

# POLARIZATION, CONGRESSIONAL DYSFUNCTION, AND CONSTITUTIONAL CHANGE

NOLAN McCARTY\*

According to the Gallup Organization, only seventeen percent of Americans approve of the way Congress is handling its job.<sup>1</sup> The good news is that number represents an almost doubling of congressional approval from its low of nine percent following the 2013 government shutdown.<sup>2</sup> But more Americans believe that they can communicate with the dead (twenty-one percent) or see the future (twenty-six percent) than believe Congress is doing a good job.<sup>3</sup>

The reasons for the public's discontent can easily be found in recent headlines that suggest Congress seems to struggle equally on the big things and the little things. In Fall 2015, a government shutdown and debt ceiling crisis was narrowly averted only when Speaker of the House of Representatives John Boehner resigned to allow a budget agreement opposed by a vocal minority of his party to come to the floor.<sup>4</sup> That a faction as small as the House Freedom Caucus can force the chamber to choose between a governing crisis or a leadership succession crisis should hardly inspire public confidence.

Nor is it reassuring that Congress struggles all too often in more mundane and routine tasks of governance. Consider another recent example. During those battles over the debt ceiling and a potential government shutdown, Congress almost failed to reauthorize a little-known program within the Census Bureau, "The Quarterly Financial Report Program," a survey of companies that generates background data used for GDP, corporate profits and the Federal Reserve.<sup>5</sup>

---

\* Susan Dod Brown Professor of Politics and Public Affairs, Woodrow Wilson School and Department of Politics, Princeton University, nmccarty@princeton.edu. This Article is a revised version of the presentation Professor McCarty gave during the *Indiana Law Review Symposium* held on November 6, 2015 entitled *Partisan Conflict, Political Structure, and Culture*. Portions of this Article are based on Professor McCarty's article, *Reducing Polarization: Some Facts for Reformers*. 2015 UNIV. CHI. L. F. 243 (2016), <http://chicagounbound.uchicago.edu/uclf/vol2015/iss1/9> [<https://perma.cc/56TB-BAL2>].

1. Justin McCarthy, *U.S. Congress Approval Remains Low*, GALLUP (Apr. 13, 2016), [http://www.gallup.com/poll/190598/congress-approval-remains-low.aspx?g\\_source=Politics&g\\_medium=newsfeed&g\\_campaign=tiles](http://www.gallup.com/poll/190598/congress-approval-remains-low.aspx?g_source=Politics&g_medium=newsfeed&g_campaign=tiles) [<https://perma.cc/4LNE-54BR>].

2. *Id.*

3. David W. Moore, *Three in Four Americans Believe in Paranormal*, GALLUP (June 16, 2005), [http://www.gallup.com/poll/16915/Three-Four-Americans-Believe-Paranormal.aspx?g\\_source=witches&g\\_medium=search&g\\_campaign=tiles](http://www.gallup.com/poll/16915/Three-Four-Americans-Believe-Paranormal.aspx?g_source=witches&g_medium=search&g_campaign=tiles) [<https://perma.cc/8Q4Q-7EMP>].

4. Deirdre Walsh et al., *John Boehner's Exit Makes Shutdown Less Likely*, CNN (Sept. 29, 2015), <http://www.cnn.com/2015/09/26/politics/john-boehner-resigns-government-shutdown/> [<https://perma.cc/C489-Q6KF>].

5. Josh Zumbrun, *How Congressional Chaos Could Make It Harder to Measure Economic Growth*, WALL ST. J. (Oct. 15, 2015), <http://blogs.wsj.com/economics/2015/10/15/how-congressional-chaos-could-make-it-harder-to-measure-economic-growth/> [<https://perma.cc/NV45-UYED>].

Without authorization, the survey could not be fielded nor could its reports be released.<sup>6</sup> The House passed the bill reauthorizing the survey by an “uncontroversial voice vote.”<sup>7</sup> But the Senate did not get around to acting until a week after the authorization expired. It passed the bill with unanimous consent but tacked on an unrelated rider ordering the Census Bureau to produce a report on the Census Bureau’s cybersecurity practices.<sup>8</sup> The program’s authorization expired almost a month before the House got around to passing the Senate version. Fortunately, the snafu only resulted in some delays in the release of the program’s reports.<sup>9</sup> Although scholars of legislative politics are generally not as critical of Congress as is the public,<sup>10</sup> the evidence is mounting that the public may be on to something.

Among the indicators of legislative dysfunction, scholars have documented declining legislative output,<sup>11</sup> an appropriations process that increasingly fails to conclude prior to the beginning of the fiscal year,<sup>12</sup> and increasing delays in the confirmation process, which have enlarged the number of vacancies in the executive branch and the judiciary.<sup>13</sup>

As discussed below, there is reasonably good evidence that these trends in congressional performance are related to rising levels of partisan and ideological polarization in Congress. The potential for a link between legislative dysfunction and polarization has led many scholars, pundits, and activists to suggest electoral reforms designed to reduce polarization. The evidence, however, that these proposed reforms can meaningfully reduce polarization is quite weak.<sup>14</sup> If the level of polarization in Congress is unlikely to decline in the near future, an

---

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. See McCarthy, *supra* note 1.

11. See generally SARAH A. BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK* (2003); Sarah A. Binder, *The Dysfunctional Congress*, 18 ANN. REV. OF POL. SCI. 85 (2015); NOLAN MCCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2016).

12. See generally Nolan McCarty, *The Decline of Regular Order in Appropriations – Does It Matter?*, in CONGRESS AND POLICY MAKING IN THE 21ST CENTURY 162 (Jeffery A. Jenkins & Eric M. Patashnik eds., 2016).

13. See generally Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885-1996*, 43 AM. J. POL. SCI. 1122 (1999); Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947-1998*, 46 AM. J. POL. SCI. 190 (2002); Anne Joseph O’Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1644 (2015); Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913 (2008) [hereinafter O’Connell, *Vacant Offices*].

14. See generally Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in NEGOTIATING AGREEMENT IN POLITICS 19 (Cathie Jo Martin & Jane Mansbridge eds., 2013).

important question is how the American political system may adapt to ameliorate its consequences. Therefore, the remainder of the essay will speculate as to how the polarization-induced decline in legislative capacity might enable or constrain the other branches of government as they attempt to fill the vacuum created by an increasingly inefficient Congress.

The Article proceeds as follows. Part II provides the context for the arguments presented about polarization by reviewing the historical trends and several arguments about the causes and non-causes of our contemporary partisan divisions. Part II reviews many of the theoretical arguments that link partisan polarization to congressional performance. These models generally indicate that polarization reduces legislative capacity. Part III provides some evidence that this is indeed the case. Congress has produced less legislation, managed the budget and appropriations process worse, and been much slower to confirm executive branch appointees as polarization has grown. Part IV, discusses how polarization has affected the performance of our Constitution through its impacts on the separation of powers and federalism. It argues that the implications for the balance of power within the system are ambiguous. Polarization clearly increases the power of the other branches and the states *relative* to Congress. But because legislative capacity is a complement to the authority of other constitutional actors, the absolute power of the political system to solve pressing social problems has been diminished.

