

Why and How the Legislative Process Changed

WHY DID THE “TEXTBOOK” LEGISLATIVE PROCESS, which seemed so routinized and entrenched, change so much? In this chapter I argue that the modifications and innovations can be seen as responses to problems and opportunities that members—as individuals or collectively—confronted, problems and opportunities that arose from changes in institutional structure or challenges in the political environment.

The story is complex, and its various strands intertwine in intricate ways, but three factors can be analytically isolated as key: internal reforms that changed the distribution of influence in both chambers in the 1970s; the institution of the congressional budget process, an internal process reform with sufficiently far-reaching effects to deserve separate treatment; and a political environment in the 1980s and early 1990s characterized by divided control, big deficits, and ideological hostility to the legislative goals of the congressional Democratic Party. I discuss each of these briefly and then analyze how the legislative process was affected by them.

Unorthodox lawmaking, I argue, predates the extreme partisan polarization that characterizes contemporary politics. Yet polarization has powerfully affected the form that changes with other origins have taken. I close the chapter with an analysis of how partisan polarization under both Republican and Democratic control has shaped the legislative process since the mid-1990s.

From Decentralization to Individualism in the Senate

In the U.S. Senate of the 1950s and before, influence was decentralized but unequally distributed, with committee chairs and other senior members,

who were predominantly conservative, exercising the lion's share. Although Democrats were the majority party (except for the first Eisenhower Congress [1953–1954]), southerners, who were mainly conservative, made up a substantial part of the party membership and, being more senior than their northern colleagues, held a disproportionate share of committee leadership positions. The Senate of this era was a relatively closed and inward-looking institution. Typical senators specialized in the issues that came before their committees and participated meagerly on the floor; they were deferential to their seniors, loyal to the institution, and restrained in the use of the powers that Senate rules confer on the individual (Matthews 1960; Sinclair 1989).

Senate rules then, as now, allowed unlimited debate and, in most cases, unlimited amending activity. The restraint that characterized the Senate of this period was not a function of rules; rather, it depended on norms—unwritten rules of behavior—and on a political environment in which acting with restraint was relatively costless to senators.

That began to change in the late 1950s. The 1958 elections brought into the Senate a big class of northern liberal Democrats who had won competitive elections on a platform promising action; succeeding elections through the mid-1960s augmented the number of such members. These senators could not afford to wait to make their mark, as the old norms had demanded; both their policy and their reelection goals dictated immediate and extensive activism.

An activist style based on participation in a broader range of issues and on the floor as well as in committee became attractive to more and more senators as the political environment and the Washington political community changed radically in the 1960s and 1970s. New issues and an enormous growth in the number of groups active in Washington meant that senators were eagerly sought as champions of groups' causes. The news media played an increasingly important role in politics and needed credible sources to represent issue positions and to offer commentary. These developments made the role of outward-looking policy entrepreneur available to more senators. Successfully playing that role brought a senator a Washington reputation as a player, media attention, and possibly even a shot at the presidency.

With this great increase in the incentives to exploit fully the powers that Senate rules confer on the individual, senators began to offer many more amendments on the floor and to use extended debate more often. As a result, the Senate floor became a more active decision-making arena. The proportion of legislation subject to high amending activity (ten or more amending roll calls) was tiny in the 1950s; for the 84th and 86th Congresses of 1955–1956 and 1959–1960, it averaged 3 percent. During

TABLE 6.1 Increase in Filibusters and Cloture Votes, 1951–2014

Years	Congress	Filibusters per Congress	Cloture votes per Congress	Successful cloture votes per Congress
1951–1960	82nd–86th	1.0	0.4	0
1961–1970	87th–91st	4.6	5.2	0.8
1971–1980	92nd–96th	11	22	9
1981–1986	97th–99th	17	23	10
1987–1992	100th–102nd	27	39	15
1993–2006	103rd–109th	30	53	21
2007–2014*	110th–113th	55	91	55

* Filibusters/cloture votes on nominations after rules change on November 21, 2013, reducing number required for cloture to simple majority are not counted.

Sources: Data for 82nd–102nd Congresses: Democratic Study Group (1994, app. B); Ornstein, Mann, and Malbin (2002, 162). Data for 103rd Congress: Beth 1995a. Data for 104th–108th Congresses: *CQ Almanac (CQA)* for the years 1995–2007 (Washington, DC: Congressional Quarterly); 108th–114th Congresses: *CQ* online.

the 1960s and 1970s, it rose to a mean of 8 percent per Congress, and in the 1980s it averaged 15 percent (Sinclair 1989, 115).¹

As senators became much more willing to exploit their prerogative of extended debate, filibusters, both overt and covert, increasingly became a routine part of the legislative process in the Senate. As Table 6.1 shows, filibusters were once rare; in the 1950s a typical Congress saw one filibuster. By the 1970s more than ten filibusters occurred per Congress on average and by the late 1980s and early 1990s filibusters were taking place at a rate of more than one a month.² As the number of filibusters grew, so did attempts to stop them by invoking cloture; cloture votes became an ordinary part of the legislative process. While cloture was successfully invoked fairly often, passing legislation that was at all controversial increasingly required sixty votes.

Reform and Its Legacy in the House

In the House, changes in chamber and majority-party rules during the 1970s transformed the distribution of influence (Dodd and Oppenheimer 1977; Rohde 1991; Sinclair 1983; Smith 1989). Even more than in the Senate,

1. These figures are based on data for even-numbered Congresses from the 88th to the 96th Congress and for all Congresses from the 97th through the 99th.

2. See Chapter 3 and Beth 1995b for cautions about these data.

legislative influence in the House had been vested in powerful and often conservative committee leaders—often southerners—over whom party leaders and members had little control. Reformers, who were primarily liberal Democrats, objected to the conservative policy this system produced and to the limited opportunities for participation it afforded rank-and-file members.

Elections throughout the 1960s changed the composition of the Democratic Party in the House, as they did in the Senate, increasing the number of northern Democrats, many of whom were liberal reformers, and decreasing the number of conservative southerners. Through a series of rules changes mostly instituted between 1969 and 1975, reformers correspondingly changed the distribution of influence. Powers and resources were shifted from committee chairs down to subcommittee chairs and rank-and-file members and up to the party leadership. For example, the power to appoint subcommittee chairs was taken away from the committee chair and given to the majority-party members of the committee; subcommittees were ensured adequate budget and staff. Rather than securing their positions automatically through their seniority on the committee, committee chairs had to win approval by majority vote on a secret ballot of the majority-party membership. Junior members gained resources—especially staff—that enormously increased their ability to participate actively in the legislative process. The Speaker, the leader of the majority party, was given the power to select the majority-party members of the Rules Committee, a greater say in the assignment of members to other committees, and new powers over the referral of bills.

During the same period, the House adopted sunshine rules, which opened the legislative process to greater public scrutiny. Recorded votes became possible—and easy to force—in the Committee of the Whole, where the amending process takes place.³ Most committee markup sessions and conference committee meetings were opened to the public. The greater visibility of congressional decision making increased members' incentives for activism.

These reforms had far-reaching direct and indirect effects. By reducing the power and autonomy of the committees, the reforms made legislating more difficult for the majority party. To be sure, Democratic reformers had often been unhappy with the sort of legislation conservative-led committees had produced. By the late 1970s, however, the committee chairs and the membership of the most powerful committees were more representative of the Democratic Party than they had been earlier, and Republicans and

3. Before 1971 votes in the Committee of the Whole were either voice votes or teller votes, in which the members voting aye and those voting nay walked by "tellers," who counted them but did not record who voted how.

dissident Democrats had become adept at using floor amendments to make political points and confront mainstream Democrats with politically difficult votes. Compromises carefully crafted in committee were picked apart on the floor, and floor sessions stretched on interminably.

The number of floor amendments decided on a teller or recorded vote had risen gradually from 55 in 1955–1956 to 107 in 1969–1970. With the institution of the recorded teller, it jumped to 195 in 1971–1972, and with electronic voting it jumped again to 351 in 1973–1974 (Smith 1989, 33). During the 94th Congress (1975–1976), 372 such amendments were offered on the floor, and during the 95th, 439. In 1979 floor consideration of the budget resolution took nine days, during which time 50 amendments were offered (Sinclair 1983, 180).

Democrats began to look to their party leaders, the only central leaders in the chamber, to counter these problems. The leaders responded by innovating in ways that led to alterations in the legislative process. The leadership became more involved with legislation before it reached the floor, and this involvement increasingly took the form of negotiating substantive changes in the legislation, often at the postcommittee stage, in order to produce a bill that could pass the chamber. To respond to the barrage of amendments offered on the floor, the leadership developed special rules into powerful devices for structuring floor decision making.

