoked sparingly from 1917 to 1970. For example, successful filibusters blocked civil rights legislation dealing with the poll tax, literacy tests, and employment discrimination. During the 84th and 85th Congresses (1955-1959), there were no cloture motions filed. It merits mention that "the most remarkable feature of Senate politics for much of its history is how often a slim majority of senators proved able to pass highly controversial, major legislation over the opposition of a large minority of senators."¹³⁷

Fast forward to the polarized Senate of today: the number of cloture motions filed, voted upon, and invoked have increased dramatically. Consider these aggregate cloture numbers from the eight most recent full Congresses, the 108th through the 115th (2003-2018): 1,102 cloture motions filed, 888 voted upon, and 617 invoked. The 113th Congress (2013-2014), which detonated the "nuclear option" (see below), saw 252 cloture motions filed, 218 voted upon, and 187 invoked. The 108th Congress (2003-2004) witnessed the fewest cloture motions filed (62), with 49 voted upon and 12 invoked. The 116th Congress (2019-2020), as of August 10, 2020, is the current record setter: 265 cloture motions filed, 245 voted upon, and 223 invoked.

These figures underscore a significant change in senatorial behavior: cloture is being used much more frequently, even multiple times on a measure or matter; on many more issues (controversial or noncontroversial); and on measures where there is little partisan disagreement. Today, filibuster threats are commonplace on all manner of legislation. If measures are to reach the floor, majority leaders and like-minded Senators realize they may have to mobilize supermajority support from among their Senate colleagues.

Cloture is often a useful parliamentary device for the majority leader. For example, he might file a cloture motion immediately after a colleague objects to the leader's unanimous consent request to take up a bill. Minority lawmakers might then lament that cloture is filed before any debate has begun. The majority leader's cloture-filing objectives might be twofold: (1) to provoke private discussions with the opposition on ways to move the bill forward, such as limits on the number of amendments each party could offer; and (2) to protect party colleagues from casting nongermane, electorally problematic "poison pill" amendments. If cloture is invoked, amendments during post-

analysis of Senate debate during the 19th and early 20th centuries, when there were no formal rules governing prolonged debate, can be found in Wawro and Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate*.

¹³⁷ Eric Schickler and Gregory J. Wawro, "What the Filibuster Tells Us About the Senate," *The Forum*, vol. 9, no. 4 (2011), p. 1.

cloture must be germane. The basic point is that cloture serves a number of purposes other than as a debate-ending procedure. As a scholar of the Senate concluded, the increase in cloture votes "documents the effort of majority parties and majority leaders to expand their control over the Senate."¹³⁸

The 60-Vote Senate

In a Senate that is closely and deeply divided, it is difficult to muster the 60 votes to invoke cloture on legislation. Partisan filibusters occur, and cloture votes regularly follow party lines. Thus, a cohesive minority party of 41 Senators is well-positioned to delay or derail consideration of majority party initiatives.

For most of the Senate's history, a majority vote was sufficient for approving most measures.¹³⁹ Not so today. The 60 vote required to invoke cloture has morphed to become an institutionalized de facto rule for winning passage of many bills and amendments. As the Senate's GOP leader once said, "I think we can stipulate once again for the umpteenth time that matters that have any level of controversy about it in the Senate will require 60 votes."¹⁴⁰

UCAs often include the 60-vote threshold for adopting legislative matters. An advantage of an agreement requiring 60 votes is that it could avoid the lengthy cloture process. Sixty votes also serve some of the interests of both parties: majority lawmakers receive a direct vote on their policy alternatives, and 41 united minority Senators can prevent adoption of proposals they dislike. In sum, the filibuster was once infrequently used and typically reserved for major issues; its threatened or actual use today on scores of matters has transformed the Senate into a 60-vote institution. This supermajority voting standard is now common practice in the Senate.

The "Nuclear Option" Is Detonated (2013, 2017, 2019)

On November 21, 2013, the Democratic Senate took a history-making procedural action: it triggered the "nuclear option." The Senate established a new precedent: *majority cloture* for presidential nominations (executive and judicial), excepting only nominees to the Supreme Court. No longer could the minority rely on the filibuster to block these nominations. Recall that the text of Rule XXII states that a *supermajority*—"three-fifths of the Senators duly chosen and sworn" (60 of 100)—is required to invoke cloture on most matters, with two-thirds of those voting necessary to invoke cloture on proposals to amend Senate standing rules. The new precedent reinterpreted Rule XXII to allow majority cloture without making any changes to the text of the Rule. A Senate scholar called this "among the three or four most important events in the procedural history of the Senate."¹⁴¹

The precedential approach to overriding chamber rules has been available to the Senate from 1789 forward under its constitutional rulemaking authority. The 2013 use of the nuclear option for all nominations, except to the Supreme Court, was its most contentious and consequential application to that date.¹⁴² In short, a cohesive majority of Senators, if so inclined and under the

¹³⁸ James Wallner, "Filibusters and Cloture, June 19, 2020, p. 4, at <https://www.legbranch.org/>.

¹³⁹ See Wawro & Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate*, p. 127. They found that "policymaking in the pre-cloture Senate was generally majoritarian, with the exception that obstruction posed a somewhat greater—but not absolute—threat late in a session."

¹⁴⁰ Quoted in David Herszenhorn, "How the Filibuster Became the Rule," *New York Times*, December 2, 2007.

¹⁴¹ Smith, *The Senate Syndrome: The Evolution of Procedural Warfare in the Modern U.S. Senate*, p. 265.

¹⁴² Sarah Binder, "Dodging the Rules in Trump's Republican Congress," *The Journal of Politics*, July 2018, pp. 1454-1463.

right procedural circumstances, is able to establish new precedents that override formal Senate rules. The formal language of a Senate rule is untouched, but its application by the presiding officer is now reinterpreted to comport with the new precedent. This technique is sometimes called "reform by ruling."

Importantly, precedents are binding on the Senate. They occur by rulings of the presiding officer or when the Senate votes either to sustain or reject the presiding officer's rulings. The Senate's book of precedents authoritatively states the following: "Any ruling of the Chair not appealed or which is sustained by vote of the Senate, or any verdict by the Senate on a point of order, becomes as precedent of the Senate which the Senate follows just as it would its rules, unless and until the Senate in its wisdom should reverse or modify that decision."¹⁴³

The 2013 precedent was created in large measure because of Democratic frustration with the GOP's blockage of President Barack Obama's nominees, especially judicial nominees, with their lifetime appointment and ability to affect the ideological balance on the courts if confirmed by the Senate. Worth noting is that in 2005, when the Senate was in GOP hands, Majority Leader Bill Frist of Tennessee stated that he would use the nuclear option to break the Democratic minority's filibustering tactics that prevented approval of President George W. Bush's judicial nominees. Senator Frist's promise never materialized, however. An informal Senate "Gang of 14"—seven Senators from each party—devised a bipartisan plan that avoided use of the nuclear option. Eight years later, given continuing conflict between the parties over presidential nominations, the nuclear option was detonated.¹⁴⁴

Briefly, the arguments of the two sides were as follows: Majority Leader Harry Reid of Nevada contended that GOP Senators were undermining the President's constitutional right to nominate people to serve in executive and judicial positions. He said that Republicans have "turned 'advice and consent' into 'deny and obstruct.'"¹⁴⁵ In response, the Senate minority leader stressed two points: first, Democrats were "breaking the rules to change the rules"; second, Democrats would soon regret their use of the nuclear option. In the end, the Senate voted to establish majority cloture for presidential nominations, except to the Supreme Court.¹⁴⁶

Once used, nontraditional procedures become part of the parliamentary toolkit of party leaders and Members, to be utilized if the policy and political benefits outweigh the costs. This was the case with the nuclear option. The November 2016 elections produced Republican control of the Senate and White House, as well as GOP retention of the House. Senate Republicans kept the

¹⁴³ Riddick and Frumin, *Senate Procedure*, p. 987.

¹⁴⁴ In brief, the "nuclear option" involved a series of five key procedural actions, all carefully scripted by Majority Leader Harry Reid, D-NV. First, a second cloture vote on a judicial nominee was pending before the Senate. The first cloture vote did not attract the required 60 votes; however, a second cloture vote occurred on that nominee when Senator Reid successfully offered a motion to reconsider, which is nondebatable in this circumstance. Reid's reconsideration motion was adopted (57 to 40). Second, Majority Leader Reid made a point of order (a parliamentary objection) "that the vote on cloture under rule XXII for all nominations other than for the Supreme Court of the United States is by majority vote." Third, the Chair (Senator Patrick Leahy, D-VT) rejected the point of order on the advice of the Senate's Parliamentarian—Rule XXII requires three-fifths of the Senate to invoke cloture. Fourth, Majority Leader Reid appealed the ruling of the Chair. (Appeals are usually debatable but, by Senate precedent, not in this type of proceeding.) Fifth, 48 Senators voted aye to uphold the Chair's ruling; 52 Senators voted nay to overturn the Chair's ruling, which established majority cloture for most presidential nominations except to the Supreme Court.