### I. THE TRENDS IN POLARIZATION

A brief tour of the history and trends in legislative polarization provides some context for the analysis presented in this Article. Figure 1 presents a measure for the United States House and Senate known as DW-NOMINATE.<sup>15</sup> Underlying DW-NOMINATE is a statistical model that estimates the left/right positions of legislators based on observed roll call voting behavior. Larger estimated scores represent more conservative positions. The simplest way to understand the statistical model is that it associates a conservative position for legislators who vote often with conservatives and never with liberals. Liberals are those who vote with other liberals and never with conservatives whereas moderates are those who vote with both liberals and conservatives.<sup>16</sup> The DW-NOMINATE scores of individual legislators are aggregated into these measures so that the polarization measure is just the average difference in the scores of Republicans and Democrats.<sup>17</sup>

---

15. NOLAN McCARTY ET AL., *INCOME REDISTRIBUTION AND THE REALIGNMENT OF AMERICAN POLITICS* 45-48 (1997).

16. *See id.* For a more extensive discussion of the measurement, see Nolan McCarty et al., *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666, 670 (2009).

17. An important feature of DW-NOMINATE is that we can use overlapping cohorts of legislators to make inter-temporal comparisons about the degree of polarization. For example, we can establish that in relative terms Ted Cruz is more conservative than John Tower even though they never served in the Senate together. We can do this by leveraging that John Tower served with

The first takeaway of Figure 1 is that the level of polarization in Congress has varied dramatically over the course of the Democrat-Republican party system since Reconstruction.<sup>18</sup> Not surprisingly, congressional polarization was quite high following the Civil War and Reconstruction.<sup>19</sup> But it declined markedly from the 1920s to the 1950s where the greatest declines appear to be associated with the Great Depression and World War II.<sup>20</sup> Partisan differences in Congress remained at fairly low levels from the 1950s to the 1970s.<sup>21</sup> During this period, both the Democrats and Republicans were divided ideologically between the liberal and conservative wings.<sup>22</sup>

The current trend towards greater and greater polarization began in the late 1970s and was detectable by academics as early as 1982.<sup>23</sup> This fact lies uncomfortably against any narrative that pivots on a single event or “great person.” The trend precedes the election of Ronald Reagan, the unsuccessful nomination of Robert Bork, the impeachment of Bill Clinton, and the election of Barack Obama.<sup>24</sup>

The second takeaway point is that the House and the Senate have remarkably similar histories with respect to polarization. The two time series tend to decline together, stabilize together, and increase together.<sup>25</sup> Generally, there is a little less polarization in the Senate, but there are periods in which the Senate was the more polarized body.<sup>26</sup> Although polarization in the Senate leveled off in the early 2000s, it has increased faster than it has in the House over the past half-dozen years.<sup>27</sup>

Figure 2 presents a third important historical fact about polarization. Rather than both parties moving toward the extremes, polarization over the past forty years has been asymmetric.<sup>28</sup> It is overwhelmingly associated with the increased movement of Republican legislators to the right.<sup>29</sup> Each new Republican cohort

---

Phil Gramm, who served with Kay Hutchison, who served with John Cornyn, who served with Ted Cruz.

18. See Figure 1.

19. See *id.*

20. See *id.*

21. See *id.*

22. See *id.* Indeed, the *intra-party* divisions were so great that the American Political Science Association commissioned a report arguing for *more* partisan polarization. See *A Report of the Committee on Political Parties: Toward a More Responsible Two-Party System*, 44 AMER. POL. SCI. REV. 1, 37-85 (1950).

23. See generally Keith T. Poole & Howard Rosenthal, *The Polarization of American Politics*, 46 J. POL. 1061 (1984) (contending congressional politics have begun polarizing in the late 1970s).

24. See Figure 1.

25. See *id.*

26. See *id.*

27. See *id.*

28. See Figure 2.

29. See *id.*

has compiled a more conservative record than the returning cohort.<sup>30</sup> Importantly this has been the case since the 1970s, it is not a reflection of the emergence of the “Tea Party” movement.<sup>31</sup> The Democratic Party has not followed a similar pattern. Although some new cohorts are more liberal than the caucus on average, many are more moderate.<sup>32</sup> The slight movement of the Democratic Party to the left can be accounted for by the increase of African-American and Latino legislators in its caucus.<sup>33</sup> Outside of majority-minority districts, the average position of the Democratic Party has changed very little.<sup>34</sup>

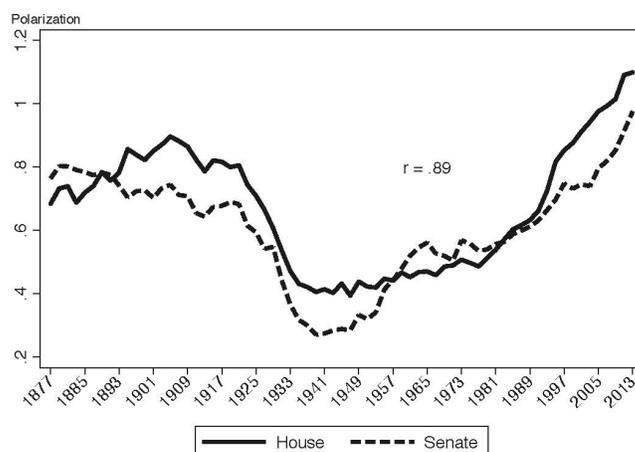


Figure 1: Polarization in the U.S. Congress 1877-2014 Computed from DW-NOMINATE Scores<sup>35</sup>

30. *See id.*

31. *See id.* At least in the case of the Senate, the Tea Party might have *decreased* polarization through its support of extreme candidates such as Christine McDonnell, Richard Mourdock, and Todd Akin that ultimately cost the Republican Party seats that were won by moderate Democrats.

32. *See* Figure 2.

33. Barber & McCarty, *supra* note 14, at 27 (“McCarty, Poole, and Rosenthal (2006) found that African American and Latino House members have more liberal DW-NOMINATE scores, even after controlling for party and the ethnic and racial composition of their districts.”).

34. Although there is more variation in the movements of the Democratic and Republican parties at the state level, Republicans have become more extreme on average in state legislatures. *See* Boris Shor & Nolan McCarty, *Asymmetric Polarization in the State Legislatures? Yes and No*, MEASURING AM. LEGIS. (July 29, 2013), <https://americanlegislatures.com/2013/07/29/partisan-polarization-in-state-legislatures/> [<https://perma.cc/MF8T-RSSR>].

35. The polarization measure is the difference in the mean score for Republicans and the mean score for Democrats.

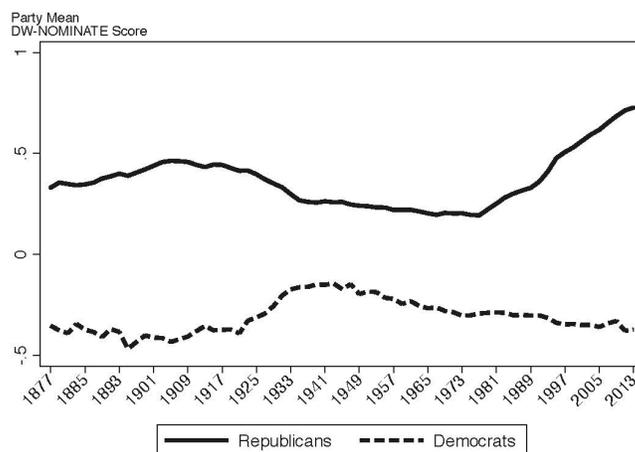


Figure 2: Party Positions in the U.S. House 1877-2014<sup>36</sup>

Explanations specific to the Congress and national politics also contradict the findings that Boris Shor and I put forth, based on our measures of state legislative polarization since the 1990s that are comparable to those used for Congress.<sup>37</sup> We found that, on average, state legislatures have become more polarized over time (although there is variation across states).<sup>38</sup> Moreover, we concluded that most state legislatures are more polarized than the U.S. House.<sup>39</sup>

Perhaps the most important take-away from this section is that the current levels of congressional polarization did not emerge overnight. It has been a forty-year process. These deep roots may explain why political scientists have found very little evidence that electoral reforms would do much to reverse these trends. That eliminating partisan gerrymanders would reduce polarization is hard to square with the finding that the U.S. Senate has polarized in tandem with the House.<sup>40</sup> More systematic analyses have failed to show any real impact of districting on polarization in the U.S. House or state legislatures.<sup>41</sup>

Similarly, there is very little evidence that reforming nominating primaries would reduce legislative polarization. First, the timing is all wrong. Primaries have tended to become more open to participation by independents as

36. Figure 2 shows average DW-NOMINATE scores by party.

37. See generally Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530 (2011).

38. *Id.* at 546-50.