Budget Reform

When President Richard Nixon aggressively challenged Congress's power of the purse, Congress responded by passing the Congressional Budget and Impoundment Control Act of 1974 (hereafter the Budget Act). Presidents had been encroaching on Congress's budgetary powers for decades; lacking a mechanism for making comprehensive decisions, Congress had long used the president's budget as its point of departure for budgetary decision making and usually altered it only marginally. However, when Nixon claimed the right to impound—that is, not spend—congressionally appropriated funds, the Congress had to respond or acquiesce in a severe diminution of its powers. Nixon argued that congressional appropriations were just ceilings and that he was not required to spend any of the money Congress appropriated. In effect, he was arguing that Congress had only negative powers: Congress might be able to prevent the president from doing something by not appropriating funds, but it could not force a president to carry out a policy he opposed.

The Budget Act went far beyond devising a procedure to control impoundments: the budget process that it established provided a mechanism by which comprehensive policymaking in Congress became possible.

During its first few years, however, the budget process was not used in that way. In the House the battles over budget resolutions were hard fought and highly partisan; debate did turn on the political parties' different priorities, but the resolutions themselves did not call for significant policy change (Ellwood and Thurber 1981; Schick 1980).

Reconciliation instructions that mandated committees to make changes in legislation under their jurisdiction were first included in the budget resolution in 1980 (Sinclair 1983, 181–190). Frighteningly high inflation in January 1980 convinced President Jimmy Carter and the Democratic congressional party leadership that budget cuts needed to be made—and quickly. The ordinary legislative process, they decided, would take too long and be subject to delay by interests adversely affected by the cuts. Therefore, they decided to use the budget process and to include reconciliation instructions in the first budget resolution. Doing so was highly controversial (in part because the Budget Act envisioned that such instructions would be included in the second budget resolution, which in this and most other cases would be too late), and the committees subject to instructions objected vigorously. Nevertheless, the resolution with the instructions passed, and the committees did comply. To do otherwise was to defy the will of Congress as expressed in its budget resolution.

Although the policy changes required by the 1980 budget resolution were modest by later standards, the experience made clear to perceptive participants that, under certain circumstances at least, the budget process was a mechanism available to central leaders for making comprehensive policy change. David Stockman, a Republican member of the House from Michigan from 1977 to January 1981, was one of those perceptive participants. As President Ronald Reagan's first head of the Office of Management and Budget (OMB), he suggested using the budget process to enact Reagan's economic program in 1981 (Stockman 1986). The administration-supported budget resolution included instructions to committees to make substantial changes in policy; supporters forced a single vote on them as a whole and then packaged the policy changes into one massive reconciliation bill, where again the key vote was whether to accept or reject them as a whole. This strategy enabled Reagan and his supporters to achieve major policy change quickly in a system resistant to such change.

The budget process has had wide-reaching effects on the legislative process. In the years since 1981, budget politics have remained at center stage. The attempt to control the big deficits Reagan's economic program created shaped the politics of the 1980s and most of the 1990s. Even more significant, the budget process has become the tool of choice for those attempting to bring about comprehensive policy change.

A Hostile Political Climate as a Force for Innovation: The 1980s and Early 1990s

Both the House and Senate entered the 1980s beset by problems resulting from changes in their internal distribution of influence. The highly individualistic Senate, in which each senator was accorded extraordinary latitude, was very good at agenda setting and publicizing problems, but it was less well structured for legislative decision making. The House, which had greatly increased rank-and-file members' opportunities for participation, also had problems legislating, although its central leadership had begun to develop reasonably effective responses.

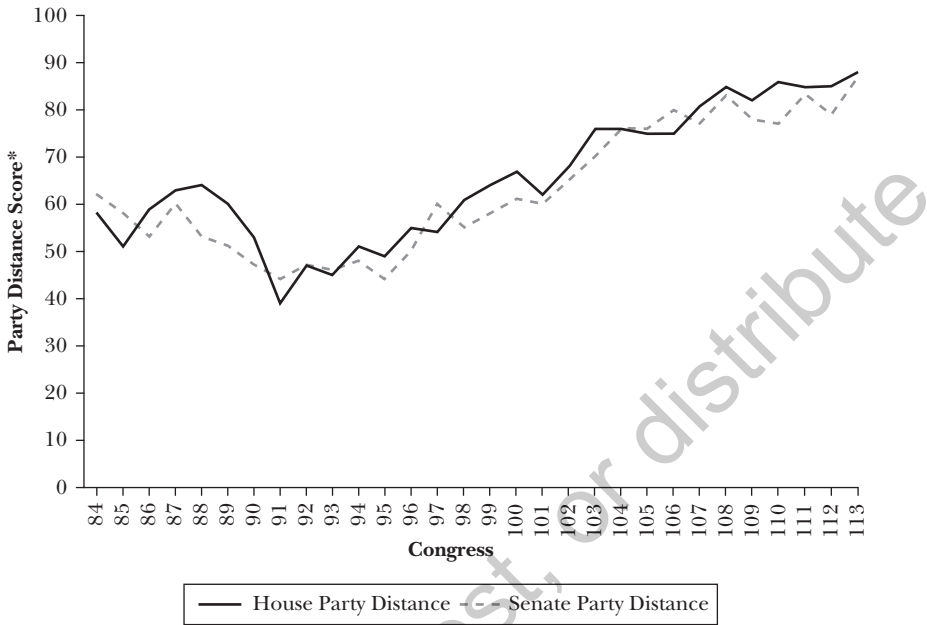
The political climate of the 1980s and early 1990s exacerbated the problems of legislating, especially for the Democratic House. Ronald Reagan was a conservative, confrontational president whose policy views were far from those of congressional Democrats, and the policy preferences of his successor, George H. W. Bush, were not much closer. In 1981, Reagan and his congressional allies steamrolled the Democratic House majority and enacted sweeping policy changes over futile Democratic protests. Thereafter, Reagan was never as politically strong again, but he and Bush still had the bully pulpit and the veto.

The growing ideological polarization of the parties exacerbated the conflict. Reagan's nomination had signaled the Republican Party's move to the right. The congressional party, especially the House Republican Party, had begun to change in the mid- and late 1970s. Not only were fewer moderates being elected, but also more hard-edged, ideological conservatives were entering the House. The elections of 1978 brought a Republican freshman from Georgia named Newt Gingrich to the House.

The Democratic Party in the 1980s became more ideologically homogeneous as its southern contingent changed. Republicans won southern seats, often ones previously held by the most conservative Democrats, and the southern Democrats who remained depended for reelection on the votes of African Americans, who tend to be liberal. The Republican Party's increasing conservatism also made any ideological differences that remained among Democrats seem smaller.

The voting cohesion of House Democrats began to increase after the 1982 elections, and in the late 1980s and early 1990s it reached levels unprecedented in the post-World War II era. A member's party unity score is simply the frequency with which the member votes with his or her party colleagues on votes that pit majorities of the two parties against each other. For the period 1951 through 1970, House Democrats' average party unity score was 78 percent; it fell to 74 percent for the period 1971

FIGURE 6.1 Distance between the Parties on Partisan Votes, 1955–2014



*Party Distance Score = mean Democratic Party voting score – (100 – mean Republican Party voting score)

to 1982.⁴ Then after the 1982 elections the scores began rising again and averaged 86 percent for the 1983–1994 period. During this same period, the proportion of party votes also increased, averaging 56 percent compared with 37 percent during the 1971–1982 period. During the 103rd Congress, a majority of Democrats opposed a majority of Republicans on 64 percent of House recorded votes (*CQA*, various years; Rohde, 1991).

Figure 6.1 illustrates the polarization of the congressional parties since the early 1980s. Party voting scores can be used to construct a measure of the difference or distance between the parties. If, on average, 85 percent of Democrats voted against 90 percent of Republicans on party votes, then on average 10 percent of Republicans voted with the 85 percent of Democrats and the difference between these figures (75 = 85–10) provides an indicator of the distance between the parties. As Figure 6.1 shows, that distance increased enormously.

4. Party votes are recorded votes on which a majority of Democrats voted against a majority of Republicans. A member's party unity score is the percentage of party votes on which he or she voted with a majority of his or her party colleagues.

During the 1980s, then, an increasingly cohesive House Democratic majority faced a hostile president, a Republican Senate, and a more aggressive and conservative Republican minority. After 1981 big deficits became chronic and severely restricted feasible policy options. Democrats often found themselves in the position of fighting to protect past policy successes. Partisan conflict and stalemate in Washington fed public cynicism about government's ability to handle effectively the problems facing the country; many citizens concluded that government could not do anything right. Passing legislation that majority Democrats considered satisfactory became very difficult in such a climate. Even enacting legislation to keep the government going was hard, both because of the ideological gulf between congressional Democrats and Republican presidents and because the legislation frequently required making unpalatable decisions. This tough climate forced further innovation in the legislative process, especially in the House.