¹⁴⁵ This quotation is cited in William G. Dauster, "The Senate In Transition or How I Learned to Stop Worrying and Love the Nuclear Option," *New York University Journal of Legislation & Public Policy*, vol. 19 (October 2016), p. 645. Dauster was a long-time aide to the majority leader and well-versed in the workings and procedures of the Senate. See also Mark E. Owens, "Changing Senate Norms: Judicial Confirmations in a Nuclear Age," *Political Science & Politics*, vol. 51, no. 1 (January 2018), pp. 119-123.

¹⁴⁶ See footnote 144 for a synopsis of the procedural details.

2013 majority cloture precedent for presidential nominees and extended it to Supreme Court nominees. President Trump named Neil Gorsuch to fill an outstanding vacancy on the Supreme Court, which had occurred with the death of Justice Antonin Scalia. On April 6, 2017, after a Democratic filibuster blockaded Senate action on Gorsuch, the Senate's majority leader (Mitch McConnell of Kentucky) used the nuclear option to establish majority cloture for all Supreme Court nominees.

"Going nuclear" was also employed two years later (April 3, 2019) to expedite Senate consideration of President Trump's executive and judicial nominees. The GOP majority was dismayed that Democrats were using the 30 hours of post-cloture debate time provided in Rule XXII to slow-walk Senate action on most presidential nominations. Democrats argued that the post-cloture change was unnecessary and would facilitate confirmation of unqualified candidates. The GOP Senate disagreed. It employed a modified version of the nuclear option—overturning a ruling of the chair on appeal (nondebatable) after cloture had been invoked—to reduce the 30 hours of post-cloture consideration to two hours for subcabinet and federal district judicial nominations, retaining the 30-hour debate standard for the Supreme Court, circuit courts, and cabinet-level positions.

The nuclear option increased the pace of confirmations. As one account noted, "the Senate can process up to 15 district judges or sub-Cabinet executive branch positions in the time it used to take to confirm one."¹⁴⁷ Over a six-year period, the usually tradition-bound Senate employed the nuclear option three times to fundamentally alter the import and meaningfulness of Rule XXII. Repetitive use of the nuclear option sparked debate about whether it might at some point be used on legislation in addition to nominations. A Senate committee chair said the following in response to a question from a journalist: "The question is where does it stop, and that's your question? It might not stop."¹⁴⁸ The nuclear option has other implications, such as these two: it contributes to the Senate becoming a more majoritarian body, mimicking the House to a degree; and, when the same party controls the Senate and White House, partisan incentives bolster Senate approval of presidential nominations.

"Filling the Amendment Tree"

Traditionally, Senators have enjoyed expansive opportunities, subject to few restrictions, to offer amendments to pending legislation, including nongermane amendments. Freedom to amend is one of the principal pillars of Senate floor procedure. In today's polarized Senate, that freedom can be circumscribed by a procedure called "filling the amendment tree." The amendment "tree" is a chart depicted in *Senate Procedure*, the chamber's book of precedents.¹⁴⁹ The tree determines the number of amendments that may be pending to a measure at the same time. When the "branches" or "limbs" of the tree are filled, the amendment process is frozen. No further amendments can be offered until those pending are disposed of in some fashion (e.g., withdrawn

¹⁴⁷ Alex Swoyer, "GOP Rapidly Pushing Judicial Picks Through Senate," *The Washington Times*, August 2, 2019, p. A3.

¹⁴⁸ Niels Lesniewski, "Nuclear Fallout...Or Not?," *Roll Call*, April 4, 2019, p. 8. In delivering the eulogy at the funeral of Rep. John Lewis, D-GA, the civil rights hero, President Obama recommended eliminating the filibuster if that was necessary to win passage of a revitalized Voting Rights Act. Emma Dumain, "Obama Calls for Ending Filibuster," *Energy and Environment News*, July 30, 2020, (eenews.net). See also Eric Mogilnicki and Drey Samuelson, "It's Beyond Time to Retire the Filibuster," *The Washington Post*, September 8, 2020, p. A21.

¹⁴⁹ There are actually four charts based on the form (or purpose) of the first-offered amendment: Chart 1, amendment to insert; Chart 2, an amendment to strike; Chart 3, an amendment to strike and insert; and Chart 4, an amendment that is a complete substitute for a measure.

or rejected or the Senate, by unanimous consent, agrees to set aside an amendment, which opens a branch of the "tree" for further amendment).

The majority leader, by precedent, has special advantages in filling the tree. The leader receives priority of recognition from the presiding officer. This recognition prerogative enables the majority leader to offer amendment after amendment until the tree is filled. This procedure was available to majority leaders for decades but infrequently employed. In contrast, tree-filling by the majority leader has surged in this polarized era. Consider that there were a combined nine filled amendment trees in the five Congresses from the 99th (1985-1987) through the 103rd (1993-1995). By comparison, the five Congresses from the 110th (2007-2009) through the 114th (2015-2017) witnessed 115 instances of tree-filling.¹⁵⁰

Although tree-filling freezes the amending process, Senators may still engage in prolonged debate, an occurrence that could prompt the majority leader to file a cloture motion. Even so, tree-filling provides a number of advantages to the majority leader. For example, tree-filling can promote negotiations with the minority leader that unfreeze the filled "tree" through, for instance, formulation of a UCA that limits debate and the number of amendments that each side may offer. Tree-filling also blocks majority party lawmakers from offering amendments, which might upset a number of these Senators.

Decline of Conference Committees

The U.S. Constitution requires the House and Senate to approve identical legislation before measures can be sent to the President for his consideration. The founding document is silent on how the House and Senate are to resolve their differences when they pass dissimilar versions of the same bill. However, the very first lawmakers were quite familiar with conference committees from their knowledge of the two-chamber British Parliament and their use by the bicameral colonial legislatures (except unicameral Pennsylvania). Unsurprisingly, in April 1789, the first rules of the House and Senate provided for the formation of conference committees.

These ad hoc joint panels, consisting of House and Senate members selected primarily from the committee(s) that reported the particular bill in disagreement, are responsible for resolving the bicameral differences. The majority party in each chamber is advantaged in the resolving process because it selects more conferees than the minority party.

Instead of conference committees, another important method for ironing out bicameral differences is through the exchange of amendments (the "ping pong") between the two houses: proposed amendments are sent back-and-forth between the chambers until a settlement is reached on the outstanding matters in disagreement. A combination of the two methods is sometimes employed to work out House-Senate policy dissimilarities. Informal discussions permeate these methods of interchamber resolution.

For most of the 20th century, conference committees were the principal bargaining and negotiating forum for reconciling bicameral disagreements on major bills. Lawmakers even referred to them as "the third house" of Congress. Explaining the role of conference committees during this era, congressional scholar Richard Fenno wrote the following: Conference committees come into play "in only 15 to 25 percent of all pieces of legislation. But included within that group are most all of the consequential and highly publicized legislative enactments. And when a conference

¹⁵⁰ Data provided by CRS analyst Christopher Davis.

decides, ninety-nine times out of a hundred its decisions become law."¹⁵¹ Conference committees have long been a fundamental component of "regular order" law making.

Today, that is no longer the case. There has been a precipitous decline in the convening of conference committees and an increase in the exchange of amendment process. A number of factors account for this change, but partisan polarization and the Senate's permissive rules are among the most compelling explanations. Former Senator Orrin Hatch of Utah, the Senate's longest serving GOP lawmaker (1977-2019), pointed this out. There is a concerted effort, he said, "on the part of the minority to tie the Senate in procedural knots and then accuse the [GOP] majority of being unable to govern." We have witnessed "dilatatory procedural maneuvering of the like I have never witnessed before in the Senate," including the "threat to filibuster the appointment of conferees."¹⁵²

This threat is especially potent because the traditional procedure for going to conference was swift Senate approval of a three-part motion, which often went something like this: "Mr. President, I move that the Senate insist on its amendment, request a conference with the House on the disagreeing votes thereon, and that the Chair be authorized to appoint conferees." For over 200 years, this three-part motion was a routine matter that won fast approval.