39. *Id.*

40. See generally McCarty et al., *supra* note 16.

41. See *id.* at 666; MCCARTY ET AL., *supra* note 11, at 60-68; Seth E Masket et al., *The Gerrymanderers Are Coming! Legislative Redistricting Won't Affect Competition or Polarization Much, No Matter Who Does It*, 45 POL. SCI. & POL. 39, 39 (2012).

polarization has increased.<sup>42</sup> Shigeo Hirano and his coauthors have studied the history of Senate primaries and find that the introduction of a primary had no effect on polarization in the Senate.<sup>43</sup> They also refute a common corollary argument that primaries have become polarizing because turnout has fallen—it turns out primary turnout has always been low.<sup>44</sup> Second, arguments about partisan or “closed” primaries have been rejected by statistical analyses. Using a panel of state-legislative elections, Eric McGhee and collaborators found no evidence that switching away from closed primaries reduced the level of polarization.<sup>45</sup> Perhaps the most popular reform proposal is to do away with partisan primaries altogether and nominate general election candidates via the non-partisan “top-two” system recently adopted by California.<sup>46</sup> Under the top-two system, a non-partisan primary is held where the top two vote getters (regardless of party) move to the general election ballot.<sup>47</sup> Reformers generally argue that moderate candidates would be advantaged by such a system because some supporters of the minority party will support the more moderate candidate of the majority party, which will lead to the nomination and victory of moderates.<sup>48</sup> But the early evidence suggests that top-two has failed to deliver on its promise of less polarization.<sup>49</sup>

Research on the role of money in politics has uncovered some linkages between polarization and our campaign finance system. But the reforms

---

42. See generally Shigeo Hirano et al., *Primary Elections and Partisan Polarization in U.S. Congressional Elections*, 5 Q. J. POL. SCI. 169 (2010).

43. *Id.* at 188-89.

44. *Id.* at 176.

45. Eric McGhee et al., *A Primary Cause of Partisanship? Nomination Systems and Legislator Ideology*, 58 AM. J. POL. SCI. 337, 347-49 (2014).

46. Douglas J. Ahler et al., *Do Open Primaries Help Moderate Candidates? An Experimental Test on the 2012 California Primary*, 41 LEGIS. STUD. Q. 237, 238-39 (2013).

47. *Id.*

48. See generally *id.*

49. Will Bullock & Joshua D. Clinton, *More a Molehill than a Mountain: The Effects of the Blanket Primary on Elected Officials' Behavior from California*, 73 J. POL. 915, 927-28 (2011). Will Bullock and Joshua Clinton investigated California's short-lived move from a closed primary to a blanket primary in which any registered voter can vote for candidates of either party. *Id.* at 916. They found that the change led to more moderate candidates in competitive districts, but not in districts where one party had a clear majority. *Id.* at 928. Thus, their study provides little reassurance that blanket or top-two primaries are a solution to the problem of a lack of inter-party competition. *Id.* In a more recent study, Ahler et al. conducted an experiment in which voters were randomly provided either a top-two style non-partisan ballot or a closed partisan ballot. They found that moderate candidates fared no better on the top-two ballot. Ahler et al., *supra* note 47. Finally, Kousser et al. found that the top-primary made things worse as representatives became less tied to the median voter of their district. Thad Kousser et al., *Reform and Representation: Assessing California's Top-Two Primary and Redistricting Commission* (Apr. 2013) (unpublished paper), <http://www.columbia.edu/~jhp2121/workingpapers/ReformAndRepresentation.pdf> [<https://perma.cc/BJV9-WJGQ>].

suggested by this research include deregulating political parties, corporation, and labor unions while clamping down on individual contributors.<sup>50</sup> Unfortunately, such reforms conflict with many other reform goals and are constitutionally suspect.

Given the deep-seated nature of polarization and its likely resistance to reform, the focus of the remainder of this Article will be on the ways that the American political system is likely to evolve given a permanently high level of partisan division.

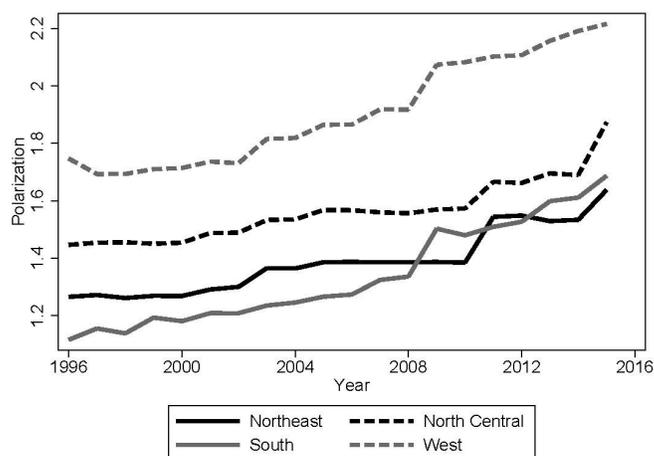


Figure 3: Polarization of State Legislators by Region Computed from NPAT Common Space Scores<sup>51</sup>

## II. THEORETICAL PERSPECTIVES ON THE IMPACT OF POLARIZATION ON CONGRESS

How does polarization affect the capacity of Congress to fulfill its constitutional functions? A variety of theoretical perspectives and models suggest possible mechanisms through which polarization reduces the ability of Congress to act. At the core of these theories is the fact that Congress is not a majoritarian institution. Constitutional structures such as bicameralism and the separation of powers as well as internal rules such as the Senate's cloture procedures make it difficult for a simple legislative majority to act.

Indeed, if Congress were governed by pure majority rule, legislative

50. See generally RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, *CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL* (2015); Michael J. Barber, *Ideological Donors, Contribution Limits, and the Polarization of American Legislatures*, 78 J. POL. 296 (2015).

51. The polarization measure is the difference in the mean score for Republicans and the mean score for Democrats.

outcomes would reflect the preferences of the median legislator.<sup>52</sup> If outcomes were governed by the median legislator, the increasing number of extreme legislators associated with polarization would have no impact on policy outcomes. Moreover, there would be policy gridlock.<sup>53</sup> If the preferences of the median voter change, there would be a swift policy response moving policy to the new median preferred outcome.<sup>54</sup>

If legislative politics were dominated by the majority party as in Westminster parliamentary systems,<sup>55</sup> polarization would not necessarily imply dysfunction and gridlock. In such a system, the winning party enacts its preferences rather than those of the median voter leaving no gridlock. Polarization should simply lead to wider policy swings upon a change in power, not paralysis.