How Internal Reform and a Hostile Climate Spawned Unorthodox Lawmaking

Internal reforms, the hostile political climate, and other lesser changes in the environment altered the context in which members of Congress functioned. As they and their leaders sought to advance their goals within this altered context, they changed the legislative process. Sometimes changes were brought about by formal revisions in chamber rules; more frequently, they were the result of alterations in practices.

Multiple Referral

As our society and economy evolve over time, the issues at the center of controversy change. In the 1950s and early 1960s, for example, environmental protection was an obscure issue, and congressional attempts to deal with it mostly entailed programs to help municipalities build water treatment plants; by the 1970s the environment had become a highly salient issue, and Congress was considering ambitious legislation to protect endangered species and to force automakers and other polluters to clean up the air. As new issues arise and old ones change, the fit between the prominent issues on the congressional agenda and the committee system becomes increasingly poor. Yet Congress, especially the House, has great difficulty in realigning committee jurisdictions. Taking away jurisdiction from a committee reduces its clout; both committee members and affected interest groups that have established good working relationships with the committee will fight the change. Since committee membership is a considerably more important basis of members' influence in the House

than in the Senate, realigning jurisdictions so that they fit better with the issues of the day is harder in the House than in the Senate.

By the early 1970s committee jurisdictions that had last been significantly overhauled in 1946 were seriously outmoded; jurisdiction over a number of key issues—energy, the environment, and health, for example—was spread over a number of committees, leading to a lack of coordination and numerous turf fights. The House attempted to reform its committee jurisdictions in the mid-1970s but largely failed (Davidson and Oleszek 1977). The Senate’s attempt at committee reform in the late 1970s was considerably more successful (Davidson 1981).

Unable to realign committee jurisdictions and driven by reform-minded members’ desire to increase opportunities for broad participation in the legislative process, the House in 1975 changed its rules to allow multiple referral of legislation (Davidson and Oleszek 1992).⁵ In the first Congress with multiple referral, 1975–1976, 6.5 percent of the measures introduced were multiply referred. Over time and driven by the same forces that led to its institution, multiply referred legislation became an increasingly prominent part of the House workload (see Table 6.2). On average 12 percent of measures were multiply referred during the five Congresses between 1977 and 1986; the frequency has risen to an average of 20 percent in Congresses since the mid-1980s.

For major legislation, the increase has been steeper. Multiply referred measures have made up a considerably greater proportion of major legislation than they have of all legislation. Beginning in the late 1980s, about 30 percent of major measures were multiply referred. In the 104th Congress, however, 51 percent of major measures were referred to more than one committee—despite a rule change intended to rein in multiple referral. Since then the proportion has usually been about one-third though it did increase to almost 60 percent in the 113th Congress. (But see the discussion in Chapter 2.)

Multiple referral of legislation has always been possible in the Senate through unanimous consent. The Senate, however, did manage to realign its committee jurisdictions during the 1970s, and because senators can more easily influence legislation outside the committee setting than House

5. Actually, even before then, something quite similar to multiple referral occurred under specialized circumstances; when legislation referred to a committee other than Ways and Means contained a revenue component, that section would be sent to the tax committee. In the 91st Congress (1969–1970), for example, three bills primarily under the jurisdiction of a committee other than Ways and Means also were referred to Ways and Means for consideration of their revenue sections; thus, the Interstate and Foreign Commerce Committee was mostly responsible for the Airport and Airway Development Act, but the trust fund and tax provisions were handled by Ways and Means.

TABLE 6.2 Multiple Referral in the House and Senate, 94th–113th Congresses

Congress*	Years	House		Senate	
		Percentage of all bills	Percentage of major legislation	Percentage of all bills	Percentage of major legislation
94th	1975–1976	6.5	8.6	3.2	5.2
95th–99th	1977–1986	12.3	17.9	2.6	5.0
100th–108th	1987–2004	20.0		1.6	
100th–112th	1987–2012		34.1		3.7
113th	2013–2014		57		0

*For major legislation, selected Congresses

Sources: For all bills, compiled by Thomas P. Carr, analyst with the Government and Finance Division of the Congressional Research Service (CRS) using the Legislative Information System (LIS). For major legislation, compiled by the author.

members can, they have less incentive to insist on a referral (Fenno 1973; Sinclair 1989). As a consequence, the referral of legislation to more than one committee continues to be much less frequent in the Senate.

Major measures are more likely than ordinary bills to be sent to more than one committee, but even on important and controversial bills, formal multiple referral is much less frequent in the Senate than in the House. In keeping with the Senate’s tendency toward less formal procedure, several committees sometimes consider different bills on the same topic. This can create complications much like those that stem from formal multiple referral.

Committees as Shapers of Legislation

By reducing the power of committee chairs and increasing the opportunities and incentives for rank-and-file members to participate in the legislative process, the House reforms of the 1970s diminished the capacity of committees to pass their legislation without change. No longer were bills protected by a powerful chair with the weapons to retaliate against members who challenged legislation in committee or on the floor or by voting rules that prevented most recorded votes on floor amendments. Junior committee members and members not on the committee now had the staff and the access to information that made their participation feasible. The increased prevalence of multiple referral lessened committee autonomy; committee leaders were not always capable of resolving the conflicts among their committees, yet unresolved intercommittee conflicts endangered legislation on the floor. The reformers had given Democratic majority-party leaders some new tools, and as the problems the reforms had wrought

became increasingly evident, the now more ideologically homogeneous Democrats began to expect their leaders to use those tools to engineer passage of legislation broadly supported by the Democratic membership.

To respond to their members' demands, the Democratic leadership became more involved in the legislative process in the period before legislation reached the floor. A bill's substance is by far the most important determinant of its fate on the floor. As it became more difficult for the committee or committees of jurisdiction to write a bill that could pass on the floor, the party leaders stepped in more often to help.

Party leaders, of course, may involve themselves informally on legislation during committee consideration; anecdotal and interview evidence indicates that such intervention is much more frequent than it used to be (Sinclair 1995). That kind of involvement is, however, impossible to document systematically across time. Substantive adjustments to legislation after it is reported—whether engineered by the party leadership or others—can be counted with more precision.⁶

Postcommittee adjustments were rare in the prereform era. In the 91st Congress (1969–1970), for example, the House leadership was involved in making an adjustment on one bill but only after a veto. Committees were quite successful on the floor, lessening the need for tinkering after they had finished their work. Even when committees lost on the floor and when that loss was no big surprise, leaders seem to have made no attempt to head off the floor defeat by substantive adjustments in the legislation. Presumably, the committee leaders had done what they could and would in committee and the party leaders lacked the tools to get involved.

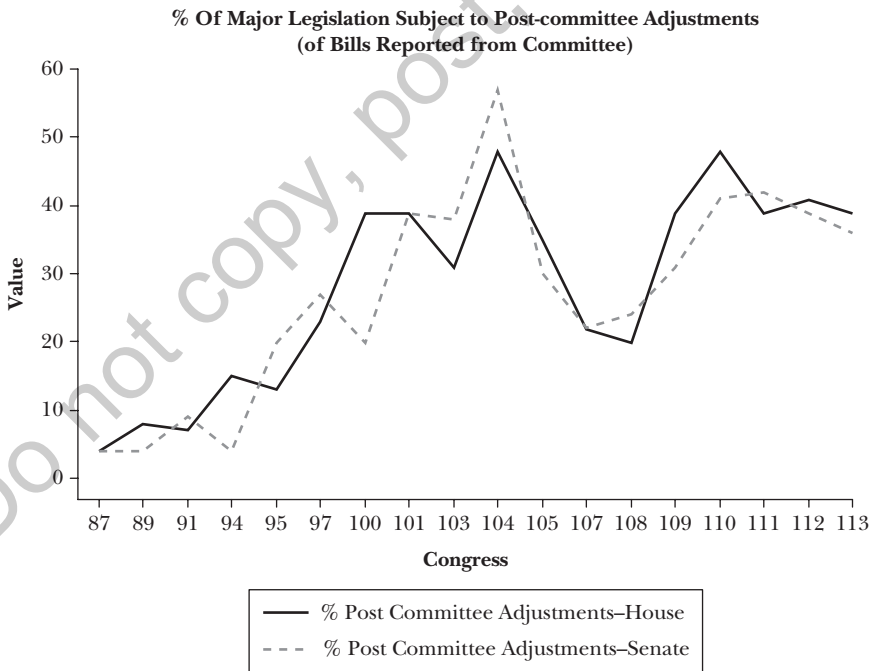
In the 94th Congress (1975–1976) there were two clear instances of postcommittee adjustments to major measures; both cases involved the new budget process. In 1975 and again in 1976 it became evident that the budget resolution as reported by the Budget Committee would not pass. In each case the party leadership stepped in and crafted an amendment to the budget resolution to ensure passage in a form acceptable to most Democrats.