That began to change in the 1990s and 2000s with the rise of sharper partisanship in the Senate. For example, minority party Senators were named as official conferees, but they were excluded by the majority from participating in the bicameral negotiations. Their voices and votes were not sought after or required by the majority's conferees. In response, minority party Senators began to object to routine approval of the three-part motion, which triggered the decline of the conference process. A former Parliamentarian of the Senate explained why this was the case:

The three steps are usually bundled into a unanimous consent agreement and done within seconds. But if some senators do not want a conference to occur and if they are determined, they can force three separate cloture votes to close debate [on each discrete part], and that takes a lot of time. It basically stops the whole process of going to conference.¹⁵³

Thus, the number of conference committees plummeted from 62 (13% of 465 public laws) in the 103rd Congress (1993-1995) to 5 (1.5% of 329 public laws) in the 114th Congress (2015-2017) and to 6 (1% of 442 public laws) in the 115th Congress (2017-2019). Conference committees are still utilized on legislation that attracts bipartisan and bicameral support, such as defense and agriculture measures.¹⁵⁴

The Senate adopted a new rule in the 113th Congress (2013-2014) to facilitate the convening of a conference with the House. The new rule combined the aforementioned three parts (insist, request, authorize) into one motion; however, the consolidated motion could still be subject to a cloture vote, but one rather than three. If cloture were invoked, the Senate would vote on the consolidated motion without further debate. Unlike the Senate, the "majority rule" House seldom encounters issues in arranging a conference with the other body.

¹⁵¹ Lawrence D. Longley and Walter J. Oleszek, *Bicameral Politics: Conference Committees in Congress* (New Haven, CT: Yale University Press, 1989), p. viii.

¹⁵² Senate debate, *Congressional Record*, vol. 146, part 1 (October 11, 2000), pp. S10197.

¹⁵³ Carl Hulse and Robert Pear, "Feeling Left Out on Major Bills, Democrats Turn to Stalling Others," *New York Times*, May 3, 2004, p. A18.

¹⁵⁴ A recent study of the bicameral resolution process is by Hong Min Park, Steven S. Smith, and Ryan J. VanderWielen, *Politics Over Process: Partisan Conflict and Post-Passage Processes in the U.S. Congress* (Ann Arbor, MI: University of Michigan Press, 2017).

Given the Senate's difficulty in creating conference committees, the two chambers turned to the exchange of amendment process to resolve their bicameral differences. This change has important consequences. For example, it strengthens the hand of the top House and Senate party leaders and places them in the "driver's seat" in negotiating bicameral agreements. They meet in secret, along with other invited participants, to devise agreements acceptable to each chamber. Second, in the "ping pong" process, the role of committees is minimized compared with that of House and Senate party leaders. Third, minority party lawmakers are unlikely to have any role in the ping pong process unless their input is necessary (e.g., to attract a supermajority vote in the Senate to break filibusters). Fourth, formal House and Senate rules that apply to conference committees do not apply to the ping pong process. For example, conferees from each chamber are made public; there is no "identity" requirement for participants in the ping pong process.

In short, recent years have witnessed the gradual institutionalization of a leadership-directed bicameral bargaining process whether through ping pong or conference. The Speaker has exclusive authority to name the House's conferees, including the right to remove or appoint additional conferees. (The Speaker, so far as is known, has never been a conferee.) On some occasions, top House and Senate party leaders are named as conferees. In the Senate, the presiding officer officially names the conferees, but the respective party leaders make the selection of majority and minority conferees.

Brief mention should be made of another contemporary change: conference committees have increased in size, particularly in the House. A key reason: the House adopted a rule in 1975 that empowered the Speaker to refer legislation to multiple committees. Members from these panels are appointed as conferees to resolve bicameral differences on matters within their committees' jurisdiction. The annual authorization for defense is a good example. Conferees from a dozen or more standing committees are named besides those appointed from the principal jurisdictional panel, the House Armed Services Committee. Although the House typically has more conferees than the Senate, that difference is largely inconsequential. Each chamber's conferees independently determine whether to accept, amend, or reject compromises proposed by the other body.

Dynamics of Partisan Polarization

Overview

The shift from traditional to nontraditional lawmaking broadly reflects two interconnected developments: (1) partisan polarization in Congress and (2) sharp political divisions in the country, such as geographic, demographic, or electoral. This duality has significantly fostered the unconventional legislating often seen today—two unified parties often willing to exploit procedural rules to achieve their policy and political aims. This development makes legislating difficult on pressing public issues; it allows public problems to fester; and creates incentives for "messaging" bills to be taken up that have little or no chance of becoming law.

Even in a politically charged environment, there is bipartisan friendship and cooperation in lawmaking. Nevertheless, "personal friendships struggle against the deep-seated animosities that now permeate politics."¹⁵⁵ The challenge of legislating is less about friendship or lawmakers "getting along" with one another regardless of party; it is more about the parties' profound

¹⁵⁵ Dan Balz, "Americans Decry Partisanship While Fanning Its Flames," *The Washington Post*, October 27, 2019, p. A2. See James A. Thurber and Antoine Yoshinaka, eds., *American Gridlock: The Sources, Character, and Impact of Political Polarization* (New York: Cambridge University Press, 2015).

ideological and policy differences—intensified by outside Democratic or GOP activists and reinforced by partisan media outlets. These conditions can thwart problem-solving by Congress.

Another factor heightening acrimonious partisanship is the “permanent campaign.” It is waged constantly by each party either to hold or reclaim majority control of Congress. As former House Speaker Newt Gingrich, R-GA, said to GOP campaign volunteers, “You’re fighting a war. It is a war for power. Don’t try to educate. That is not your job. What is the primary purpose of a political leader? To build a majority.”¹⁵⁶

The hard-edged partisanship evident in both legislative chambers reflects the diverse and distinct constituency bases of the two parties. A 42-year veteran of the House stated that the public has become “more ideologically polarized. This is reflective of Congress, as Congress has become more ideologically polarized as well.”¹⁵⁷ A scholar emphasized that when the nation is polarized, “Congress reflects that image back to the American people.”¹⁵⁸ Gradually, the nation witnessed a partisan and ideological realignment. Today, voters with liberal views and values largely support Democratic candidates; conservative voters largely connect with Republican aspirants. A consequence of this development: centrist lawmakers are a vanishing breed on Capitol Hill.

Party polarization accelerated with the 1980 election of Ronald Reagan as President on a bold conservative platform (e.g., cut domestic spending, strengthen defense, and devolve more program authority to the states). The 1980 election also produced Republican control of the Senate after 26 years in the minority and increased by 33 the number of House GOP minority seats. Partisan polarization strengthened further when Republicans captured control of the House after 40 years (1955-1995) in the minority. Newt Gingrich, R-GA, became Speaker and, much to the chagrin of minority Democrats, won rapid House action on his 10-point policy agenda called the “Contract with America” (e.g., reforming welfare; cutting taxes).¹⁵⁹ Speaker Gingrich was not reluctant to use nontraditional means (e.g., bypassing committees) to expedite House action on his legislative priorities. Rapid House action on the GOP’s 100-day agenda emulated legislative governance by European parliaments.

The 1980 and 1994 elections widened the ideological and policy divergence between Democratic and Republican lawmakers and their outside supporters. Subsequently, political, rhetorical, and procedural confrontations suffused the decisionmaking process on Capitol Hill. As a Senator said, “Ideology and partisanship dictate far too much of our conduct. Obstruction is too often employed for its own sake. Base motives are impugned for reasonable policy differences, allowing legitimate differences to evolve into bitter personal disputes.”¹⁶⁰

Vigorous partisan disagreements, as history demonstrates, are not novel to Congress. What is different today is how closely the identities (e.g., race and religion) and cultural values of the national electorate align with one or the other congressional party. Ideological diversity characterized the legislative parties of earlier generations; contemporary parties now exhibit

¹⁵⁶ The Rep. Gingrich quote is from John M. Barry, “The House of Jim Wright,” *Politico Magazine*, May 7, 2015.

¹⁵⁷ Alex Gangitano, “When Town Halls Heat Up,” *Roll Call*, June 11, 2018, p. 9.

¹⁵⁸ The quote is from Harvard Professor Joanne B. Freeman. See Jean B. Bordewich, “Shootout on Capitol Hill,” *Washington Monthly*, January/February/March 2020, p. 44.

¹⁵⁹ James G. Gimpel, *Fulfilling the Contract: The First 100 Days* (Boston: Allyn and Bacon, 1996). See also Julian E. Zelizer, *Burning Down the House: Newt Gingrich, the Fall of a Speaker, and the Rise of the New Republican Party* (New York: Penguin Press, 2020).

¹⁶⁰ Sen. Susan Collins, “Incivility and Hyperpartisanship: Is Washington a Symptom or a Cause,” Margaret Chase Smith Lecture, University of Maine, Orono, ME, April 3, 2015, p. 3.

significant ideological homogeneity. The most liberal Republican, for example, could be to the right of the most conservative Democrat.