Thus, any connection between polarization and congressional gridlock should be due to the Madisonian Constitution and the non-majoritarian procedures that Congress has adopted. In the next two subsections, I detail two theories that help to explain why Congress's capacity to govern has been reduced by polarization.

#### *A. Partisan Politics*

Many legislative scholars argue that legislators have strong electoral incentives to delegate substantial powers to partisan leaders to shape the legislative agenda and to discipline wayward members.<sup>56</sup> To the extent that parties can successfully pursue such strategies, policymaking becomes the interaction of parties.

If control of the House, Senate, and presidency were concentrated in the hands of a single party, the impact of polarization would approximate those of the Westminster model described above.<sup>57</sup> But unfortunately, political polarization has occurred in an era of frequent divided government. In situations

---

52. See generally Duncan Black, *The Decisions of a Committee Using a Special Majority*, 16 *ECONOMETRICA* 245 (1948) (discussing the median voter theorem). Technically, the median voter theorem requires that preferences be aligned on a single dimension. Unidimensionality is a reasonably good approximation of the contemporary Congress. MCCARTY ET AL., *supra* note 11, at Figure 2.2.

53. See generally Black, *supra* note 52.

54. *Id.*

55. *Parliamentary Government*, INT'L ENCYCLOPEDIA SOC. SCI., [http://www.encyclopedia.com/topic/parliamentary\\_law.aspx#1](http://www.encyclopedia.com/topic/parliamentary_law.aspx#1) [<https://perma.cc/ZE8F-VCM4>] (last visited Sept. 27, 2016).

56. See John H. Aldrich & David W. Rohde, *The Logic of Conditional Party Government: Revisiting the Electoral Connection*, in *CONGRESS RECONSIDERED* 249, 251-62 (Lawrence Dodd & Bruce Oppenheimer eds., 8th ed. 2000); GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 189-90* (Robert H. Bates et al. eds., 1993); GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE US HOUSE OF REPRESENTATIVES 201-19* (2005) [hereinafter COX & MCCUBBINS, *SETTING THE AGENDA*].

57. See *Parliamentary Government*, *supra* note 55.

of divided government with cohesive parties, party theories predict that policymaking represents bilateral bargaining between the parties. Polarization, however, may affect whether a bargain can be struck. Just as a house cannot be sold when the buyer values it less than the seller's reservation price, increased policy differences shrink the set of compromises that both parties are willing to entertain. The increased policy differences have a second effect on bargaining, which endangers even feasible compromises. Returning to the analogy of a home buyer, consider the case when the buyer is willing to pay slightly more than the seller is willing to accept. Under such circumstance, the buyer may be more willing to make a low-ball offer as her only risk is losing out on a transaction in which she stands to gain little. Returning to the political context, increased policy differences exacerbate the incentives to engage in brinksmanship so that even feasible policy compromises might not be reached. Thus, this perspective predicts that polarization should lead to more gridlock and less policy innovation during periods of divided government.

More sophisticated partisan theories suggest that the legislature may be gridlocked even under unified governments. Gary Cox and Mathew McCubbins argue that the majority party has strong incentives to prevent consideration of issues that divide the party.<sup>58</sup> Thus, they argue that the majority party will invoke a version of the so-called "Hastert Rule" which requires a majority vote of the majority party before a bill may be considered by the chamber.<sup>59</sup> This form of *negative agenda control* has important implications for legislative gridlock. If we were to assume that legislator preferences were arrayed along a single dimension, any new legislation would require the support of both the median legislator and the median of the majority party. But polarization may reduce this source of gridlock. The preference gap between the party median and the chamber median mainly reflects the lack of homogeneity in the majority party. When the two parties have no ideological overlap, as in recent years, both the majority party median and the House median must be members of the majority party. In this case, minority party preferences have no influence on the gap. As the parties have polarized, they have also become more homogeneous, so the gap today is less than it was in the 1960s.<sup>60</sup> Thus, this suggests that other features of our political system are more consequential for linking polarization to gridlock.

### *B. The Filibuster and the Presidential Veto*

Perhaps the largest deviation from the majoritarian ideal is the institution of cloture in the Senate. Ostensibly to protect its tradition of unfettered and unlimited debate, the Senate requires that three-fifths (i.e., sixty) of its members

---

58. See COX & MCCUBBINS, *SETTING THE AGENDA*, *supra* note 56.

59. See Susie Madrak, *The Return of the Hastert Rule—And What It Means for the Rest of Us*, CROOKSANDLIARS (Oct. 29, 2015), <http://crooksandliars.com/2015/10/return-hastert-rule-and-what-it-means-rest> [https://perma.cc/QSS3-Z3XN].

60. See generally NOLAN MCCARTY ET AL., *POLITICAL BUBBLES: FINANCIAL CRISES AND THE FAILURE OF AMERICAN DEMOCRACY* (2013).

vote for a cloture resolution before debate can be terminated and votes taken on the measure in question.<sup>61</sup> Because opponents of legislation always have the option to keep talking until cloture is successfully invoked, sixty votes has become the *de facto* threshold for passing legislation through the Senate.<sup>62</sup>

We can assess the importance of cloture rules for legislative responsiveness.<sup>63</sup> Again assume that the ideal points of senators can be arrayed from left to right. Given the rules for cloture, we can characterize what a successful coalition must look like. Because sixty votes are required for passage, the senator with the sixtieth most liberal ideal point must support cloture. Let's call her Senator sixty. Suppose the alternative for consideration was too liberal for Senator number sixty. Then it would also be too liberal for the forty senators with ideal points to her right. These forty senators and Senator sixty would vote against cloture and the bill would fail. In a world of liberal-conservative voting, Senator sixty is pivotal for policy change. If a policy is too liberal for Senator sixty, it will be too liberal for forty more conservative senators and no change will occur. But if the policy appeals to the senator, she can push through the policy by voting with the fifty nine senators who are more liberal. In this sense, Senator sixty is pivotal. Just knowing the vote of this senator will allow us to know if a new policy that is more liberal will pass. Senator forty-one (the forty-first most liberal) is similarly pivotal. If the bill is too conservative for him, it will also be for the forty senators to his left and so cloture cannot be obtained. For this reason, we refer to senators forty-one and sixty as the filibuster pivots.

Since the consent of both pivots is necessary for cloture, the new bill cannot be too liberal for Senator sixty-one or too conservative for Senator forty. It is easy to see that no bill altering a status quo located between the pivots can be successfully revised. Thus, the ideological distance between Senator forty-one and Senator sixty's ideal point is a rough gauge of the Senate's propensity to stalemate due to the cloture rule. Because the majority party in the Senate rarely controls sixty seats, the link between polarization and filibuster-induced gridlock is almost immediate.

Internal roadblocks such as bicameralism and the filibuster are not the only impediments to legislative policy change. Bills that survive the legislative process face the presidential veto.<sup>64</sup> Certainly, presidents can, from time to time, use the bully pulpit to force bills through the road blocks posed by partisan agenda control and filibusters. But for the most part, the president's legislative powers are negative.<sup>65</sup>

---

61. See *Filibuster and Cloture*, UNITED STATES SENATE, [http://www.senate.gov/artandhistory/history/common/briefing/Filibuster\\_Clature.htm](http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm) [https://perma.cc/8ZHK-HULQ] (last visited Oct. 13, 2016).

62. *Id.*

63. For a detailed explication of the underlying theory, see KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* (1998).