In the 1980s and early 1990s the hostile political climate made passing legislation Democrats wanted difficult. Big deficits made it harder for committee leaders to forge broadly acceptable deals; a climate of scarcity begets zero-sum politics in which one group's gain is perceived as a loss by

6. I ascertained the presence or absence of a postcommittee adjustment and whether it was directed by the party leadership by doing a case study of each of the major measures for the selected Congresses. The case studies relied primarily on the *CQ Weekly* (*CQW*) and the *CQA*. Thus, instances not ascertainable from the public record could have been missed; however, when I had independent information from interviews or participant observation available, they confirmed the coding done on the basis of the written record.

other groups and fewer “sweeteners” to induce support are available. As committee Democrats tried to craft a bill that was passable yet as close as possible to their preferred policy position, they could easily misjudge what was passable. Furthermore, changes in the political environment after the committee had reported—in the salience of the issue or in the public’s response to presidential rhetoric—could alter what could pass. Leadership counts of members’ voting intentions often showed not enough support for the committee-reported bill. Therefore, major legislation frequently required substantive alterations. As important legislation increasingly involved a number of committees, the compromises that needed to be made among the committees to bring a passable bill to the floor were often beyond the capacity of committee leaders to negotiate. In such a climate postcommittee adjustments, almost always directed by the party leadership, became almost routine (see Figure 6.2).

FIGURE 6.2 The Changing Role of Committees in the Legislative Process*, 87th–113th Congresses: Percentage of Major Legislation Subject to Post-committee Adjustment



*Selected Congresses

Source: Compiled by the author.

The same forces—internal reforms that decreased the power and autonomy of committees and empowered party leaders and a hostile political climate that exacerbated the difficulties the reforms had produced—led to committees increasingly being bypassed altogether. To be sure, not every instance of the bypassing of committees is directed by the leadership; occasionally a discharge petition is successful. Most often, however, when a committee is bypassed, it is the party leadership that made the decision, although not necessarily over the committee's opposition. Sometimes a committee is bypassed with its members' full concurrence simply to speed the process—when identical legislation passed in the previous Congress, for example.

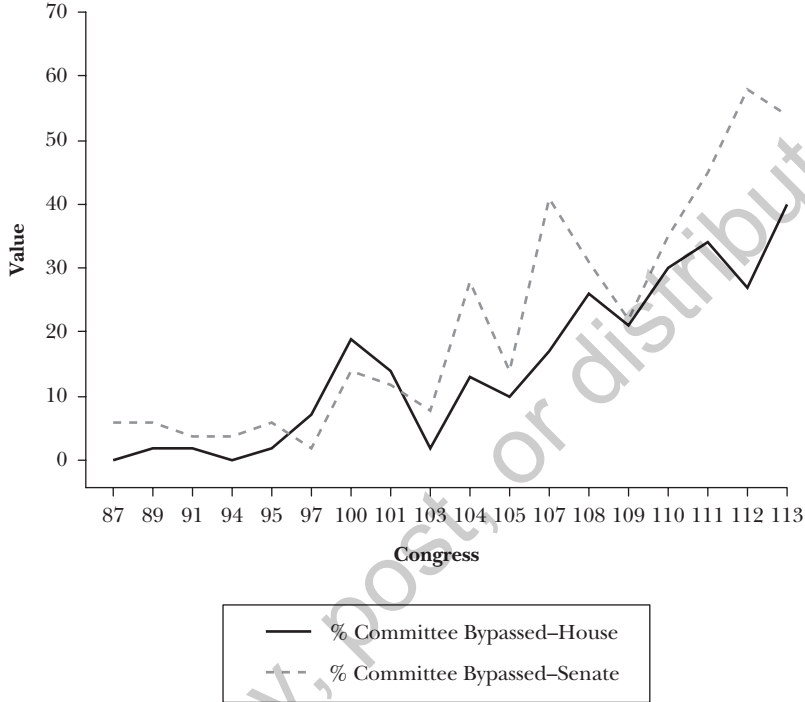
In the prereform period and through the 1970s, committees were almost never bypassed in the House. In the 87th and 91st Congresses (1961–1962; 1969–1970), for example, the committee was never actually bypassed in the House, although in one instance in the 91st the committee reported only because of a threat of discharge. (That case, an organized crime control bill forced out of a reluctant Judiciary Committee, is counted as a bypass in Figure 6.3.) In the 95th Congress (1977–1978), the House Agriculture Committee was effectively bypassed when the House agreed to go directly to conference on a Senate-passed emergency farm bill. As Figure 6.3 shows, bypassing the committee has become considerably more frequent since the early 1980s. The circumstances vary widely, but in most cases the decision to bypass the committee is a majority-party leadership decision. Leaders became more willing to use informal task forces or even less formal working groups to work out the compromises necessary to pass legislation and to take a direct hand in the process themselves.

If internal reforms had unintended consequences that made legislating more difficult for the House, the Senate's individualism run rampant made the House's problems look picayune. Furthermore, the Senate, unlike the House, did not give its central leadership new tools for dealing with the problems.

In the Senate as in the House, one response was an increase in postcommittee adjustments to legislation. They were rare in the 1960s and 1970s. In the 1980s and 1990s postcommittee adjustments became much more frequent. The Senate majority leader often engineered or at least oversaw the devising of postcommittee changes in legislation, but committee leaders and even individual senators sometimes took on the task, reflecting the wide dispersion of power in the Senate.

Although the frequency of postcommittee adjustments declined a bit in the 103rd Congress in the House, in the Senate it did not. For the majority-rule House, unified control made legislating somewhat easier; at least

FIGURE 6.3 The Changing Role of Committees in the Legislative Process,*
87th–113th Congresses: Percentage of Major Legislation on Which
the Committee of Jurisdiction Was Bypassed



*Selected Congresses

Source: Compiled by the author.

amassing large margins to dissuade the president from vetoing the legislation was no longer necessary. The Senate, in contrast, still needed sixty votes to pass most controversial legislation. With the return of divided control in the 104th, postcommittee adjustments became more frequent again in both chambers.

In the Senate the frequency with which committees are bypassed also has increased. Committees were seldom bypassed on major legislation before the mid-1980s, although recalcitrant committees occasionally were bypassed on major bills. In the 89th Congress (1965–1966), for example, the Judiciary Committee was bypassed on a highly controversial open housing bill; nevertheless, civil rights opponents managed to kill it by filibustering the motion to proceed.

The frequency of bypassing increased substantially with the 100th Congress and has remained well above its previous level since then. The first two Congresses of the twenty-first century (the 107th and 108th) saw extremely narrow margins of control in the Senate. When the 107th Congress convened in January 2001, it was split evenly between Republicans and Democrats, and only Vice President Dick Cheney's role as president of the Senate allowed Republicans to organize the chamber. When in June 2001, Sen. Jim Jeffords of Vermont left the Republican Party and began caucusing with the Democrats, Democrats became the Senate's majority party. In the 2002 elections, Republicans won enough seats to reclaim majority status, but just barely, with fifty-one senators. Those difficult circumstances, made more problematic by high partisan polarization, led to the extraordinarily high rate of committees being bypassed, as was evident in Figure 6.3. Democrats, too, faced politically complex circumstances after they narrowly regained the majority in the 2006 elections and then during the Barack Obama presidency, and the rate of committees being bypassed shot up again after a brief drop in the 109th Congress.

Special Rules in the House

In the prereform era most legislation was brought to the House floor under a simple open rule that allowed all germane amendments. Tax bills and often other legislation from the Ways and Means Committee were considered under a closed rule that allowed no amendments (except those offered by the committee itself); tax legislation was regarded as too complex and too politically tempting a target to allow floor amendments. In the 91st Congress (1969–1970), for example, 80 percent of the major legislation was considered under simple open rules; 16 percent—primarily bills reported by the Ways and Means Committee—came to the floor under closed rules. Only two measures were considered under rules with provisions more complex than simply allowing all germane amendments or barring all amendments.