During the mid-20th century, it was common for many people to lament that there was not a "dime's worth of difference" between the two parties. That is not the case today. Individuals' party identification suggests a range of issues and values they are likely to embrace and those they are likely to oppose. Moreover, as the two congressional parties became intensely and internally united with pronounced policy and ideological differences—and in rough electoral parity—this array of intersecting conditions strengthened partisan polarization in Congress and the country. "Party wars" over what constitutes good public policy now occur with some frequency.¹⁶¹

Sorting: Alignment of Political Ideology and Party Preference

A variety of forces contributed significantly to the party wars. Among several are the following: "sorting" (geographic, demographic, residential, and social); electoral volatility; partisan media; polarized interest groups; gerrymanders; and the dearth of bipartisan trust. This combination of factors helps to explain why lawmakers and voters have such substantial differences on ways to resolve many of the major issues confronting the nation.

Geographic Sorting

Geographically, people in different regions of the country gradually changed their political leanings. The South is perhaps the best example of this phenomenon. The "solid South" once meant that for decades the states of the Confederacy, following Reconstruction, voted overwhelmingly for Democratic officeholders. This pattern no longer exists. Change came with various cultural, social, and political upheavals of the 1960s and after (e.g., civil rights struggles, the Vietnam War, Woodstock, the feminist and environmental movements, Watergate, *Roe v. Wade*, and the assassinations of major public leaders). Together, these forces repelled many conservative southerners with strong pro-evangelical, anti-government, or pro-military views. GOP presidential candidates Senator Barry Goldwater of Arizona in 1964 and Richard Nixon four years later campaigned with a "southern strategy" that encouraged conservative Democratic voters to support Republican candidates.

Over time, the GOP's regional strategy gained traction across the South. Many conservative Democrats became conservative Republicans. A congressional scholar explained as follows:

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. Over this period, fairly conservative southern Democrats were replaced, often when an incumbent retired, by very conservative southern Republicans in Congress. As a result, the congressional Democratic Party became more liberal—by subtraction—and the congressional Republican Party more conservative—by addition.¹⁶²

Today, the South is largely a GOP bastion, electing mostly Republican lawmakers who represent their constituents' views, values, and interests.

¹⁶¹ Barbara Sinclair, *Party Wars: Polarization and the Politics of National Policy Making* (Norman, OK: University of Oklahoma Press, 2006).

¹⁶² Barbara Sinclair, "Is Congress Now the Broken Branch?" *Utah Law Review*, vol. 2014, no. 4 (August 2014), p. 708.

Other states and regions also witnessed party sorting: for example, California and Maine, once largely "red" are now predominately "blue." In 2020, Senator Susan Collins of Maine serves as the lone federally elected GOP officeholder in the New England region. Twenty years ago, 10 Republican lawmakers represented New England in Congress.¹⁶³ In 1999, California's House delegation was divided 27 Democrats to 25 Republicans; two decades later, it was 46 Democrats and 7 Republicans. Geographic sorting also occurs in other areas, such as the partisan divide among states' suburban areas¹⁶⁴ and the different economies of various "red" (e.g., agriculture and mining) and "blue" (e.g., digital and financial) House districts.¹⁶⁵

Residential Sorting

Residential self-segregation might be viewed as a component of geographic sorting. Studies have shown that like-minded individuals and families prefer to live in communities where people share similar lifestyles, values, interests, and political views.¹⁶⁶ As two scholars noted, "Such geographic polarization—where supporters of one or the other party cluster together in homogeneous enclaves, producing localities with lopsided distributions of political preferences—has been growing steadily in the United States since the 1970s." They explained that political polarization "manifests itself geographically, in large part because partisan preferences are strongly correlated with population density."¹⁶⁷ This relationship suggests why Republicans often do better in rural areas than Democrats, with the reverse the case for urban areas.

Tellingly, people who live in homogeneous neighborhoods are more engaged in political activities than those who reside in diverse neighborhoods. "Political activism is much easier when you're surrounded by like-minded others" who share your views and biases, said a political scientist.¹⁶⁸ These individuals might contribute to campaigns, vote in primaries, work on campaigns, and look askance at the value of compromise. People in heterogeneous communities might steer clear of political discussions with neighbors of different views to avoid provoking anger or hard feelings.

Demographic Sorting

Demographically, American politics have undergone major changes. Consider the demographic profile of the people who broadly identify or align with either the Democratic or Republican parties. Voters who support Democratic views are likely to be younger (millennials); ethnically diverse (African Americans, Hispanics, and Asians); urban-centered; college-educated; secular;

¹⁶³ Regions and states are constantly in some degree of flux for any number of reasons. Consider the southern region. A "perennial Southern phenomenon," wrote a historian, is "long decades of stasis followed by periods of rapid change, nearly always compelled by national forces." Today, the information economy, along with many other developments (e.g., the influx of millennials), is producing numerous "changes in patterns of work, politics and culture." An outstanding issue, wrote the historian, is whether "newblood and new jobs have turned large pockets of deep-red states at least a shade of purple." As Tennessee's GOP governor stated, "Many of our most conservative citizens are people who have come here from a more liberal state." See Jon Meacham, "The Many Souths," *Time*, August 6-13, 2018, pp. 75-76.

¹⁶⁴ Sabrina Tavernise and Robert Gebeloff, "Are the Suburbs Turning Democratic? It Depends Which Ones," *New York Times*, October 26, 2019, A1.

¹⁶⁵ Aaron Zitner and Dante Chini, "America's Political Polarization Is Almost Complete," *Wall Street Journal*, September 20, 2019, p. A4.

¹⁶⁶ Bill Bishop, *The Big Sort: Why the Clustering of Like-Minded Americans Is Tearing Us Apart* (New York: Mariner Books, 2009).

¹⁶⁷ Greg Martin and Steven Webster, "The Real Culprit Behind Geographic Polarization," *The Atlantic*, November 26, 2018.

¹⁶⁸ Sheryl Gay Stolberg, "You Want Compromise? Sure You Do," *New York Times*, August 14, 2011, p. 5SR.

and internationalist in outlook. Among GOP supporters are large numbers who are working-class White males; elderly; rural and exurban residents; high school graduates; religiously oriented; and nationalist in their viewpoints. Understandably, the demographic divergence of the two parties—*racially* (ethnically heterogeneous versus mainly White persons), *culturally* (e.g., support or opposition to fraught issues such as abortion, gun control, or same sex marriage), and *ideologically* (e.g., an activist national government versus greater reliance on the private sector)—underscores why partisan polarization suffuses legislative decisionmaking.¹⁶⁹ A “charged political climate is in large part explained by how neatly demographics divide Democrats and Republicans.”¹⁷⁰

Partisan Social Sorting

Partisan social sorting adds another dimension to the pronounced divide between Democrats and Republicans. This phenomenon indicates that peoples’ partisan preferences correlate closely with their personal characteristics or identities, such as race, gender, religion, or age (e.g., most African Americans are Democrats; most evangelicals are Republican). Beyond just policy differences, partisan social sorting influences peoples’ attitudes, biases, and emotions toward the other party. A consequence of this behavior is an identity-based polarization that foments a contentious “us” versus “them” politics. Scholars and analysts refer to this as “affective” polarization: people who harbor a deep-seated emotional animus toward the other party. A 2017 study by the Pew Research Center highlights the partisan antipathy.

The shares of Republicans and Democrats who express *very* [in original] unfavorable opinions of the opposing party have increased dramatically since the 1990s, but have changed little in recent years. Currently, 44% of Democrats and Democratic leaners have a very unfavorable opinion of the GOP; 45% of Republicans and Republican leaners view the Democratic Party very unfavorably. In 1994, fewer than 20% in both parties viewed the opposing party unfavorably.¹⁷¹

The partisan reality today is that “more Democrats and Republicans dislike each other more, and more intensely, than in the past.”¹⁷² Partisans “are no longer fighting only for party victory. We are also fighting for the victory of the racial, religious, geographical and gender-based groups that win or lose with the party.”¹⁷³ An analyst explained as follows:

Americans are increasingly taking opposition to their views as an assault on their way of life. So issues such as gun control or climate disruption—instead of being matters requiring debate and offering the possibility of compromise—become signifiers of cultural identity.... The strongest and loudest political advocates tend to think their loss might end America as they know it.¹⁷⁴

As a congressional scholar concluded, “the large ideological differences between Democrats and Republicans in Washington reflect the large differences between the characteristics and attitudes

¹⁶⁹ See Alan I. Abramowitz, “The Electoral Roots of America’s Dysfunctional Government,” *Presidential Studies Quarterly*, vol. 43, no. 4 (December 2013), pp. 709-731.