64. See *Vetoes*, UNITED STATES SENATE, [http://www.senate.gov/reference/reference\\_index\\_subjects/Vetoes\\_vrd.htm](http://www.senate.gov/reference/reference_index_subjects/Vetoes_vrd.htm) [https://perma.cc/2RTK-75BV] (last visited Sept. 27, 2016).

65. See generally Nolan McCarty, *Presidential Reputation and the Veto*, 9 *ECON. & POL. 1*

The veto is a tool for blocking change rather than propagating it. A successful bill requires the presidential signature or a two-thirds vote on an override motion.<sup>66</sup> Using logic similar to that for the filibuster, Senator thirty-four becomes pivotal on the override motion for a leftist president's veto and Senator sixty-six becomes pivotal on a rightist veto. But because the override motion must carry both chambers, Representatives 148 and 287 are similarly empowered. The most extreme of these two legislators on the president's side of the spectrum is known as the veto pivot.<sup>67</sup> Since adding new pivotal actors can never increase the status quos that can be successfully overturned, the propensity for gridlock expands.

Combining the effects of the filibuster and the veto pivots, we can compute what political scientists call the gridlock interval. This interval is the policy gap between the leftmost pivot and the rightmost pivot. One or the other of these senators could block the change of any status quo in this interval. Therefore, the longer this interval the more likely that policy change can be blocked. Again, the link between the gridlock interval and polarization is quite direct. As the parties' positions diverge, the distance between the pivotal legislative actors will generally move in tandem. Statistically a very substantial fraction of the variance in the width of the gridlock interval is due to party polarization.<sup>68</sup>

### *C. Strategic Disagreement*

Another mechanism that might help transform polarization into legislative paralysis is the increased incentives of politicians to engage in strategic disagreement.<sup>69</sup> Strategic disagreement occurs when a president, party, or other political actor refuses to compromise with the other side in an attempt to gain an electoral advantage by transferring blame for the stalemate to the other side.<sup>70</sup> Classical instances include attempts to bring up controversial legislation near an election in the hopes that a president will cast an unpopular veto such as was done with the Family and Medical Leave Act in 1992 and the so-called Partial-Birth Abortion Bill before the 1996 election.<sup>71</sup> Such electoral grandstanding not

---

(1997); CHARLES M. CAMERON, *VETO BARGAINING: PRESIDENTS AND THE POLITICS OF NEGATIVE POWER* (2000); Charles M. Cameron & Nolan McCarty, *Models of Vetoes and Veto Bargaining*, 7 ANN. REV. POL. SCI. 35 (2004).

66. *Vetoes*, *supra* note 64.

67. *See* KREHBIEL, *supra* note 63.

68. MCCARTY ET AL., *supra* note 11, at Table 6.1.

69. *See generally* JOHN B. GILMOUR, *STRATEGIC DISAGREEMENT: STALEMATE IN AMERICAN POLITICS* (1995).

70. *See id.* at 3; Tim Groseclose & Nolan McCarty, *The Politics of Blame: Bargaining Before an Audience*, 45 AM. J. POL. SCI. 100, 101 (2001); *see generally* FRANCES E. LEE, *BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE US SENATE* (2009).

71. *See* SENATE LIBRARY, *PRESIDENTIAL VETOES, 1989-2000*, S. PUB. NO. 107-10 at 8, 19 (2001), <http://www.senate.gov/reference/resources/pdf/presvetoes.pdf> [<https://perma.cc/Q76Y-JA4L>].

only lowers legislative capacity by diverting resources into an unproductive endeavor but also because it makes both sides less willing to engage in the compromises required by successful legislation.

There are several reasons to believe that polarization may exacerbate these incentives. As the parties have become more extreme relative to voters, making the other side appear to be the more extreme becomes more valuable. Recent examples include the Democrats' engineering of two George W. Bush vetoes of the reauthorization of the Children's Health Insurance Program in 2007.<sup>72</sup> Another example is Republican passage of the Keystone Pipeline Approval Act to force President Obama into a veto that was not only unpopular but might drive a wedge between the president and the labor unions that supported the pipeline.<sup>73</sup>

Exacerbating things is the contemporary media environment of politics. The media often covers policymaking much as they would a heavyweight boxing match, scoring the winner and loser round-by-round. In such an environment, both sides are loath to make any compromises for fear of having it scored as a losing round. The result is policy stagnation.

### III. POLARIZATION AND POLICYMAKING

The theoretical perspectives described in the previous section suggest that polarization will make it considerably harder for Congress to fulfill its legislative and other functions. In this section, I focus on three areas, legislative output, budgetary performance, and Senate confirmations, to show empirically that Congress's performance has indeed declined as polarization has risen.

#### *A. Legislative Output*

The approaches described above predict that polarization should make it

---

72. The dynamics of the vetoes suggest the strong role of strategic disagreement. The original bill called for a thirty-five-billion-dollar expansion of the program's budget over five years. Robert Pear, *Veto of Children's Health Plan Stands*, N.Y. TIMES (Jan. 23, 2008), <http://www.nytimes.com/2008/01/23/washington/23cnd-health.html> [<https://perma.cc/NT2V-L7JT>]. President Bush vetoed it, suggesting that he was willing only to increase the program by five billion dollars. *Id.* Despite this offer, the second bill also provided for a thirty-five-billion-dollar increase. *Id.* While the second bill did contain a few provisions designed to increase Republican support, the number of Republicans supporting a veto override actually fell. *Id.* Because the Democrats preferred the stalemate to successful legislation, the program would not be permanently reauthorized until President Obama took office. Robert Pear, *House Votes to Expand Children's Health Care*, N.Y. TIMES (Jan. 14, 2009), <http://www.nytimes.com/2009/01/15/washington/15healthcare.html> [<https://perma.cc/QB6U-FSWR>]. See Children's Health Insurance Program Reauthorization Act of 2007, H.R. 976, 110th Cong. (2007); Children's Health Insurance Program Reauthorization Act of 2007, H.R. 3963, 110th Cong. (2007).

73. At the time of the veto, a CNN poll showed fifty-seven percent support for the pipeline. Eric Bradner, *Poll: Majority of Americans Back Keystone Pipeline*, CNN (Jan. 15, 2015), <http://www.cnn.com/2015/01/15/politics/poll-majority-of-americans-back-keystone-pipeline/> [<https://perma.cc/HT5H-NNAY>].

more difficult for Congress to pass important, new legislation. David Mayhew's data on landmark legislative enactments can be used to demonstrate polarization's effects on the legislative process.<sup>74</sup> Figure 4 plots the number of significant legislative enactments by congressional term against the DW-NOMINATE polarization measure. It reveals a striking pattern. Congress enacted the vast majority of its significant measures during the least polarized period. The ten least polarized congressional terms produced almost sixteen significant enactments per term, whereas the ten most polarized terms produced slightly more than ten.<sup>75</sup>

To control for other factors that might explain these differences I developed a multivariate model of legislative output.<sup>76</sup> I attempt to isolate the effect of polarization by controlling for unified party control of government, split party control of Congress, the election cycle, changes in party control of the presidency and Congress, and secular trends. In the preferred specification, there are substantively large and statistically significant negative effects of polarization. Based on the estimates, the least polarized congressional term produces 111% more legislation than the most polarized. To get at the magnitude of these differences, Figure 5 presents a counterfactual analysis of Congress's output if polarization had remained at its lowest level.