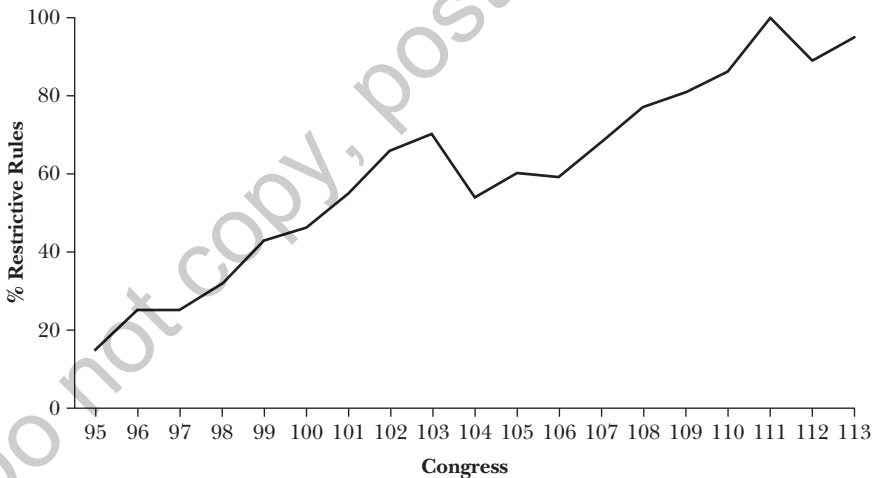
The reforms made legislation much more vulnerable to alteration on the floor. With rank-and-file members having greater incentives and resources for offering amendments on the floor, the number of amendments offered and pushed to a roll call vote shot up. Committee bills were more frequently picked apart on the floor, members often were forced to go on the record on votes hard to explain to constituents back home, and floor sessions stretched on late into the night.

The reformers had given the Democratic leadership the power to name the Democratic members and the chair of the Rules Committee and had thereby made the committee an arm of the leadership. In the late 1970s some Democrats began to pressure their leaders to use special

rules to bring floor proceedings under control. Forty Democrats wrote Speaker Thomas “Tip” O’Neill Jr., D-MA, in 1979 to ask that he make more use of restrictive rules in order to curtail frequent late-night sessions (Smith 1989, 40–41).

As Figure 6.4 shows, as late as 1977–1978 (95th Congress) most special rules were still open rules; only 15 percent restricted amendments in some way. As Democratic members began to comprehend the costs of the wide-open amending process fostered by the reforms and to demand that their leaders do something about these costs, the frequency of restrictive rules increased. In the hostile climate of the 1980s and early 1990s, restrictive rules were used more and more often. Holding together compromises and protecting members from political heat became more difficult and more essential, and leaders, in response to their members’ demands, developed special rules into powerful devices for shaping the choices members faced on the floor. By 1993–1994 (103rd Congress), 70 percent of special rules restricted amendments to some extent.

FIGURE 6.4 Change in the Character of House Special Rules, 1977–2014



Rules are for initial consideration of legislation, except rules on appropriations bills that only waive points of order. Restrictive rules are those that limit the germane amendments that can be offered and include so-called modified open and modified closed, as well as completely closed rules and rules providing for consideration in the House as opposed to the Committee of the Whole.

Source: Compiled by Donald Wolfensberger, formerly minority and then majority counsel, Committee on Rules, now director of the Congress Project of the Wilson Center, from the Rules Committee calendars and surveys of activities and by the author from Rules Committee list of rules at rules.house.gov.

The new Republican majority in the 104th Congress had promised during the campaign to pass an ambitious agenda, much of it in the first 100 days. Before the election, however, House Republicans, including their leadership, had vehemently denounced restrictive rules and also had promised not to use them. And the proportion of all rules that were restrictive did go down in the 104th, although Democrats claimed that Republicans manipulated the figures by considering under open rules some uncontroversial legislation that should have been considered under the suspension procedure. In the next Congress, the use of restrictive rules on all legislation rose, and it has continued to do so ever since, reaching 81 percent in the 109th Congress (2005–2006). When they took the House majority in the 2006 elections, Democrats, like the Republicans in 1994, promised to open up the floor process, but they, too, continued the trend toward ever-increasing restrictive rules; in the 111th Congress, 100 percent of the rules were at least somewhat restrictive and only one was a modified open rule. Republicans promised to open up the amending process if they retook the House and, after the 2010 elections made them the majority party again, they in fact did increase the number of open rules but not by much.

When only major measures are examined, the trend toward restrictive rules is even stronger. Table 6.3 displays the percentage of major measures that were considered under substantially restrictive rules—that is, structured, modified closed, or closed rules (see Chapter 2, page 42 for definitions). These sorts of rules limit the amendments that may be offered on the floor to ones explicitly allowed by the Rules Committee.⁷ The frequency of open or modified open rules dropped steeply between the 1970s and the late 1980s. In the 1990s and early 2000s, substantially restrictive rules became more and more frequent, rising from 60 percent in the last Democratic-controlled Congress of the early 1990s to 96 percent in the 109th Congress, the last before the GOP lost control. The figure was also 96 percent in the 110th Congress, after Democrats won control, and it rose to 99 percent in the 111th, the first of the Obama presidency. In the next two, both Republican-controlled congresses, it averaged 96 percent.

The power and flexibility of special rules make them a useful tool under a broad variety of circumstances. Both the uncertainty that the

7. The percentage is of those major measures that were considered under rules; usually (very) few major measures come to the floor under suspension. In the first and second editions, I displayed the percentage of major measures considered under any sort of restrictive rule, including a modified open rule, just as I do for all legislation. I switched to substantially restrictive in the third and continue that here so that variation among the later Congresses in the series is evident. Simple open rules have become an endangered species.

TABLE 6.3 Substantially Restrictive Rules on Major Legislation, Selected Congresses, 89th–114th

Congress	Years	Percentage structured, modified closed, or closed
89th, 91st, 94th	1965–1966, 1969–1970, 1975–1976	12*
95th	1979–1980	21
97th	1981–1982	18
100th	1987–1988	42
101st	1989–1990	42
103rd–107th	1993–2002	67
108th–113th	2003–2014	95

*Mean percentage for these Congresses.

Source: Compiled by the author.

1970s reforms begot and the problems that majority Democrats faced in legislating during the adverse political climate of the 1980s and early 1990s stimulated an increase in the use of complex and restrictive rules (Bach and Smith 1988; Sinclair 1983, 1995). The election of a Democratic president in 1992 presented congressional Democrats with a great legislative opportunity, but it also put them under pressure to deliver under difficult circumstances. The Democratic leadership responded by intensifying its employment of restrictive rules during the 103rd Congress.

When Republicans won control of the House, they, too, found restrictive rules to be extraordinarily valuable tools and, on major legislation, increased their use. Even in the 104th Congress, their first, the usefulness of such rules for promoting the Republicans' legislative objectives outweighed any damage from the inevitable charges of hypocrisy that their use provoked. Narrow margins and, after the 2000 election, a president of their party with an ambitious agenda prompted Republican leaders to routinely employ highly restrictive rules. Similarly when Democrats regained control, and then when Republicans regained it, they, too, found restrictive rules much too useful to eschew.

The Senate Floor:

Amending Activity and Extended Debate

The Senate, unlike the House, has not developed effective tools for coping with the consequences of alterations in its internal distribution of influence and challenges from its political environment. The attractiveness to modern senators of rules that give the individual so much power and the difficulty of changing Senate rules make developing such tools extraordinarily difficult. Since a two-thirds vote is required to cut off debate on a

proposal to change Senate rules, an oversized coalition for change must be constructed. To be effective, the tools would have to give more control to the majority-party leadership, as they did in the House, but minority-party senators certainly have no reason to do so, and even many majority-party senators are likely to be ambivalent.

The rules changes the Senate was able to make were modest. Perhaps most important, the Budget Act imposed limits on debate on budget resolutions and reconciliation bills, preventing filibusters on these measures. In 1975 the number of votes required to invoke cloture was lowered from two-thirds of those present and voting to three-fifths of the full membership—usually sixty. (Cloture on changes in Senate rules was exempted and still requires a two-thirds vote, though there is controversy about the threshold for changing rules at the beginning of a Congress.) In response to the postcloture filibuster developed in the late 1970s, rules concerning delaying tactics in order after cloture were tightened. In 1986 floor consideration after cloture was limited to a total of thirty hours.

Although no rules restricted senators' amending activity in the 1950s and 1960s, amending marathons (ten or more amendments offered and pushed to a roll call vote) were nevertheless infrequent. For example, on average, slightly less than 10 percent of major measures were subject to an amending marathon in the 87th, 89th, and 91st Congresses. Thereafter, however, an average of 30 percent of major measures considered on the Senate floor encountered such a barrage of floor amendments. This figure did decline in the 112th and 113th Congresses to 24 and 17 percent respectively but, with Majority Leader Mitch McConnell's, R-KY, promising to allow greater amendment activity in the 114th, it is likely to rise again.

In the 1970s senators often pursued their individual policy interests by offering amendments on the floor. A senator's right to offer unlimited amendments to almost any bill proved as useful to senators in the 1980s, the 1990s, and beyond. The political climate of the 1970s may have been more conducive to policy entrepreneurship, and floor amendments may have been more frequently used as tools toward that end, but amendments also proved to be useful tools in the more ideological and partisan struggles of the 1980s, 1990s, and 2000s.