¹⁷⁰ Sahil Chino, “Predicting Your Party,” *New York Times*, August 11, 2019, p. 2SR.

¹⁷¹ Pew Research Center, “The Partisan Divide on Political Values Grows Even Wider,” October 5, 2017, p. 5. See also Elizabeth N. Simas, Scott Clifford, and Justin H. Kirkland, “How Empathic Concern Fuels Political Polarization,” *American Political Science Review*, vol. 114, no. 1 (February 2020), pp. 258-269.

¹⁷² Mark S. Mellman, “Pew Study of Polarization is Incomplete,” *The Hill*, July 9, 2014, p. 13.

¹⁷³ Lilliana Mason, “The President’s ‘Winning’ Is Our Loss,” *New York Times*, June 7, 2018, p. A23. See also Lillian Mason’s *Uncivil Agreement: How Politics Became Our Identity* (Chicago: University of Chicago Press, 2018).

¹⁷⁴ Michael Gerson, “A Trend Threatening to Become a Tragedy,” *The Washington Post*, January 14, 2020, p. A21.

of the voters represented by the two parties.”¹⁷⁵ An alignment of the electorate into two competing political teams compounds the difficulty of legislating. One result—policymaking power shifts to House and Senate party leaders who may utilize unorthodox procedures to achieve their objectives.¹⁷⁶

Electoral Volatility

For much of the 20th century, it was common for either Democrats or Republicans to hold party control of the elective branches (House, Senate, and White House) for extended periods of time. For example, from 1901 until 1932, Republicans held the White House, except for the two terms (1913-1921) of Woodrow Wilson’s presidency. Republicans mostly controlled the House and Senate as well during this time period. The Democratic resurgence started with the 1932 election of President Franklin Delano Roosevelt. Democrats continued their control of the White House, except for the Eisenhower presidency (1953-1961), until the end of Lyndon Johnson’s presidency in 1969. The Nixon/Ford White Houses came after President Johnson’s, followed by Democrat President Jimmy Carter’s occupancy of the White House (1977-1981). Throughout this period (1932 to 1980), Democrats controlled the House and Senate, often by wide margins, with only two exceptions (the 80th Congress, 1947-1949 and the 83rd Congress, 1953-1955).

This general pattern of Democrats or Republicans maintaining institutional power for lengthy periods began to end with the 1980 election of Republican Ronald Reagan as President. The 1980 elections, as noted earlier, brought GOP control of the Senate and increased the number of House Republican minority lawmakers. President Reagan’s large Electoral College victory (over 90% of the electoral vote) produced several consequential developments, including these two: a governing agenda much different from the New Deal or Great Society programs of previous Democratic Presidents¹⁷⁷ and a new era of heightened party competition for control of the elective branches. In brief, the 1980 elections ushered in “a period of [party] parity in the contest for control of American national institutions,” which continues to this day.¹⁷⁸ No longer is either congressional party the “permanent minority”;¹⁷⁹ control of the House or Senate could flip every election cycle.

Consider the 20 Congresses from the 97th (1981-1983) to the 116th (2019-2020). Each party held the House 10 different times; for the Senate, Republicans have been in charge 11 different times; Democrats, 9. A consequence of frequent shifts in party control, according to an analyst, is the following: “Once a political party has decided the path to governing is winning back the majority, not working with the existing majority, the incentives transform. Instead of cultivating a good relationship with your colleagues across the aisle, you need to destroy them [politically], because you need to convince the voters to destroy them, too.”¹⁸⁰

¹⁷⁵ Abramowitz, “The Electoral Roots of America’s Dysfunctional Government,” p. 714.

¹⁷⁶ Lee Drutman, “United We Fall,” *Washington Monthly*, July/August 2018, p. 56.

¹⁷⁷ Recall President Reagan’s January 20, 1981, Inaugural Address, where he said the following: “Government is not the solution to our problem [of numerous economic and social ills]. Government is the problem.” His agenda priorities, as noted briefly in the text, included shrinking the domestic government’s size and scope, cutting taxes, reducing federal regulations, and hiking defense expenditures.

¹⁷⁸ Lee, *Insecure Majorities: Congress and the Perpetual Campaign*, p. 38.

¹⁷⁹ William F. Connelly Jr. and John J. Pitney Jr., *Congress’ Permanent Minority? Republicans in the U.S. House* (Lanham, MD: Littlefield Adams, 1994).

¹⁸⁰ Ezra Klein, “The Political Scientist Donald Trump Should Read,” *Vox.com*, January 24, 2019, p. 4. Compare the cited quotation with another by former Senate Majority and Minority Leader Harry Reid, D-NV, which highlights today’s torn social fabric on Capitol Hill. Senator Reid stated the following: “Nobody lives here anymore. When I came

Today's fusion of more divided governments, slim partisan majorities, and highly competitive electoral conditions has led to constant interparty struggles to maintain or to win legislative control, not to mention command of the White House. This set of circumstances often means there are few incentives for the minority party in Congress to work with the majority party to enact major legislation. If consequential measures pass regularly with bipartisan majorities, why would voters support the minority party's "time for a change" campaign theme rather than the majority's "stay the course" message? "When control is always within reach," wrote an analyst, "the minority party loses the incentive to help mint legislative accomplishments that fortify the brittle majority."¹⁸¹ In short, congressional governance can be much harder when institutional control is within each party's grasp every electoral cycle.

Partisan Media

Numerous media and digital outlets allow individuals to access liberal or conservative media networks 24/7 where contrary views are commonly dismissed, ignored, or disparaged, often by harsh and one-sided commentary. Gone is the post-World War II period when the anchormen of the three major television networks (ABC, CBS, and NBC), such as Walter Cronkite, provided viewers with a common base of knowledge for collective understanding of public issues. Today, proliferation and fragmentation of the media environment is commonplace. The three major networks have been joined by, among others, Fox News, cable TV, talk radio, Facebook, Twitter, blogs, and numerous other social media platforms. Traditional sources—newspapers, magazines, or books, for example—still remain important sources of political and policy analysis and information but less so than previously.

The goal of many contemporary news outlets is to provide partisan analysis, information, and opinion to their niche audience. Politically engaged voters tend to self-sort to receive news that comports with their partisan biases and policy preferences. This is a throwback to the partisan press that characterized the nation's early decades. "Newspapers controlled by the Federalists branded Thomas Jefferson an 'infidel,' while the Democratic-Republican press called George Washington a 'traitor.'"¹⁸² As in earlier times, many contemporary media outlets amplify party conflicts to attract partisan viewers through false claims and misinformation.¹⁸³ Modern technology and the algorithms of social media also enable party organizations to target specific, self-sorted audiences who support particular policies (e.g., gun rights or gun controls).

Typically, people select media outlets that bolster, confirm, and reinforce their beliefs, prejudices, and views rather than news sources that present contrary perspectives. A historian stated, "You choose your reality by the paper to which you subscribe, or the channel which you watch."¹⁸⁴ A

[to Congress in 1983.] lawmakers lived here, they had their families, but not anymore. We made friends not only of the members, but of their families. It is so changed." See Carl Hulse, "Senator's Farewell: 'I Just Shake My Head,'" *New York Times*, March 24, 2018, p. A11.

¹⁸¹ Ronald Brownstein, "The Volatile Senate," *National Journal*, September 20, 2014, p. 4.

¹⁸² Lee Drutman, "Learning to Trust Again," *The New Republic*, March 2018, p. 5.

¹⁸³ An MIT research study found that false news "spread further, faster, and deeper, and more broadly than the truth in every category of information." See Brian Resnick, "False News Stories Travel Faster and Farther on Twitter Than the Truth," *Vox.com*, March 8, 2018, p. 4. See also Steve Lohr, "Why We're Easily Seduced by False News," *New York Times*, March 9, 2018, p. B1. Advances in technology now allow the dissemination of a new form of disinformation in the political process; it is called Deepfakes—"altered video or audio [of public candidates and officeholders] that seems convincingly real." Dwight Weingarten, "Deepfakes Under Scrutiny Ahead of 2020 Vote," *The Christian Science Monitor Weekly*, November 4, 2019, p. 15.