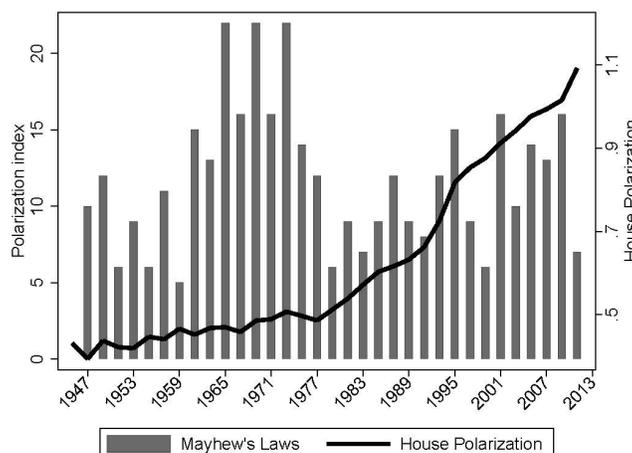


Figure 4: Polarization and Mayhew Laws

74. See generally DAVID R. MAYHEW, *DIVIDED WE GOVERN, PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-2002* (2d ed. 1991).

75. The gap would be even bigger if not for the enormous legislative output following the September 11 terrorist attacks during the polarized 2000s. See MCCARTY ET AL., *supra* note 11, at 181.

76. It is an updated version of that from Nolan McCarty, *The Policy Effects of Political Polarization*, in *TRANSFORMATIONS OF AMERICAN POLITICS* (Paul Pierson & Theda Skocpol eds., 2007).

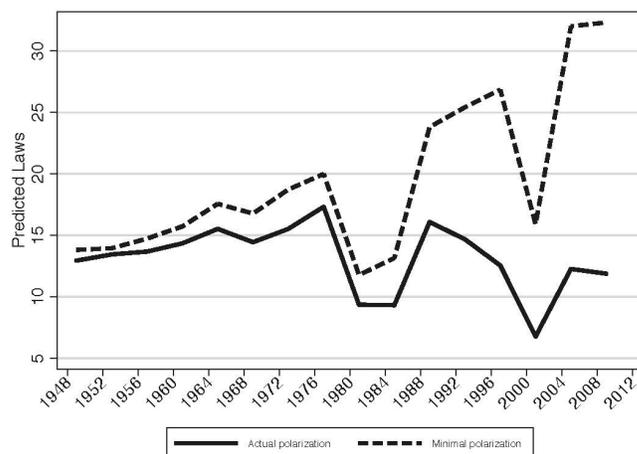


Figure 5: Counterfactual Legislative Productivity

### B. Budgetary Disorder

The 1974 Congressional Budget and Impoundment Control Act calls on Congress to pass a budget resolution.<sup>77</sup> Under “regular” order, both chambers pass resolutions and the differences are reconciled by a conference committee.<sup>78</sup> Congressional performance in this stage of the budget process shows clear deterioration over time. Figure 6 plots the number of stages successfully reached for each annual budget resolution. These possible stages are House passage, Senate passage, House passage of conference report and Senate passage of conference report.<sup>79</sup> From 1976 to 1998, Congress successfully cleared all four of these hurdles. Since then there has been a completed budget resolution in only eight of sixteen years. In 2011, neither chamber passed its own budget resolution.

Congress is also expected to pass each of its appropriations bills prior to the start of the fiscal year (currently October 1).<sup>80</sup> If it fails to do so, Congress and the president must agree to a continuing resolution (CR) or face a government shutdown such as the ones that occurred in 1995-1996 and 2013.<sup>81</sup> Generally,

77. Congressional Budget and Impoundment Control Act of 1974, H.R. 7130, 93rd Cong. (1973).

78. *Q&A: Everything You Need to Know About a Budget Conference*, COMM. FOR A RESPONSIBLE FED. BUDGET (Oct. 24, 2013), <http://crfb.org/papers/qa-everything-you-need-know-about-budget-conference> [<https://perma.cc/FQH8-R9SC>].

79. *Id.*

80. *See Updated Appropriations 101*, COMM. FOR A RESPONSIBLE FED. BUDGET (May 16, 2016), <http://crfb.org/papers/updated-appropriations-101-0> [<https://perma.cc/HK83-PD9B>].

81. *Id.*; Tara Clarke, *U.S. Government Shutdown History*, MONEY MORNING (Oct. 6, 2015),

CRs continue the funding levels of the previous fiscal year, but many also include some modifications of spending levels.<sup>82</sup> CRs often contain changes to the authorizing statutes, and because they are often “must” pass legislation, unrelated legislation is often attached.<sup>83</sup> Consequently, delays in the passage of appropriations bills and the resulting “governing by CR” have drawn wide concern. Late appropriations bills are said to create budgetary uncertainty for government agencies and private actors, reduce the ability to adjust to new spending priorities, undermine the role of committee expertise, and weaken fiscal governance.<sup>84</sup>

To measure the trends in the propensity to begin a fiscal year without completed appropriations bills, I compiled data on each regular appropriations bill for FY1974 to FY2014.<sup>85</sup>

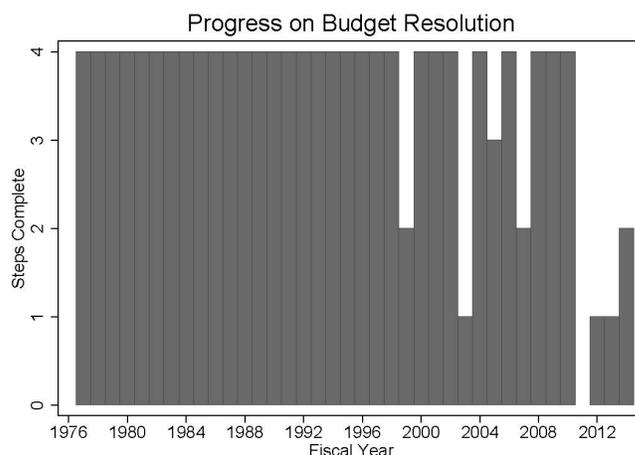


Figure 6: Progress on Budget Resolution

<http://moneymorning.com/2015/10/06/u-s-government-shutdown-history/> [<https://perma.cc/5ABU-Y2LP>].

82. *Updated Appropriations 101*, *supra* note 80.

83. *See, e.g., Closing Out the 113th Congress*, SENATE REPUBLICAN POL’Y COMM. (Dec. 9, 2014), <http://www.rpc.senate.gov/policy-papers/closing-out-the-113th-congress> [<https://perma.cc/259P-KN6F>] (proposals to use the CR to stop the president’s executive actions on immigration).

84. *See generally* Joe White, *The Continuing Resolution: A Crazy Way to Govern?*, 6 BROOKINGS REV. 28 (1988); Neal E. Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 DUKE L.J. 389 (1988); Peter Hanson, *Abandoning the Regular Order: Majority Party Influence on Appropriations in the U.S. Senate*, 67 POL. RES. Q. 519 (2014).

85. *See* McCarty, *supra* note 12, for details.

The progress of each annual budget resolution is scored from zero to four. Passage of an initial resolution by either chamber scores one point and the passage of a conference report by either chamber scores one point. To measure delay, I simply compare the date of final passage with the start date of the fiscal year. I consider an appropriations bill to have passed if it is signed by the president as a stand-alone appropriations bill or as a separate title of an omnibus appropriations bill.