In the 1960s and before, filibusters were rare although important because of their targets, especially civil rights legislation. Most legislation, however, was unlikely to encounter any sort of extended debate-related problem. As Table 6.4 shows, less than 10 percent of major measures in the 1960s Congresses for which I have data encountered any such difficulties. In the 1970s, senators made much more use of extended debate, and they continued to increase their use during the 1980s, the 1990s, and the 2000s. Rules changes may have made imposing cloture easier, but they did not

TABLE 6.4 The Increasing Frequency of Extended Debate–Related Problems on Major Measures

Years*	Measures affected (in percentages) ^a
1960s	8
1970s–1980s	27
1990s–mid-2000s	51
2007–2008	70
2009–2010	72
2011–2012	59
2013–2014	68

*Congresses included the following:

1960s: 87th, 89th, 91st

1970s–1980s: 94th, 95th, 97th, 100th, 101st

1990s–mid-2000s: 103rd, 104th, 105th, 107th, 108th, 109th

2007–2008: 110th

2009–2010: 111th

2011–2012: 112th

2013–2014: 113th

Source: Author’s calculations.

^aFigures represent the percentage of “filibusterable” major measures that were subject to extended debate–related problems.

reduce the incentives to use extended debate. Rampant individualism combined with the highly charged political climate to put an increasing share of major legislation under at least a threat of a filibuster.

In the 1990s the filibuster increasingly became a partisan tool. In the 103rd, the first Congress of the Bill Clinton presidency, half of major measures confronted an extended debate–related problem. In that Congress the filibuster was used as a partisan tool to an extent unprecedented in the twentieth century. A Republican filibuster killed Clinton’s economic stimulus package, and Republicans used the filibuster or the threat thereof to extract concessions on major legislation—voter registration legislation (“motor voter”) and the national service program, for example. Republican attempts to kill or water down legislation via a filibuster were not always successful, of course. For example, the Republican filibuster of the Brady bill, which imposes a seven-day waiting period for buying a gun, collapsed when a number of Republican senators began to fear the political price of their participation.

Time pressure makes extended debate an especially effective weapon of obstruction at the end of a Congress, and the greater the backlog of significant legislation, the more potent any threat of delay is. At the end of the 103rd Congress, Republican filibusters killed campaign finance and lobbying reform bills. Although unsuccessful in the end, Republicans

filibustered and tried to prevent passage of a massive crime bill, the California Desert Protection Act, and a comprehensive education bill. In some cases filibusters were waged to prevent legislation from being sent to conference or, more frequently, to prevent approval of the conference report. Republican threats of obstructionist floor tactics contributed to the death of bills revamping the Superfund program, revising clean drinking water regulations, overhauling outdated telecommunications law, and applying federal labor laws to Congress. Succeeding Congresses maintained similarly high levels of filibuster-related problems on major measures through the mid-2000s; however, after Democrats regained control in the 2006 elections, the rate shot up again (see Table 6.4). Passing major legislation in the Senate has come to require sixty votes.

Omnibus Legislation and the Budget Process

Omnibus legislation—legislation of great substantive scope that often involves many committees—increased as a proportion of the congressional agenda of major legislation from none in the Congresses of the 1960s to a mean of 7 percent in the 1970s Congresses and a mean of 13 percent in the 1980s. In the 1990s and 2000s (103rd–113th Congresses), an average of 11 percent of major measures were omnibus.⁸

During the 1980s the Democratic majority-party leadership sometimes decided to package legislation into omnibus measures as part of a strategy to counter ideologically hostile Republican presidents, especially Ronald Reagan, who was so skillful at using the media to his advantage. Measures the president very much wanted could sometimes be packaged with others that congressional Democrats favored, but the president opposed, thus forcing the president to accept legislative provisions that, were they sent to him in freestanding form, he would veto. By packaging disparate and individually modest provisions on salient issues such as trade, drugs, or crime into an omnibus bill, Democrats sought to compete with the White House for media attention and public credit. During the 103rd Congress, congressional leaders no longer needed to coerce the president into signing their legislation, but omnibus measures remained useful for raising the visibility of popular legislation, and the device continued to be employed in that way. When the Republicans took control of Congress, they used omnibus legislation for similar purposes.

Many omnibus measures are budget related. Budget resolutions, reconciliation bills, and massive omnibus appropriations bills have constituted the preponderance of omnibus measures since the passage of the Budget Act

8. In each case, figures are based on those Congresses for which I have data.

in 1974. In both the 94th and the 101st Congresses, for example, all of the omnibus measures were budget related. Budget-related measures, however, were much more important pieces of legislation in the 101st than in the 94th. The Budget Act made omnibus measures a regular part of the congressional agenda, but changes in the political environment made budget measures the focus of controversy. During the 1970s, budget resolutions did not include reconciliation instructions—that is, instructions to committees to make changes in law. The budget process, by and large, accommodated what the committees wanted to do rather than constrained them.

In 1980, as I discussed earlier, the president and congressional Democratic leaders, in response to an economic crisis, used the budget process to make spending cuts, and reconciliation instructions were included in the budget resolution for the first time. Then in 1981 the Reagan administration and its congressional allies not only used the budget process to make significant changes in domestic programs so as to cut spending but they also enacted a huge tax cut. With that, the budget process moved to the center of the legislative process and has remained there ever since. The Reagan administration's use of the budget process to redirect government policy made its potential clear; since then it has remained the tool of choice for comprehensive policy change and was used for that purpose by the Clinton administration in 1993, the new Republican majority in 1995, and the George W. Bush administration in 2001 and 2003.

The budget process's centrality also stemmed from the impact of the big budget deficits of the 1980s and 1990s. The deficits that resulted from the Reagan tax cut powerfully shaped American politics. From the mid-1980s to the late 1990s, efforts to do something about the deficit dominated political debate, if not legislative enactments. The decisions made in the budget resolution and in the reconciliation bill that it usually required became crucial. Decisions on other legislative issues were made within the context of scarce resources, and as discretionary domestic spending shrank, the trade-offs that had to be made among programs became increasingly tough. The Gramm-Rudman legislation, the stated aim of which was to force Congress to balance the budget, complicated the process by adding targets and deadlines that, if missed, would result in substantial automatic spending cuts.⁹

The politics of big deficits thus made unpalatable policy decisions necessary. The deep policy divisions first between Republican presidents and

9. The Gramm-Rudman law was superseded by the Budget Enforcement Act of 1990, which included a pay-as-you-go (PAYGO) provision requiring that any tax cuts or increases in entitlement programs had to be offset by either revenue increases or spending cuts of equal total magnitude (see Oleszek 2004, 70–71). PAYGO expired in 2002 and was not renewed until the beginning of the 110th Congress.

congressional Democrats and, after 1994, between President Clinton and congressional Republicans made reaching agreement between the branches on such decisions excruciatingly difficult. The 1980s and 1990s saw a succession of high-visibility, high-stakes showdowns between the branches and the parties on budget measures. Reconciliation bills, like other omnibus measures, were sometimes used to try to force provisions on an opposition-party president that he opposed; such attempts, of course, raised the level of conflict. The existence of the budget process at least made it possible to wrap unpopular spending cuts and, sometimes, tax increases into one big package—often sweetened with provisions that members wanted—and get a single vote on the package as a whole. The congressional leadership frequently could persuade its members to pass such a package because defeating it would be devastating for the party's reputation. Passing the components individually would have been impossible.

Even after deficits briefly turned into surpluses in the late 1990s, partisan and interbranch battles over priorities continued to be fought in the context of the budget process. High partisan polarization and narrow margins of control assured the continued centrality of the budget process, because budget rules in the Senate protect budget resolutions and reconciliation bills from filibusters. In the contemporary climate the sort of legislative changes made via the budget process in the early 2000s certainly would have provoked filibusters had they been possible, and quite likely these filibusters would have been successful. With the return of big deficits, House leaders also found it useful to package many, not necessarily palatable, changes in law into one bill “too big to fail.”

Summits

In the 1980s and 1990s the sharp differences in policy preferences between presidents and opposition-party majorities in the Congress and the tough decisions that had to be made sometimes stalemated normal processes. When normal processes, even supplemented by the increasingly active role of majority-party leaders, were incapable of producing legislation, the president and Congress had to find another way—the costs of failing to reach an agreement on budget issues were just too high, especially after Gramm-Rudman, with its automatic spending cuts, went into effect in the mid-1980s. The new device of choice was the summit: relatively formal negotiations between congressional leaders and high-ranking administration officials representing the president. Because summits take place only when the stakes are very high, congressional party leaders have always represented their members in such talks; members are not willing to rely on committee leaders to make such decisions on behalf of the party membership as a whole.