¹⁸⁴ Michael M. Grynbbaum, "In the Fractured Lens of Cable News, Two Impeachments for Two Nations," *New York*

likely consequence of choosing your own reality, scholars report, is an “electorate that privileges partisan purity and intransigence [and] elects representatives that eschew compromise and create gridlock.”¹⁸⁵ Stated differently, “polarized media doesn’t emphasize commonalities, it weaponizes differences; it doesn’t focus on the best of the other side, it threatens you with the worst.”¹⁸⁶

Interest Groups and Partisan Polarization

In 2019, there were over 11,000 registered lobbyists who represented the interests of numerous businesses, groups, and organizations around the country.¹⁸⁷ There are also an unknown number of unregistered lobbyists—the “un-lobbyists”—who avoid federal registration requirements by calling themselves strategic advisors, educators, or public relations specialists. James Thurber, a professor at The American University, using a broader definition that includes “think-tanks, shadow lobbyists, and other door-openers,” estimates that “Washington’s advocacy industry probably employs about 100,000” people.¹⁸⁸ (Think tanks, too, are affiliated with each party. As the head of a partisan think tank said to a researcher, “This is your [party’s policy] objective. Now go do your analysis.”)¹⁸⁹

Many lobbying organizations self-sort to align or affiliate informally with either the Democratic Party or the Republican Party. Along with various media and think tanks, many lobbying firms are part of the political infrastructure of each party. In the main, for example, environmental, consumer, and gun control groups often advocate for Democratic candidates and policies; business, farm, and gun rights groups often support GOP candidates and initiatives.

Interest groups, especially single-issue organizations, monitor closely the ideological purity and votes of lawmakers. If Members deviate too often from interest groups’ policy preferences or cooperate too closely with the opposition, these lawmakers might see the withering away of the group’s campaign support (votes, funds, services). The wayward lawmaker might even face the threat of a primary challenge. “In a partisan atmosphere,” remarked a Senator, “it’s hard to help the other side without being accused [by various interest groups] of aiding and comforting the enemy.”¹⁹⁰ In sum, Democratic and Republican-leaning interest groups have become “more closely and formally intertwined and integrated in party organizations as well as lawmakers’ own political operations.”¹⁹¹

In a unique development, the U.S. Chamber of Commerce, an organization long aligned with Republicans, added for the first time in 40 years a new criterion for rating and supporting

Times, November 17, 2019, p. 23.

¹⁸⁵ Markus Prior and Natalie Jomini Stroud, “Using Mobilization, Media, and Motivation to Curb Political Polarization,” in *Solutions to Polarization in America*, ed. Nathaniel Persily (New York: Cambridge University Press, 2015), p. 191. Some analysts suggest that the decline of local newspapers has likely contributed to increased polarization in the country. Absent local newspapers, people may turn to national outlets that often cover contentious news that divide the two parties. See Dean DeChiaro, “No News Is Bad News,” *CQ Weekly*, November 4, 2019, pp. 60-61.

¹⁸⁶ Ezra Klein, “Why the Media is So Polarized—and How It Polarized Us,” *Vox.com*, January 28, 2020, p. 10. This article is a chapter from Klein’s new book, *Why We’re Polarized* (New York: Simon & Schuster, 2020).

¹⁸⁷ Lobbying is a right of the people under Article I of the U.S. Constitution: the freedom of speech and the right of the people “to petition the Government for a redress of grievances.”

¹⁸⁸ Barney Jopson and Andrew Edgecliffe-Johnson, “Cohen Case Puts Spotlight on ‘Shadow Lobbying,’” *Financial Times*, May 15, 2018, p. 5.

¹⁸⁹ Bryan Bender, “Many DC Think Tanks Now Players in Partisan Wars,” *The Boston Globe*, August 11, 2013, p. 5.

¹⁹⁰ Darren Samuelsohn, “Climate Bill Gets GOP Cold Shoulder,” *Politico*, June 28, 2010, p. 10.

¹⁹¹ Gary J. Andres, *Lobbying Reconsidered: Under the Influence* (New York: Pearson Education, Inc., 2009), p. 103.

law makers of either party—Members’ willingness to engage in bipartisan compromises. The Chamber’s objective is “to rebuild the governing-focused political center” by rewarding law makers who reach across the aisle.¹⁹² The Chamber’s president stated, “We will not base our support solely on casting the right votes—though that remains essential. We will give law makers credit for showing leadership on good legislation—even if it doesn’t pass or even come up for a vote. And we’re going to take bipartisanship into account.”¹⁹³

Other Contributors to Partisan Polarization

Many other reasons are also said to account for partisan polarization in Congress and the country. An analyst wrote, “Explanations come as grand as the absence of a geopolitical threat to bring Americans together since the fall of the USSR. They come as small as the deregulation of the broadcast media in the 1980s” that ended the obligation of radio and television stations to present opposing views on controversial issues.¹⁹⁴ Consider two more reasons that could promote excessive partisan polarization.

Gerrymanders

Following the constitutionally required decennial census, the 435 House seats—set by law—are apportioned among the states according to their population. Some states gain House seats and others lose seats based on how the U.S. population is distributed across the 50 states, as determined by a mathematical formula. Each state is guaranteed at least one Representative. The legislatures of most states redraw House districts of equal population—the “one person, one vote” principle—as mandated by various U.S. Supreme Court decisions. (Several states assign the line-drawing process to an outside, independent commission.)

Gerrymandering refers to the purposeful drawing of House district lines to maximize partisan advantage. This type of gerrymandering occurs frequently in state legislatures controlled by one political party. Partisan gerrymandering is sometimes cited by analysts and others as fostering party polarization in the House of Representatives. A House lawmaker explained as follows:

When Members come here from these [partisan] districts that have been gerrymandered, they have little incentive to really work across party lines in order to reach solutions. As a matter of fact, they have a disincentive because if their district is skewed so heavily one way or the other, then the election is really in the party primaries . . . [S]o if one comes here wanting to work across the aisle, one has to watch one’s back, because the highly charged partisans [back home] don’t like [bipartisanship].¹⁹⁵

Contrarily, congressional scholars suggest that gerrymandering has scant to modest effects in fomenting partisan polarization in the House of Representatives.¹⁹⁶ They often point to the statewide Senate elections. The Senate is about as polarized as the House.

¹⁹² Kate Ackley, “In Major Shift, US Chamber to Rate Lawmakers on Bipartisanship,” *CQ News*, January 10, 2019.

¹⁹³ Joe Williams, “U.S. Chamber’s 2019 Ambitions Collide with Harsh Political Realities,” *Washington Examiner*, January 15, 2019, p. 47. See Timothy Cama, “U.S. Chamber Backing 23 Democrats for Reelection,” *eenews.net*, September 3, 2020, pp. 1-2; and Timothy Cama, “Oil Executive Quits Chamber Post Over Dem Endorsements,” *eenews.net*, September 9, 2020, pp. 1-2.

¹⁹⁴ Janan Ganesh, “Political Partisanship Sates the Lust for Belonging,” *Financial Times*, December 27, 2019, p. 15.

¹⁹⁵ House debate, *Congressional Record*, vol. 154 (July 29, 2008), p. H7285.

¹⁹⁶ Sean M. Theriault, *Party Polarization in Congress* (New York: Cambridge University Press, 2008), p. 83.

Death of Bipartisan Trust

Studies suggest that a dearth of bipartisan personal and social relationships contributes to Congress's sharp partisan polarization.¹⁹⁷ Members' hectic legislative schedules and workload demands (e.g., often flying home weekly to meet with constituents and reconnecting with their families who reside there)—make it harder than previously for lawmakers to become well-acquainted with colleagues from across the aisle or to socialize with them. The fraying of strong personal and bipartisan relationships could contribute to a polarized legislative environment that makes problem-solving hard. "A lack of social interaction means many Members and staff don't know each other well, making it difficult for them to work together," stated a former committee staff aide with decades of legislative experience.¹⁹⁸ Although the social comradeship "hypothesis is compelling," wrote a scholar, "it has not been subject to systematic empirical tests."¹⁹⁹

Nonetheless, in the view of former Senate Majority Leader Tom Daschle of South Dakota, the absence of cross-party working relationships can produce legislative gridlock. "Because we can't bond, we can't trust. Because we can't trust, we can't cooperate. Because we can't cooperate, we become dysfunctional."²⁰⁰ Bolstering the views of Senator Daschle, a journalist wrote the following:

[O]ne of the most important but least-talked-about factors [that encourage partisanship] is the simple decline in personal relationships. Gone are the days when Members of Congress lived in the Washington area bonding over their children's school events, golf, or at parties. Instead, they usually work an intense three days in DC and then travel to their home state. The lack of social interaction has led to an erosion of deep, cross-party friendships, which in turn feeds a deficit of trust—a crucial ingredient of legislating.²⁰¹

Representative Lee Hamilton of Indiana suggested a way out of this conundrum: "the more interaction you have with others, even with your adversaries, the more common ground you can find, and the more confidence you have in them—and the more likely you can move forward."²⁰² A similar recommendation was made by a House select reform panel in 2019. The panel proposed bipartisan retreats for Members and their families at the start of each new Congress. The panel also proposed bipartisan retreats for top committee staff. In addition, the House select committee suggested the creation of "a members-only hangout space, where Republicans and Democrats could randomly run into each other and chat."²⁰³ An objective of the designated space was to

¹⁹⁷ See U.S. Congress, Senate Committee on Rules and Administration, *The Evolving Congress*, committee print, 113th Cong., 2nd sess., S.Prt. 113-30 (Washington, DC: GPO, 2014). Specifically, two chapters are on point: "Being a Member of Congress: Some Notable Changes During the Last Half Century," by Michael L. Koempel; and "Collaborative Relationships and Lawmaking in the U.S. Senate: A Perspective Drawn from Firsthand Accounts," by Mark J. Oleszek.