Figures 7 and 8 present the distribution of appropriations delays in months.<sup>86</sup> Figure 7 presents the data for the entire sample. Appropriations delays are the norm. Only about ten percent of all appropriations bills passed prior to the beginning of the fiscal year. The modal month of passage is during the third month of the fiscal year (currently December). But a substantial share of bills pass in months 4, 5, and 6.

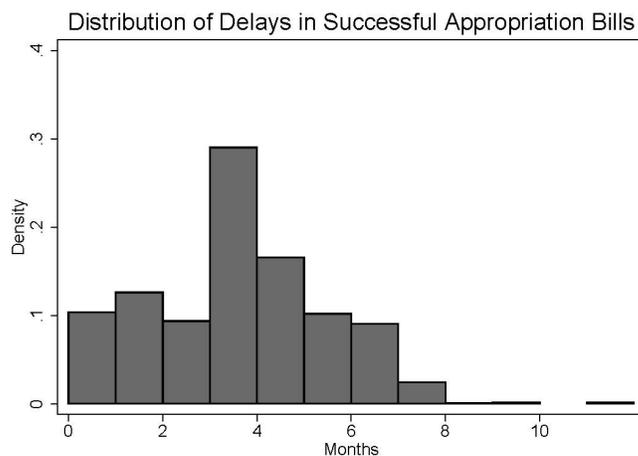


Figure 7: Distribution of Delays in Successful Appropriations Bills: 1974 -2014

---

86. In both figures, a delay of zero is assigned to any bill passed prior to the start of the fiscal year.

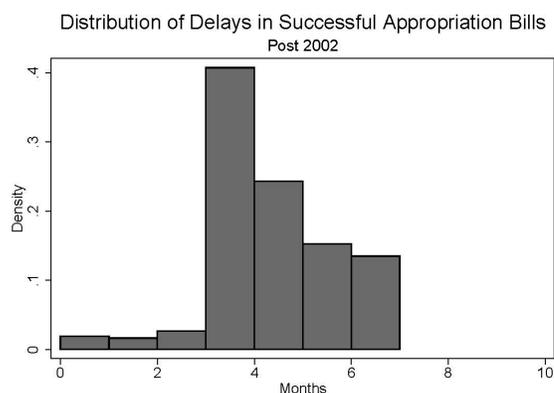


Figure 8: Distribution of Delays in Successful Appropriations Bills: 2002 -2014

Figure 8 shows the distribution of delays since 2002. Clearly, delays have become much more common. Very few appropriations bills have been completed on time since 2002 and the frequency of delays exceeding two months has gone up dramatically. In a multivariate analysis of the determinant of appropriations delay, I find that delays correlate directly with polarization and with inter-branch and inter-chamber preference differences, which themselves are functions of partisan polarization.<sup>87</sup>

### *C. Confirmation Delay*

Rose Razaghian and I collected information about the almost five-thousand nominations to positions in domestic executive branch agencies from the 49th to the 109th Senates (1885-2004).<sup>88</sup> From both the *Congressional Record* and the *Journal of the Executive Proceedings of the Senate of the United States*, we attempted to re-construct the universe of nominations that meet our criteria. From these documents, we collected our main dependent variables committee delay and floor delay by recording the date of nomination, the date of the final committee report, and the date of confirmation. We then computed the number of intervening days between each of these three events. The distribution of delays by congressional term is plotted against the DW-NOMINATE polarization measure in Figure 9.

87. See McCarty, *supra* note 12.

88. See McCarty & Razaghian, *supra* note 13. To avoid complications related to senatorial courtesy, we did not collect data on nominees to head regional offices such as United States attorneys or custom officials. Finally, to limit our focus to domestic politics, we did not collect data on the Departments of State or Defense.

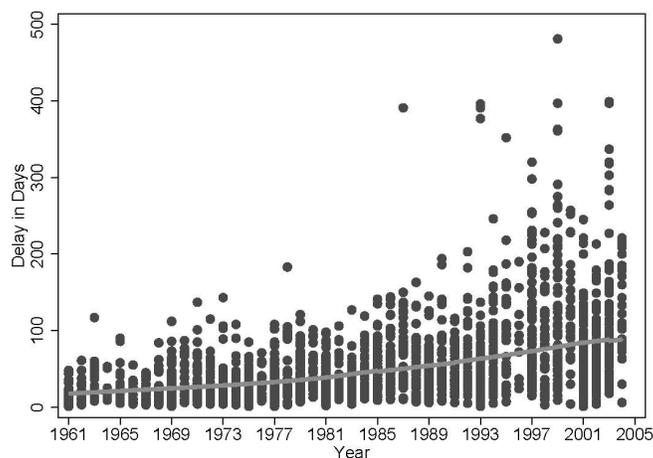


Figure 9: Confirmation Delay

In a multivariate analysis, we found a strong correlation between the level of polarization and the duration of the confirmation process. Moreover, we found that the association with polarization was strengthened during periods of divided government.

### III. POLARIZATION AND THE CONSTITUTION

Given the effects of polarization on Congress, how might the other branches respond? How might the balance of power between the legislative, executive, and judicial branches shift? How will our federal balance between the national and state governments be altered? Unfortunately, I do not think we have entirely clear answers to these questions.

The first problem is that it is not clear which legislative capacity is a substitute or a complement to executive and judicial capacity. Even though congressional dysfunction may allow the other branches and the states to increase their relative power over Congress, their absolute power may be declining along with that of Congress. The second problem is that polarization is a key contemporary feature of the executive and judicial branches.<sup>89</sup> State legislatures are also very polarized.<sup>90</sup> Although polarization within these branches may not lessen their decision making capacities as significantly as it does Congress's, such effects may be consequential. Moreover, polarization in these branches may produce policy with significantly more oscillation and less durability.

---

89. See, e.g., Tom S. Clark, *Measuring Ideological Polarization on the United States Supreme Court*, 62 POL. RES. Q. 146 (2009); Neal Devins & David E. Lewis, *Not-So-Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459 (2008).

90. Shor & McCarty, *supra* note 37, at 546-49.

### A. Executive Branch

Recent scholarship has stressed how declining congressional capacity to override presidential and agency decisions allows the executive branch to become relatively more powerful.<sup>91</sup> Consider the conventional models of lawmaking such as pivotal politics<sup>92</sup> or majority party agenda control,<sup>93</sup> described above. Each predicts a “gridlock interval” of policies that cannot be overturned by a statutory override. As discussed, these gridlock intervals tend to be larger when congressional parties are more polarized. Therefore, presidents and agencies have considerably more leeway to set policy without fear of congressional override when polarization is high.<sup>94</sup>

But this policy setting autonomy may represent a relative gain in power rather than an absolute one. First, many tools of executive policymaking depend on legislative delegation to at least some degree. A less active Congress will give the president much less with which to work. Moreover, a more partisan and ideological judiciary may read legislative grants of authority more restrictively. Such constraints are apparent in the judicial responses to recent executive actions on immigration.<sup>95</sup> Second, presidents may be charged with implementing and enforcing poorly drafted laws. Thus, sending the bill back to a polarized Congress for technical corrections may not be an option. The administration is opened up to even more judicial scrutiny such as in the recent *King v. Burwell* case over Obamacare subsidies.<sup>96</sup> Third, congressional delays in confirming presidential appointments and appropriating funds clearly reduce the policymaking capacities of the executive branch. For example, Anne Joseph O’Connell reports that, due in large part to greater confirmation delays, the initial vacancy period at the start of a new administration for all subcabinet officials increased substantially between the Regan and Bush II administrations.<sup>97</sup> These vacancies, she argues, fosters agency inaction and confusion while undermining agency accountability.<sup>98</sup>

A common presumption is that the executive branch should be less internally

---

91. See, e.g., John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON & ORG. 1 (1990); Terry M Moe & William G Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850 (1999); WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* (2003); Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today’s Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395 (2008).

