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**Congress as Problem Solver:
Building Consensus Despite Polarization**

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Congress as Problem Solver: Building Consensus Despite Polarization

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Abstract

We examine the contributions Congress makes to problem solving in contemporary American government. We offer a more positive assessment of the institution than is the norm for political science. In terms of representation, institutional processes, and policy outcomes, Congress functions better than is generally appreciated. Its membership and party composition do a credible job reflecting the political diversity that exists in the country, and its institutional processes show respect for that diversity. Most importantly, Congress's policy outcomes reliably command broad support across party lines. Amid the intense polarization of contemporary American politics, Congress routinely arrives at results that large majorities and both parties support.

Key Words

Congress
party polarization
lawmaking
representation

“‘The failure of Congress’ is a hoary theme that for years has been propounded by academics in textbooks and from lecture platforms. The general impression among academics [is] that ‘something ought to be done about Congress.’”

Roger H. Davidson, David M. Kovenock, and Michael Kent O’Leary (1966, 39).

“I’m pretty proud of the fact that with a Democratic president, a Democratic House, and a Democratic Senate, we were able to achieve, through this omnibus spending bill, essentially all of our priorities.”

Senate Republican Leader Mitch McConnell, December 20, 2022

In this memo, we examine the contributions Congress makes to problem solving in contemporary American government. We offer a more positive assessment of the institution than is the norm for political science. In terms of representation, institutional processes, and policy outcomes, Congress functions better than is generally appreciated. Its membership and party composition do a credible job reflecting the political diversity that exists in the country, and its institutional processes show respect for that diversity.

Most importantly, Congress’s policy outcomes reliably command broad support across party lines. Amid the intense polarization of contemporary American politics, Congress routinely arrives at results that large majorities and both parties support. The institution excels at the construction of win-win, positive-sum agreements. Our research shows that even when majority parties seek to deliver on their own partisan agenda priorities, they primarily succeed by co-opting the minority party, rather than by steamrolling it. When it comes to policymaking, Congress operates more as a brake on partisanship than as a facilitator of it. The difficulty of legislating does not mean constant gridlock. Even though polarization always threatens paralysis, there is not even clear evidence that the contemporary Congress legislates less than it did in the past.

Receiving broad bipartisan agreement, of course, does not guarantee that a policy will be well designed or effective. Assessing Congress’s overall performance as a policymaker exceeds our ambition. The quality of laws is variable. Policy assessment requires one to examine enactments individually to gauge their costs and benefits for different groups over both the medium and long term. Furthermore, policy evaluation is inevitably value-laden, and there is often no societal consensus about those values. But in terms of both process and legislative outcomes, Congress commonly plays a constructive political role in our divisive contemporary politics. In these ways, our unpopular Congress makes underrated contributions to problem-solving in American government.

Scholarly Portraits of Congress

Scholars routinely describe Congress as a “dysfunctional” institution. There isn’t much academic debate about the characterization. The description will often appear as a taken-for-granted fact even in empirical scholarship not attempting to offer a normative account of what a legislature should do or why Congress fails at it.

The bill of particulars against Congress is lengthy. It is intensely polarized (McCarty 2019), rigidly partisan (Smith 2014), gridlocked (Binder 2003), captured by narrow interests (Hall and Wayman 1990; Kalla and Broockman 2016), and parochial (Howell and Moe 2016). Although there is unquestionably truth in all these characterizations, the negativity has grown so one-sided that one might wonder what, if any, good Congress does. Only a few scholars venture to suggest that Congress functions as a problem-solving institution in American politics (Adler and Wilkerson 2012; Mayhew 2017).

In representational and procedural terms, scholars focus on Congress’s shortcomings. The Senate is highly malapportioned by the standards of one person, one vote (Evans 2024; Lee and Oppenheimer 1999). The institution inadequately reflects the nation’s diversity in terms of race, ethnicity, gender, and class (Carnes 2013; Fisher 2020; Lawless and Fox 2010; Thomsen and King 2020). Both the House and Senate employ internal legislative processes that increasingly depart from regular order, undermining the benefits of expertise and committee division of labor (Curry 2015; Sinclair 2016).