¹⁹⁸ Testimony of Elise J. Bean, director of the Washington office of Wayne State University, in U.S. Congress, House Select Committee on the Modernization of Congress, *Article One: Restoring Capacity and Equipping Congress to Better Serve the American People*, 116th Cong., 2nd sess., January 14, 2020, pp. 2-3.

¹⁹⁹ Michael J. Barber and Nolan McCarty, "Causes and Consequences of Polarization," in *Solutions to Political Polarization in America*, ed. Nathaniel Persily (New York: Cambridge University Press, 2015), p. 38.

²⁰⁰ David Rogers, "The Lost Senate," *Politico*, October 9, 2009, p. 12.

²⁰¹ Francine Kiefer, "Can the Center Hold? Susan Collins and the High Wire Act of Being a Moderate," *Christian Science Monitor Weekly*, July 23, 2018.

²⁰² Lee H. Hamilton, "Why Trust Matters," *Comments on Congress*, December 4, 2019, p. 2. This publication is from the Indiana University Center on Representative Government. See also Peter Baker, "In a Swelling of Tribalism, The Trust of a Country Teeters," *New York Times*, December 10, 2019, p. A1.

²⁰³ Paul Kane, "A Bipartisan Committee Has Novel Ideas to Make Congress More Productive," *The Washington Post*, December 29, 2019, p. A4. See also Gabriella Munoz, "Task Force Hammers Out Plans to Make Congress More

encourage the development of cross-party working relationships that might over time increase the opportunities for legislative problem-solving.

Remedial Proposals

In 1950, the American Political Science Association (APSA) issued a report entitled *Toward a More Responsible Two-Party System*. The thrust of the report was to promote programmatic and disciplined parties, one liberal and one conservative, each with the internal ideological cohesion required to win enactment of their respective policy agendas.²⁰⁴ A major concern at the time was that both political parties embraced the norms of collegiality, compromise, and centrist policies. Their policy preferences overlapped many issues, which meant that it was a challenge for the engaged public to determine which party to hold accountable and responsible for legislative action or inaction. More partisan polarization might simplify and clarify for voters the two parties' programmatic positions.

To an extent, the 1950 goals of the APSA reflect current conditions in Congress and the country. "Each side's congressional caucus," wrote two analysts, "is now rooted in places that differ enormously from the other side's, in their demographic composition, cultural values, and attitudes toward government."²⁰⁵ An open question is whether today's broadly cohesive legislative parties are any more adept at making productive ("better") public policy than the internally divided parties of earlier eras. A congressional scholar pointed out that in "evaluating the effects of party polarization on gridlock, it is important to recognize that the ebbs and flows of legislative productivity are simply not well understood by political science."²⁰⁶

If the lament of the 1950s reformers was that too much bipartisanship influenced lawmaking, today's concern is that there is too little cross-party cooperation because the two parties sorted themselves into divergent ideological camps. Legislative gridlock can be the contemporary result. Asked to comment on the biggest changes in Congress during his nearly 60 years of continuous House service, Representative John Dingell said, "Lack of collegiality, refusal to compromise, an absolute reluctance to work together, and I think, a total loss of understanding of the traditions."²⁰⁷ The erosion of these legislative norms makes it harder for the two parties to bridge their policy and procedural differences.

A response of numerous lawmakers and analysts is to propose various reforms designed to improve the governing capacity of the House and Senate. Their broad objectives are several: (1) induce party and institutional changes that foster a consensus-oriented, participatory legislative and political culture; (2) mitigate the adverse effects of party and ideological polarization, such as

Efficient," *The Washington Times*, December 26, 2019, p. A3.

²⁰⁴ For an analysis of the political scientists' report, see Austin Ranney, "Toward a More Responsible Two-Party System: A Commentary," *American Political Science Review*, September 1951, pp. 488-499; Austin Ranney, *The Doctrine of Responsible Party Government: Its Origins and Present State* (Urbana, IL: University of Illinois Press, 1954); and Sam Rosenfeld, *The Polarizers: Postwar Architects of Our Partisan Era* (Chicago, IL: University of Chicago Press, 2018), Chapter 1, "The Idea of Responsible Partisanship, 1945-1952," pp. 7-21.

²⁰⁵ Ronald Brownstein and Scott Bland, "Stairway to Nowhere," *National Journal*, January 12, 2013, p. 12.

²⁰⁶ Frances E. Lee, "How Party Polarization Affects Governance," *Annual Review of Political Science*, vol. 18 (2015), p. 275. See also Frances E. Lee and Nolan McCarthy, eds., *Can America Govern Itself?* (New York: Cambridge University Press, 2019). As the two authors state, this book is "organized around two themes: the changing nature of representation in the United States and how changes in the political environment have affected the internal processes of institutions, overall government performance, and policy outcomes."

²⁰⁷ Don Wolfensberger, "Long-Serving Dingell Is a Master of House Traditions," *Roll Call*, June 12, 2013, p. 14.

those spotlighted by Representative Dingell; and (3) support initiatives by change-oriented lawmakers who want to restore regular order.²⁰⁸

Other reformist goals are to constrain excessive partisanship, curb procedural abuses, enhance deliberative processes, strengthen committees, or boost congressional staffing. Still others "have focused on changing [specific] legislative procedures such as those related to the filibuster, appropriations, and confirmation process to limit the opportunities for polarization to undermine government."²⁰⁹

An array of electoral reforms are also advocated, such as nonpartisan redistricting commissions to curb gerrymandering; creation of a multiparty system to better represent the diversity of national views through proportional elections; or revise party primary nomination systems to encourage the selection of centrist congressional candidates who support collaboration, compromise, and civility in lawmaking.

Each reform recommendation has probable strengths and weaknesses, as well as the potential for unforeseen or unwanted consequences. Rather than any single change, a combination of various reform proposals is likely required to ameliorate the deep partisan divisions inside and outside Congress. These divisions evolved over decades and transformed the traditional procedures of earlier times to today's wider use of unorthodox procedures for partisan *and* bipartisan law making.

Summary Observations

Change and innovation are part of Congress's DNA. These qualities have enabled the House and Senate from 1789 forward to adapt and respond to new circumstances and conditions. During much of the 20th century, the "regular order" was a committee-centered, participatory model of law making that emphasized cross-party deliberation, policy specialization, and step-by-step decisionmaking. This model is still employed for measures that enjoy bipartisan support, but it has often given way in this polarized era to a party-centered process of "irregular" (unconventional) lawmaking. This change has augmented the authority of House and Senate majority (and minority) party leaders. For example, today's party leaders, not the committee chairs, generally take the lead in battles over major legislation. In short, Congress operates differently today compared with the earlier period.

A number of developments prompted the rise of unconventional lawmaking. Recall the deep and intense policy and ideological divide between the two congressional parties; the electoral volatility that promotes fierce competition between them to keep or capture majority control of the House or Senate, often an open question on election day; and the divergent demographic composition of the two parties, with Democrats ethnically diverse and Republicans largely White male. Add in the constitutional system (e.g., bicameralism and the President's veto) of separate institutions sharing powers, an observation by Representative Dingell becomes especially relevant: lawmaking is "hard, pick-and-shovel work."²¹⁰

Advocates of a "return to regular order" confront a number of challenges, such as these five. First, the parliamentary "rules of the game" change regularly in response to electoral, legislative,

²⁰⁸ Matthew Green and Daniel Burns, "What Might Bring Back Regular Order to the House?," *PS: Political Science and Politics*, April 2010, pp. 223-226.

²⁰⁹ Michael Barber and Nolan McCarty, "Causes and Consequences of Polarization," in *Negotiating Agreement in Politics*, eds. Jane Mansbridge and Cathie Jo Martin (Washington, DC: American Political Science Association, 2013), p. 19.

²¹⁰ Margaret Kriz, "Still Charging," *National Journal*, December 6, 1997, p. 2462.

and societal developments (technology, globalization, the 24/7 media culture are examples.) Law making is not a one-size-fits-all procedural pathway. Instead, it is often a disorderly, muddled, and unpredictable enterprise, especially in this era of acrimonious partisanship.