Actually, the first instance of major legislation emerging from a process similar in some respects to the summits of the late 1980s and 1990s was the 1980 (FY 1981) budget resolution and reconciliation bill during the Carter administration. The announcement on February 22, 1980, that the consumer price index had increased at an 18 percent annual rate in January created a crisis atmosphere. In early March an unprecedented series of meetings between the Carter administration and the Democratic congressional leadership took place for the purpose of discussing budget cuts. The budget resolution approved by Congress closely followed the agreement that had been reached in those meetings (Sinclair 1983).

The 1983 deal to reestablish the fiscal soundness of the Social Security system emerged from a process that showed some similarities to a summit (Gilmour 1990, 248–250). A commission had been appointed to develop a solution, but the deal was really worked out behind the scenes by a few commission members who directly spoke for President Reagan and Speaker O'Neill. In the mid-1980s attempts at summit negotiations on budget issues were made several times but with limited success.

During the 100th and 101st Congresses (1987–1990), four summits took place, three of which concerned budget issues. In fall 1987 the stock market crashed; in response, Reagan administration officials met with the congressional leadership and worked out a deal that shaped the 1987 reconciliation bill and the full-year continuing resolution (CR). The deal also determined the major outlines of the following year's budget resolution (FY 1989). In spring 1989 the new George H. W. Bush administration and the congressional leadership worked out a more modest deal to avert Gramm-Rudman across-the-board cuts; this agreement shaped the 1989 (FY 1990) budget resolution and the 1989 reconciliation bill, although it by no means settled all the major issues, especially on taxes. The need for action and the inability of normal processes to produce agreement again led to a summit on budget issues in 1990. The highly contentious issue of aid to the Nicaraguan contras was the subject of the fourth summit. In 1989 the Democratic leadership met with Bush administration representatives to work out a final agreement on contra aid. (For details on these cases, see Sinclair 1995.)

An emergency and severe time pressure may create the conditions for a summit, as they did in 1980, but when the congressional majority and the president are of the same party, normal processes supplemented by informal consultation and negotiations almost always seem to suffice. In fact, since that one instance, no summits have occurred when the president and Congress have been controlled by the same party. Thus, there were no summits during the first two years of the Clinton presidency or during George W. Bush's first six years in office. (Democrats controlled the Senate

during much of the 107th Congress, but they did not gain control until after the budget resolution and the big tax cut bill of 2001 passed.)

Not surprisingly, normal processes are more likely to fail when the president's and the congressional majority's policy and electoral goals are in conflict, as they tend to be under divided government, when the presidency is controlled by one party and the Congress by another. In fact, the increase in partisan polarization and in congressional leadership strength make it less likely that a president can circumvent opposition by House majority-party leadership and pick off enough majority-party members to pass administration priorities. Presidents frequently are forced to deal with opposition majority-party leadership directly. So when Republicans won control of Congress in the 1994 elections, President Clinton and congressional Republicans found they had to resort to summits. The budget summit of 1995–1996 failed to produce an agreement; however, in 1997, Clinton and the congressional Republicans did manage to work out a deal to balance the budget. Differences on appropriations bills also increasingly came to be negotiated in an end-of-the-fiscal-year summit between Clinton administration officials and congressional leaders.

Unorthodox Lawmaking in a Hyperpartisan Era

The 1994 elections brought enormous and unexpected political change to Congress, especially to the House of Representatives. Republicans won majorities in both chambers, taking control of the House for the first time in forty years by picking up fifty-three seats. During the campaign, House Republicans had promised to change the way Congress works if the voters would give them control. In fact, the rules changes that constitute the reforms of the 1970s were in many cases changes in Democratic Party rules, not changes in the rules of the House itself. Much of the weakening of committees and their chairs and the strengthening of the party leadership was the result of new Democratic Caucus rules concerning committee assignments and the designation of committee and subcommittee chairs (see Sinclair 2006).

One might thus expect that a change in party control would have brought with it major alterations in how the House functions. In fact, the Republican House did operate differently than its Democratic predecessor; however, as the data on special procedures and practices presented in this chapter suggest, Republican control resulted not in a change in direction but rather in an amplification of preexisting trends. An analysis of why this is so illuminates the relationship between the congressional process and the broader political process in which it is embedded.

On the first day of the 104th Congress, House Republicans made some significant but far from revolutionary changes in House rules. Modest committee jurisdiction reform was accomplished by shifting some of the Energy and Commerce Committee's immense jurisdiction to other committees. Three minor committees were eliminated, and committee staffs were cut by one-third. Sunshine rules were modestly strengthened, making it harder to close a committee meeting. Committee chairs were subjected to a limit of three terms, a rules change that ultimately would have a major impact on the distribution of legislative influence in the House.

Term limits and staff cuts potentially weakened committee chairs; however, because Republican Party rules pertained, the new Republican committee chairs were in some ways actually stronger than their Democratic predecessors. They controlled the entire majority staff of the committee and had more control over the choice of subcommittee chairs and over the assignment of members to subcommittees.

During the 1980s and early 1990s, House Republicans had in many instances imitated House Democrats by adopting party rules that decreased the autonomy of their committee leaders and strengthened their party leadership. Their committee leaders (ranking minority members when the party was in the minority, committee chairs when Republicans became the majority), after being nominated by the committee on committees, had been made subject to a secret ballot ratification vote in the Republican Conference, the organization of all House Republicans; the Republicans' top leader had been given the power to nominate Republican members of Rules and more say on the party committee that makes committee assignments. Thus, rules strengthening Republican Party leaders were, by and large, not new at the beginning of the 104th Congress, nor did they give Republican leaders powers that Democratic Party leaders had not possessed.

Political circumstances, not rules changes, made Newt Gingrich a powerful Speaker. Gingrich, in the eyes of most Republicans and the media, was the miracle maker, since he was seen as responsible for the unexpected Republican victory in 1994. He had worked and schemed to build a majority for many years (Connelly and Pitney 1994); he had recruited many of the House challengers who won and had helped them with fund-raising and campaign advice. The Contract with America, the policy agenda on which most House Republicans had run, was Gingrich's idea, and he had orchestrated its realization.

Consequently, the 1994 election results gave Gingrich enormous prestige. They also provided him with a membership that was ideologically homogeneous and determined to enact major policy change. The huge freshman class—seventy-three strong—consisted largely of true believers deeply committed to cutting the size and scope of government and to balancing the budget. Freshmen and sophomores, who were similar ideologically,

made up more than half of the Republican House membership. These members and a considerable number of more senior Republicans believed themselves mandated to make policy change. Even moderate Republicans strongly agreed that for the party to maintain its majority, Republicans had to deliver on the promises they had made in the Contract with America.

The combination of an extraordinarily ambitious agenda, a new majority united behind the agenda, and a leader with enormous stature made the exercise of strong leadership both necessary and possible. Without strong central direction, passing the agenda would have been impossible. Without a membership united in its commitment to swift and sweeping policy change, no Speaker could have exercised such strong, central direction of the legislative process.

Relying on his immense prestige with House Republicans, Gingrich, in the days after the 1994 elections, exercised power well beyond that specified in Republican Conference rules. He designated Republicans to serve as committee chairs, bypassing seniority in several instances. According to the rules, the party committee on committees nominates chairs and the Conference approves them. Gingrich preempted that process, assuming correctly that his stature would prevent anyone from challenging his choices.

The 104th Congress saw pervasive party leadership involvement and oversight on major legislation; committee leaders were clearly subordinate to party leaders on Contract with America bills and on much of the major legislation that went into the Republicans' attempt to balance the budget. Because most senior Republicans had signed the Contract with America, Gingrich had a powerful tool for persuading committee leaders to report legislation without making major changes and to do so quickly; he simply reminded them: "We promised to do it in 100 days; we must deliver." In early 1995, and later when balancing the budget was at issue, the chairs knew that the leadership was buttressed by the freshmen's strong support.

The attempt to deliver on the ambitious promises House Republicans had made took the full set of procedural tools available to the majority-party leadership. The need for speed and flexibility—and occasionally the political delicacy of the issues involved—dictated that the leaders sometimes bypass committee. The leadership made extensive use of member task forces on legislative issues ranging from agriculture policy to gun control to immigration reform. By and large, committees were not formally bypassed on the issues task forces worked on, but the task forces did have the purpose and the effect of keeping the pressure on committees to report legislation that was satisfactory to the party majority and to do so in a timely fashion.

Even though political circumstances made committee leaders unusually responsive to the wishes of the party leadership and the party membership, party leaders frequently found it necessary to make postcommittee

adjustments in legislation. Multiple referral, the need for speed, and the ambitiousness of the agenda all contributed to producing circumstances in which the legislation as reported had to be altered in order to engineer passage in a form that would accomplish the party's objectives.