Where policymaking is concerned, the most prominent models of legislative action portray lawmaking as a zero-sum battle between the parties, rather than a process of problem solving. Cox and McCubbins (2005, 18) envision legislative parties as “primarily formed to accrue electoral gains.” To do so, the majority party blocks policy proposals that divide it internally and “fashion[s] a favorable record” of partisan accomplishments (p. 7). The majority seeks to monopolize the credit, so legislating yields clear partisan winners and losers. Aldrich and Rohde (2000) also focus on how majority parties maximize their influence. Polarized parties provide their “legislative party institutions and party leadership stronger powers and greater resources” and encourage their party leaders to use those powers to “enact as much of the party’s program as possible” (Aldrich and Rohde 2000, 33-38). Here, again, the focus is on how the majority party achieves its goals over the objections of its opposition.

Scholarship on legislative negotiations and bargaining also typically casts congressional action in a zero-sum light. Krehbiel’s (1998) “pivotal politics” model envisions negotiation as a process of adjusting policy along a continuum in which gains for the left are necessarily losses for the right. Baron and Ferejohn’s (1989) “divide the dollars” game characterizes negotiation as a game of building minimum winning coalitions to divide the spoils, denying any dollars to the losers. Canonical models of “vote buying” reflect a similar logic (Snyder 1991; Groseclose and Snyder 1996), with leaders expected to offer side payments to win legislators’ votes, but only up to the minimum number of votes needed.

Finally, Congress is often described as focused more on politics than on problem solving. Under contemporary conditions of fierce party competition for majority control, members

continually engage in a quest for partisan political advantage (Lee 2016). Members constantly force roll-call votes to define party differences, deploy harsh rhetoric against opponents, and employ increasingly sophisticated public relations operations to disseminate messages to wider publics (Crosson et al 2021). Individual members win media coverage and raise campaign money by grandstanding and generating outrage (Ballard et al, 2023; Costa 2025). None of these activities tends to foster cooperative working relations across the aisle.

Taken together, the scholarly literature on Congress offers almost nothing by way of a positive view of the institution's capabilities for problem solving. The portrait is of a poorly representative institution that employs suboptimal legislative procedures to jam through legislation with clear winners and losers. That is, it behaves in such a way when it can pull itself away from position-taking and grandstanding to legislate at all.

Credibly Representative

Although Congress has never perfectly mirrored the country it represents, it measures up surprisingly well by the most important benchmark: partisan representation. Party is the single most important factor shaping the political views and behavior of both voters and elected officials. Congress has afforded roughly proportional representation to the major parties throughout the polarized era (since the 1990s). Despite its use of single member districts and plurality election rules, the division of party power in Congress closely mirrors the balance between the parties as reflected in presidential elections and in public opinion polling. Our 50-50 Congress accurately reflects our 50-50 country. In the 2024 elections, for example, Donald Trump won 51% of the two-party vote for president nationally, and Republicans won 51% of House seats and 53% of Senate seats. In the 2020 elections, Joe Biden won 51% of the national popular vote, and Democrats won 51% of House seats and 50% of Senate seats. Whatever distortions are produced by gerrymandering, parties receive aggregate seat shares roughly proportionate to their support in the electorate nationally.

Congress has never been more racially, ethnically, and gender diverse than it is today. The institution has made big strides in achieving closer correspondence to the American population, most especially during the last decade. Black representation in Congress has increased by 75% since 2000, with the biggest gains since 2014. In fact, Black Americans are no longer underrepresented in the House, making up 12% of the national population and 14.2% of the 119th House of Representatives (2025-26). Hispanic Americans have seen their presence in Congress increase more than 180% over the past 25 years. Although the Senate is much less representative in terms of race and ethnicity, it is a better mirror than it used to be. For the first time, two black women were elected to the Senate in the 2024 elections.

Women make up a quarter of the Senate and 29% of the House. As late as the 1980s, women only made up 5% of Congress. Women are now approaching representational parity in the Democratic party in Congress, where they make up 40%. Less well known is that the share of women in the congressional GOP almost doubled since 2020 (from 8 to 15%).