Moreover, proposals can become law in ways not contemplated by the formal rule books. Representative Lee Hamilton wrote, "There are ways for astute or powerful members to get around nearly every stage in the traditional model of the legislative process, making those 'How a Bill Becomes Law' charts of little value in predicting the path of legislation."²¹¹ Parliamentary pathways, said a Senate expert, can involve "exotic procedures that are basically incomprehensible" to most people.²¹²

Second, the interpretation of regular order and its meaningfulness to Members can vary. Several examples illustrate these points. Different clusters of lawmakers may champion a specific form of regular order legislating. For example, conventional lawmaking for Members who serve on the House and Senate Armed Services Committees involves annual passage of the defense authorization bill; House and Senate appropriators want timely, yearly, and separate enactment of the 12 spending bills. "We plan to do these [appropriation] bills in regular order," said the House Appropriations chair. "Well, not-so-regular order, but as regular as we can."²¹³ Newly elected Members, among others, often favor a "participatory" regular order that amplifies their voices and views in legislative decisionmaking.

Situational factors also influence Members' perspectives of regular order. In the minority, lawmakers may advocate traditional law making because that approach affords them larger opportunities to influence policy outcomes and to publicize their agenda alternatives. However, when the minority party reclaims institutional control, the new majority might reevaluate their previous stance on regular order legislating when they confront unwanted dilatory tactics of the opposition party. Speaker Ryan highlighted this tension when he said, "There's a plus side and downside of regular order. [Members] have got to take" tough votes and explain them "in difficult situations."²¹⁴ Tough votes, or success at avoiding them, can influence which party attains or retains majority control of the House or Senate.

Third, the textbook characterization of regular order emphasizes bipartisan participation, transparency, and deliberation. This description conflicts with the reality of governing in a political environment of hard-edged partisanship. A top aide to Speaker Hastert stated that the regular order is a myth. The Speaker's job, he said, is "not to preside over the regular order. The Speaker's job is to expedite the will of the majority party, to keep the trains running on time and to otherwise protect the power and prerogatives of the House of Representatives."²¹⁵ An expert on the Senate stated that people who urge a return to regular order legislating "either want the legislation to fail or are in denial with respect to the difficulty and extra effort that are required to pass major legislation in the modern Congress."²¹⁶

Fourth, many contemporary lawmakers have little familiarity with textbook legislating. An experienced journalist suggested that a "generational shift" in Congress "has left the vast majority

²¹¹ Hamilton, *How Congress Works and Why You Should Care*, p. 58.

²¹² Kane, "History Professor Landed a Privileged Perch to See How Harry Reid Works," p. A17.

²¹³ Quoted in Caitlin Emma, "Politico Pro's Budget and Appropriations Brief: The Health & Wealth Gap is Getting Worse," *Politico.com*, June 23, 2020, p. 1.

²¹⁴ Daniel Newhauser, "From Reluctant Recruit to Happy Warrior," *NationalJournal.com*, December 18, 2015, pp. 3-4.

²¹⁵ John Feehery, "The Myth of Regular Order," *The Hill*, October 6, 2015, p. 21.

²¹⁶ W. Lee Rawls, *In Praise of Deadlock: How Partisan Struggle Makes Better Laws* (Washington, DC: Woodrow Wilson Press, 2009), p. 17.

of law makers unaware of how [law making] is supposed to work."²¹⁷ A Senate party leader stated, "I doubt that there are more than a handful of senators today who have really experienced what regular order feels like."²¹⁸ Asked why he wanted to accelerate chamber action on each of the dozen appropriations measures, a House Appropriations chair said, "[T]o educate members about [what] the regular order is [because] hardly anybody in the House was here when we last did regular order [in 1994]."²¹⁹ Unlike the previous practice of annual and separate consideration of the dozen appropriations measures, common practice today is to assemble packages: combine three or four appropriations measures into a "megabill" hundreds or thousands of pages in length. These measures are then brought to the floor under debate and amendment restrictions. The regular order of previous eras is often set aside by today's unconventional legislating.

Fifth, compared with nontraditional processes, the step-by-step textbook model of legislating is time-consuming with its traditions of lengthy deliberation as well as open committee and floor processes. Contemporary lawmakers prefer certainty and predictability in the day-to-day schedule of legislative business. They have huge legislative demands on their time: attending committee and floor sessions, meeting with colleagues, or conducting oversight of the executive branch. There is also the ever-present "permanent campaign" of fundraising, voting on "messaging" bills and amendments, or meeting with donors.

The many responsibilities of lawmakers have encouraged them to generally accept limits on debating and amending legislation. The combination of reelection incentives, large representational obligations, and a "Tuesday-Thursday" legislative schedule suggests that the participatory ethos of regular order legislating could be a political liability for many legislators. As a legislative scholar concluded, "Congress has evolved over the decades from a culture of legislating to a culture of campaigning."²²⁰

The regular order has not disappeared, however. Sometimes it is more evident during committee consideration than on the floor of either chamber where the dynamics of law making change and majority party leaders exercise major influence. Even so, there are measures that broadly comport with the fundamentals of regular order. A Senate committee chair, for instance, provided a detailed review of the actions taken to develop a major energy modernization bill. It involved a robust debate and amendment process in committee and on the floor, combined with bipartisan "cooperation, collaboration, and conversation" throughout the measure's development and passage.²²¹ Every step-by-step feature of the regular order might not have been followed, but enough of the conventional process was used to attract bipartisan consensus and agreement.²²²

Calls for the regular order go beyond lawmaking. Comments by Senate Budget Chairman Mike Enzi, R-WY, underscore this point. His remarks focused on fiscal matters, but they apply equally well to other subject areas and to the House. He emphasized the following:

Pushing Congress to adhere to regular order is essential because the budgetary and fiscal dysfunction in Congress is why Americans have such dismal views of their elected leaders.

²¹⁷ Paul Kane, "When Congress Forgets How to Legislate," *The Washington Post*, January 24, 2018, p. A4.

²¹⁸ Sheryl Gay Stolberg and Nicholas Fandos, "In Congress, Only Gloom Is Bipartisan," *New York Times*, January 28, 2018, p. 17.

²¹⁹ David Rogers, "Appropriations and Baseball Are Back," *Politico*, April 3, 2014, p. 14.

²²⁰ Wolfensberger, *Changing Cultures in Congress: From Fair Play to Power Plays*, p. 6.

²²¹ Senate debate, *Congressional Record*, vol. 162 (January 27, 2016), p. S217.

²²² An outstanding question is how many steps in regular order legislating might be avoided before it becomes irregular lawmaking. For example, if a committee bypasses the hearing stage but observes the other lawmaking steps, is this still the regular order?

A well-functioning budget process that follows regular order strengthens democracy by giving citizens a clear and transparent idea of government's role and provides them with the knowledge that their tax dollars are being spent wisely. When the process breaks down, so does the people's faith in government and their elected officials.²²³

If the "process breaks down," a consequence is that other institutions—the White House, federal courts, state and local governments, federal agencies, or the Federal Reserve—will act to address national problems if Congress cannot. History demonstrates that Presidents of both parties are not reluctant to bypass a gridlocked Congress and use their executive authority to advance their policy and political objectives.

To close: a prime factor that provokes unconventional lawmaking is the intensity of two-party conflict inside Congress and outside in the broader political environment. This reality reverberates throughout the lawmaking process, making bipartisan compromises on many issues arduous to achieve. The result: unorthodox lawmaking is now a prominent feature of policymaking on Capitol Hill. As a congressional scholar wrote, nontraditional lawmaking procedures and processes, "whatever their origins, they have become flexible tools useful to members and leaders under a variety of circumstances. For that reason, we should not expect a return to what once was the regular order, at least not in the foreseeable future."²²⁴ Put differently, a seasoned legislative expert said, "Polarized procedure responds to the all-powerful force of national political polarization and will significantly change only if conditions do likewise."²²⁵

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²²³ Matthew Nussbaum, "Politico Pro Q&A: Senate Budget Chairman Mike Enzi," *Politico.com*, February 10, 2016, p. 14.

²²⁴ Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress*, 4th ed. (Los Angeles, CA: CQ Press, 2012), p. 164.

²²⁵ Tiefer, *The Polarized Congress*, p. 3. A different interpretation of governance in the 21st century underscores the role of crises in fostering a consensus-based process of legislative decisionmaking. The author states that in this period of emergency government, "congressional leaders [transcend] their mutual partisan animosity in order to massively empower the appointed members of the executive branch." He adds, "Leadership dominance is the organizing factor that underlies both of the alternating postures of 21st-century American government: polarized stalemate in normal times, and massive, rapid action in crisis." See Philip Wallach, "Crisis Government," *National Affairs*, summer 2020.

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