92. See KREHBIEL, *supra* note 63.

93. See COX & MCCUBBINS, *SETTING THE AGENDA*, *supra* note 56.

94. See Ferejohn & Shipan, *supra* note 91; HOWELL, *supra* note 91.

95. Of course, whether the courts were overly restrictive in enjoining the immigration orders or whether President Obama overreached is a debatable question.

96. See generally 135 S. Ct. 2480 (2015).

97. O’Connell, *Vacant Offices*, *supra* note 13, at 957.

98. *Id.* at 986-87.

affected by polarization in that it is headed by a single individual elected by a national constituency. Putting aside the questionable assumption that a national constituency places meaningful constraints on the partisan or ideological behavior of presidents, there are many reasons to be skeptical that polarization will not undermine the inner-workings of the administration. First, polarization would tend to increase the preference differences between political appointees and career civil servants in ways that would undermine political control and performance of agencies.<sup>99</sup> Second, there is considerable ideological heterogeneity across agencies within a single administration.<sup>100</sup> Finally, legal restrictions on removal combined with the sluggish confirmation process dramatically limits the ability of presidents to shift the ideological nature of key agencies.<sup>101</sup> But even if presidents were able to overcome all of these internal obstacles and govern as a unitary actor with few legislative constraints, executive power would be diminished by polarization in that the outputs of executive policymaking such as orders, memoranda, and rules are far less durable than statutes, as they can easily be undone by the next administration.

### B. Courts

Both attitudinalists and those working in the “separation of powers” tradition of judicial decision making predict that courts (especially the Supreme Court) will be able to exercise more policymaking autonomy when Congress is less capable of overriding its statutory interpretations and legislating around its constitutional decisions.<sup>102</sup> The key debate between the two schools is the extent to which the Supreme Court tries to strategically avoid legislative overrides and sanctions.

Putting aside that aspect of the debate, there is reasonably good evidence that Congress overrides the Supreme Court less often as polarization has grown. In updating the data from William Eskridge, Richard Hasen finds that the rate at which Congress has overridden Supreme Court statutory decisions has fallen markedly.<sup>103</sup> From 1975 to 1990, Congress overrode an average of twelve

---

99. See generally DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* (2008).

100. See, e.g., Joshua D. Clinton et al., *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POL. SCI. 341 (2012).

101. See, e.g., Devins & Lewis, *supra* note 89.

102. On the attitudinal model, see, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002). On the SOP model, see Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6 J.L., ECON. & ORG. 263 (1990); Ferejohn & Shipan, *supra* note 91.

103. See generally William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); Richard L. Hasen, *End of the Dialogue: Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 237 (2013). Some nuance is required when interpreting override rates from the SOP perspective. Most SOP models assume

Supreme Court decisions in every biennial term. But between 2001 and 2012, the rate was only 2.8 per term.<sup>104</sup> Arguably, the magnitude of this decline may understate the extent to which the Supreme Court has escaped congressional oversight of its statutory decisions. As Deborah Widiss points out, the recent Supreme Court approach to statutory interpretation has been to narrowly construe legislative overrides and to not apply their logic to similar provisions in other statutes.<sup>105</sup> Thus, Congress would have to pass overrides for each statute separately.

But this apparent gain in judicial autonomy may also represent only an increase in relative power. The slowdown of the Senate confirmation process has created large vacancies in the federal judiciary that undermine its capacity. Moreover, the decline in Congress's ability to control the court *ex post* has raised the stakes for *ex ante* control that has deeply politicized the appointment process for federal judges from the Supreme Court on down.<sup>106</sup>

The effects of polarization within the judiciary may also undermine its effectiveness. Key values such as consistency, predictability, and restraint are undermined in a polarized judiciary. Appellate court decisions are increasingly related to the partisan composition of the circuit, which may make circuit splits more common. Small changes in the composition of the courts may lead to large shifts in the balance of political power and create demands for reversing precedents and doctrine. To the extent to which these changes reduce the perceived legitimacy of the courts, the judges may suffer an absolute loss of policymaking capacity.

### C. States

A third set of actors who may derive some benefits from congressional dysfunction is the states. Federal gridlock may open spaces for states to adopt innovative policies without worries about federal preemption. Liberalization of marijuana laws may be the best example. Although Congress has not provided statutory authorization for states to legalize medical or recreational marijuana, the Department of Justice has said it will not seek to prosecute certain types of violations of federal marijuana law in those states that have a legal cannabis

---

complete information and therefore predict that the Supreme Court can perfectly anticipate congressional behavior. Consequently, no overrides occur in equilibrium. But if the court were uncertain of the preferences of the closest congressional override pivot, the logic of incomplete information veto models would predict lower override rates when the closest override pivot is more extreme in expectation—the pattern one would expect polarization to produce. *See* Cameron & McCarty, *supra* note 65.

104. Importantly, the decline in overrides cannot be explained by a decline in the number of statutory interpretation cases heard by the Court. To the contrary, the number of such cases has been roughly constant since the early 1990s. *See* Hasen, *supra* note 103, at 232, Figure 5.

105. *See generally* Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859 (2012).

106. Hasen, *supra* note 103.

market.<sup>107</sup> States, through their ability to bring lawsuits, have also had a very important role in shaping policies related to the environment, tobacco, financial regulation, and immigration (so far) in the absence of congressional action.

The downside, of course, for the states is that the exercise of these new powers requires the complicity of the federal executive and judicial branches. A new conservative presidential administration could easily reverse the DOJ's memorandum on prosecution discretion for marijuana cases. Their ability to set policy as plaintiffs depends on a sympathetic judiciary. Moreover congressional gridlock leaves the states in a vulnerable position. States can no longer depend on Congress to check executive encroachments or to override unfavorable statutory interpretations by the courts.

The states may also face their own governance problems as a result of high and increasing levels of polarization in their own legislatures.<sup>108</sup> Gridlock may not be the primary concern, however. Because states tend to have fewer super-majoritarian rules and rates of divided government are declining, polarization may be more likely to produce more extreme policy outcomes and more variation in policies across states.

#### CONCLUSION

In recent decades, congressional performance across a number of areas has deteriorated as Congress has polarized.<sup>109</sup> The decline in legislative capacity clearly creates a set of opportunities and challenges for the other branches of our government. In this essay, I have argued that at least in some cases, the executive branch, the judiciary, and the states can pick up some of the slack in governance.<sup>110</sup> But there are at least two major challenges. First, the proper functioning of the executive, judiciary, and states depends on a functioning Congress.<sup>111</sup> Power is not zero sum. Second, each of the non-legislative branches is afflicted with the same ailments that have infected Congress.<sup>112</sup> Political scientists and legal scholars need to focus much more on the impact of polarization on the executive, judiciary, and the states before we can confidently predict how our constitutional system is likely to be reshaped.

---

107. James M. Cole, *Guidance Regarding Marijuana Enforcement*, U.S. DEP'T OF JUST. (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/L9J7-3VZX>].

108. *See* Shor & McCarty, *supra* note 37.

109. *See supra* Part II.

110. *See supra* Part III.

111. *See id.*

112. *See id.*