Inclusive Processes

An underappreciated aspect of congressional processes is that they are designed to acknowledge, respect, and give full voice to political disagreement. Consider the various ways in which congressional procedure is respectful and inclusive of political differences. First, when legislation is debated, proponents and opponents are allocated equal time. This convention of granting equal time on both sides of pending questions is followed, even when the chambers operate under special rules adopted by majority vote (as is common in the House) or under unanimous consent agreements (as commonly in the Senate). When witnesses are questioned in congressional hearings, committees typically operate under the “five-minute rule” granting each committee member five minutes for questions and comments. Equal time for proponents and opponents is the norm even when one party has a large majority in Congress.

Second, Congress’s processes are inclusive because the minority party chooses its own representatives on committees. In the current Republican-majority Congress, for example, Democrats on the Ways & Means Committee or on the Oversight Committee are the Democrats that Democratic party leaders and members want to have there. Democratic members of committees are not hand-picked by the Speaker or the Republican party. Committees are not always perfectly representative of the chamber. In the House, the majority party gives itself an outsized majority on some committees. But the committee system on the whole is representative of Congress. Regardless there is no “tokenism,” where the party in power chooses its preferred minority party members for various positions.

Third, legislative processes enforce norms of respect and civility. During floor debate and within committee meetings, by rule, members may not refer to one another in a derogatory manner, nor may they attack their motives. There are breaches of decorum, but these norms are largely adhered to, and members whose actions violate these rules are typically reprimanded, and their words are “taken down.”

Americans could probably learn a thing or two about civility and respect for difference from watching Congress. In a classic comparative legislatures text, David M. Olson (1994, 130) noted how parliaments in the new democracies created after the fall of the Soviet Union embodied democratic debate and deliberation in an open society. “In newly democratic societies, parliament is the leading example of what democracy is in practice.” Whatever shortcomings congressional deliberation might have, the institution shows respect for political diversity and opposing points of view. Congress and other U.S. legislatures arguably adhere better to these fundamental liberal values than almost any other institutions in American society.

Consensus-Based Legislating

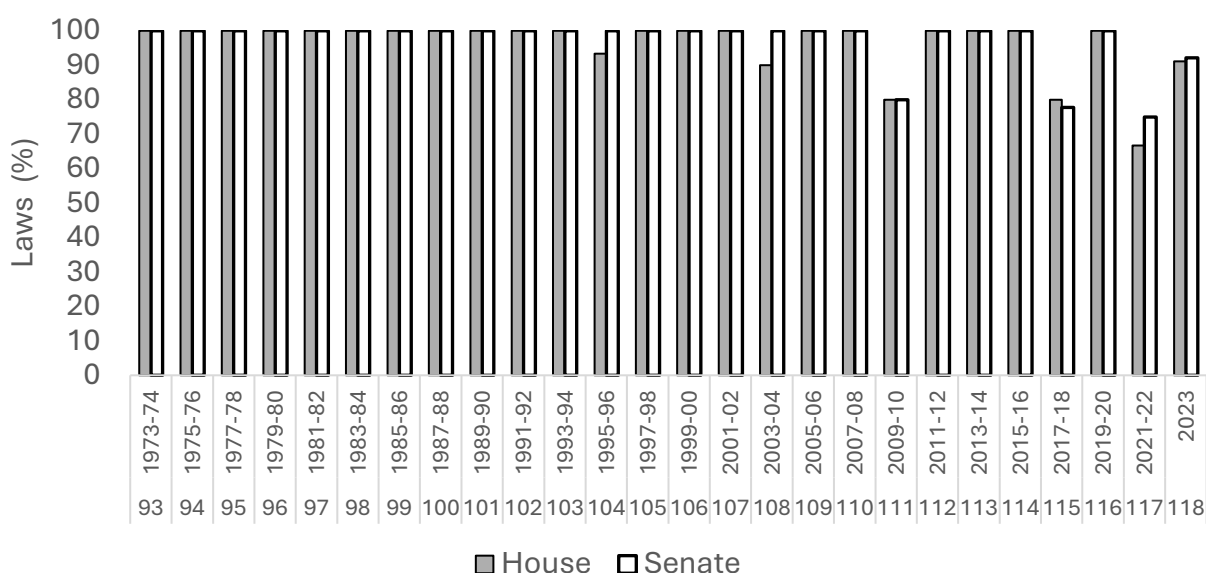
It’s not merely that Congress’s processes are inclusive and respectful of difference. Congress’s legislative outcomes are highly inclusive, as well. Laws, quite simply, rarely get enacted on close votes. Across the past 50 years, the average bill that became law passed the Senate with 77 votes and the House with support from 78% of the chamber. There has been little change in this indicator,