As developed by Democratic leaders in the 1980s and early 1990s, special rules had become powerful and flexible tools for the leadership. Given the task Republicans had set for themselves, their leaders could hardly eschew using restrictive rules, despite their preelection promise to use predominantly open rules. In working to pass their ambitious agenda, House Republican leaders continued to use substantially restrictive rules.

The extraordinary political circumstances that allowed such hyperaggressive use of the full set of leadership tools, including the tools of unorthodox lawmaking, waned even before the end of the 104th Congress. The 105th Congress saw leaders retreat a bit from the deep substantive involvement on almost all major legislation that had characterized their role in the 104th. The reversion, however, was to a legislative process still heavily characterized by the practices and procedures I have labeled unorthodox lawmaking. In their attempts to satisfy the party's members by passing the legislation they favored, House party leaders continued to make use of the tools of unorthodox lawmaking. Speaker Dennis Hastert, R-IL, who had promised a return to "regular order" when he assumed the speakership in 1999, found himself frequently drawn into legislative substance and having to either bypass committees or make postcommittee adjustments, and he routinely employed strategic restrictive rules.

Republican House leaders gained additional leverage over committee leaders when the consequences of chair term limits became evident. In 2000, thirteen chairs became vacant simultaneously, mostly because of term limits, and the Republican Party leadership instituted a new procedure for the selection of committee chairs: Chair aspirants were required to appear before the Steering Committee, the committee on committees that nominates chairs to the Conference. There they were put through rigorous interviews about their legislative and communication strategies and their proposed agendas. Given the leadership's influence on the Steering Committee as well as that committee's representative composition, the new procedure made the incentives to show responsiveness to the party and its leadership even stronger for committee chairs and those aspiring to these positions. House party leaders used the clout they gained thereby to ensure that legislation that got to the floor was acceptable to most Republican members and to President Bush.

If passing the Republicans' agenda in the majority-rule House of the 1990s was a task requiring extraordinary means, getting it through the Senate was a considerably more difficult, and sometimes impossible, endeavor. Majority Leader Bob Dole, R-KS, and his immediate successor,

Trent Lott, R-MS, used all the special procedures available to them. In the 104th Congress especially, committees were frequently bypassed, and great effort went into postcommittee adjustments to bills in an attempt to craft legislation that could amass the sixty votes Senate passage usually requires.

Having had the filibuster wielded against them so effectively in the 103rd Congress, Democrats, now in the minority, returned the favor and made full use of their prerogatives under Senate rules. In the 104th and 105th Congresses, about half of major legislation encountered extended debate—related problems; Democrats killed regulatory overhaul and property rights legislation and forced majority Republicans to make concessions on a number of major bills—product liability legislation, the Freedom to Farm bill, and telecommunications legislation, among others.

Minority Democrats became increasingly adept at using extended debate and the Senate's permissive amending rules in combination to get their issues onto the Senate agenda. By threatening or actually offering their bills as often nongermane amendments to whatever legislation the majority leader brought to the floor and using extended debate to block a quick end to debate, Democrats forced Republicans to consider a number of issues they would rather have avoided—most prominently the minimum wage, tobacco taxes, campaign finance reform, and the patients' bill of rights.

The Republican majority responded with procedural strategies of its own. Majority Leader Lott attempted to impose cloture immediately upon bringing a bill to the floor, because after cloture all amendments must be germane. When cloture failed, he simply pulled the bill from the floor to deprive Democrats of an opportunity to debate and vote on their amendments. Lott also "filled the amendment tree"—that is, he used his right of first recognition to offer amendments in all the parliamentarily permissible slots, thus barring Democrats from offering their amendments. Democratic cohesion on cloture votes, however, limited the effectiveness of such majority-party strategies; so long as the minority party can muster forty-one votes, the majority party may be able to prevent the minority from getting votes on its bills but it cannot pass its own. The result was most often gridlock, and once George W. Bush became president, Senate leaders had to abandon that strategy if they wished to move his program.

Intense partisan polarization is the single most salient characteristic of contemporary politics and one that increasingly shapes the legislative process. From the mid-1990s through 2008, the majority parties' margins of control were narrow—sometimes extremely so, yet the ideological gulf between the parties made bipartisan compromise costly. Even after the waning of the intense sense of mandate that Republicans read into the 1994 elections, congressional Republicans remained unusually ideologically homogeneous for an American party and continued to be dedicated

to conservative policy change. In the 1990s, majority Republicans faced a politically adroit president hostile to their policy goals. After Bush became president in 2001, they enjoyed a like-minded ally in the White House, but the pressure on them to produce intensified enormously. Bush offered an ambitious agenda, one that, by and large, Republicans—voters, activists, and members of Congress—supported strongly but, by the same token, one with limited bipartisan appeal.

The period that followed saw a near “replay” but with the two parties’ roles reversed. In the 2006 midterm elections, Democrats retook both houses of Congress but with narrow margins. House Democrats had complained bitterly about what they argued was undemocratic Republican leadership that prevented the minority from participating in policy making, often taking effective decision making away from the committees and centering it in the leadership and using highly restrictive floor rules that barred most Democratic amendments. During the campaign, Democrats promised less partisan and more open decision making, and many Democrats were eager to return to “regular order” in which the committees would be the primary policy decision makers. Yet House Democrats had also promised to pass a significant domestic policy agenda and to alter the country’s course in Iraq. In their attempt to do so, they confronted an adamantly opposed minority party and an opposition-party president who showed little inclination toward bipartisan compromise. The 2008 elections increased the Democratic House majority to 257, almost 60 percent, and brought in a like-minded Democrat as president. But, as was the case in 2001, a new president and the return of unified control immensely increase the expectations of supporters in the electorate for policy change. In the 110th and the 111th Congresses, the House Democratic leaders responded to the complexity of their tasks and the constraints of the political environment by aggressively using the tools of unorthodox lawmaking. As had been the case when the Republicans were in the majority, the House majority leadership’s tight control of the floor contributed greatly to the party’s legislative success, but it also contributed to the minority party’s severe discontent with the legislative process and to the hostility between the parties.

High partisan polarization combined with the Senate’s permissive rules spell trouble for the Senate as a legislative body. Contemporary majority leaders usually can count on a more cohesive party membership than could their predecessors of the 1970s and 1980s, but even a totally united party is not usually enough. Major legislation now typically runs into an extended debate—related problem in the Senate. And with the minority party now usually highly cohesive on cloture votes, getting the sixty votes to close debate often requires substantial concessions. Senate rules exert some pressure toward bipartisan compromise even in this

highly polarized era when little else does, but as they are now employed, they often lead to legislative stalemate.

GOP control of the House after the 2010 elections only ratchet up the difficulty of legislating for all the key actors. House Republicans gained a net of 63 seats in 2010 for a relatively comfortable majority of 242. The new Republican members and most of the senior ones as well read the election results as a repudiation of President Obama's agenda, especially of the Patient Protection and Affordable Care Act of 2010 (the ACA, or Obamacare), and of the erstwhile Democratic majority that had enacted it and a mandate for their shrink-the-government view. Yet Democrats retained control of the Senate albeit with a reduced majority, and Obama continued as president. Many House Republicans, especially those affiliated with the tea party, expected their leadership to somehow force their policy preferences on the president and the Democratic Senate, an unrealistic expectation that Speaker Boehner could not fulfill (see Chapter 8). Senate Democrats were charged with protecting the policy legacy of the first Obama Congress and with passing essential legislation in an acceptable form. Under such difficult circumstance, leaders unsurprisingly resorted to unorthodox practices and procedures, some even more frequently than before. Neither the changes in party control of Congress in 1995 and 2007 and of the House in 2011 or the Senate in 2014 nor unified control of government with the George W. Bush presidency in 2001 and then with the Barack Obama presidency in 2009 disrupted the trend toward unorthodox lawmaking. In part, continuity, and often acceleration, in the use of unorthodox practices and procedures can be attributed to the persistence of key conditions: Internal rules have not been altered very much and certainly not in a way as to resurrect strong, autonomous committees; the budget process continued to dominate congressional decision making; new congressional majorities faced hostile, opposition-party presidents; and then those congressional majorities confronted the high expectations that unified government in a period of high partisan polarization produce. Perhaps even more important, the frequent employment of these special procedures and practices has continued because, 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.

The case studies in the following chapters illustrate both how the broader political environment shapes the context in which the legislative process occurs and how legislative leaders—and sometimes rank-and-file members—use the various tools of unorthodox lawmaking to take advantage of the opportunities and to cope with the problems that particular political contexts create. They show how House leaders now can tailor the

legislative process to the problems that a particular bill raises in ways not available in the past, whereas Senate leaders frequently are confronted with problems derived from the tools being used by opponents to thwart their legislative aims. The cases also demonstrate how the practices and procedures of unorthodox lawmaking combine and interact and thereby illustrate the multiple paths through which bills now do—and sometimes do not—become law.

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