despite polarization on roll-call voting generally. In other words, most of what passes Congress was acceptable to most members.

The picture is not different if one looks instead only at important laws, as designated by the lists that Yale political scientist David Mayhew has long compiled at the end of each Congress.¹ The average important law passed the House with 70% support and the Senate with 77% support. Our research shows that the increase in centralized legislative power and departures from regular order have not resulted in more partisan enactments (Curry and Lee 2020). In fact, bills developed via “unorthodox” processes are no more likely to pass on party-line votes than legislation crafted via “regular order” legislative processes in which committees take the lead.

Very few important laws pass without meaningful minority party support, regardless of the procedures used or conditions of unified or divided party control. If we set the bar at 10% or more of the minority party voting in favor, 100% of important laws typically clear it. Generally speaking, a president working with unified control of both chambers of Congress can expect to get only one or two important laws passed without any support from the minority party. George W. Bush got his tax cuts; Barack Obama got Obamacare and the stimulus package; Donald Trump got a major tax cut; Joe Biden got his Covid bill and a health care / environment package. These are important laws, but enactments passed with only one party in support are very unusual, even in the polarized era. Lawmaking remains predominantly bipartisan. This fact is probably the single most important feature of congressional lawmaking in today’s party-polarized era.

FIGURE 1: Share of Important Laws Enacted With at Least 10% of the Minority Party in Support, 1973-2023



¹ David R. Mayhew, “Datasets and Materials: *Divided We Govern*,” <https://campuspress.yale.edu/davidmayhew/datasets-divided-we-govern/>. Across the congresses between 1973 and 2024, the lowest number of important laws passed in a Congress was six (1999-2000). The maximum number was 22 (in 1975-76).

Co-opting, Not Steamrolling Minority Parties

Even when majority parties in Congress are trying to legislate on their top agenda priorities, they are more likely to win by co-opting, rather than steamrolling the minority party. When they succeed in enacting legislation on their agenda items, majority parties usually do so by getting meaningful buy-in from the minority party.

For this point, we draw on data collected for our book, *The Limits of Party* (Curry and Lee 2020), which we have updated for subsequent years. To gauge the success congressional majority parties achieve on their top legislative priorities, we read the opening speeches of every Speaker of the House and Senate majority leader since the 99th Congress (1985-86) and examined every bill introduced into a majority leadership reserved bill slot in the House (H.R. 1-10) and Senate (S. 1-5). The result is a list of 295 agenda items majority parties wanted to address in each congress through the 117th (2021-22).² We then constructed legislative histories of each of these items.

For each agenda priority, we ascertain whether or not the majority party succeeded in enacting a law addressing that issue. For all those agenda items on which the majority succeeded in passing a law, we noted *how* they got the job done. We identified four potential “pathways” to legislative success.

- 1) **Bipartisan logroll**: These are cases in which the majority party logrolled with the minority party, pairing the majority’s priorities with items on the minority’s wish list.
- 2) **Seek broad support**: These are cases in which the majority party reaches out to the minority party at the start of the legislative process to craft a bill that can obtain broad support across the political spectrum.
- 3) **Back down**: These are cases in which majority party starts out by making a strong, partisan proposal. However, as the process unfolds, the majority party backs down on contentious aspects of its proposal in order to secure votes from the minority party.
- 4) **Steamroll**: These are cases in which the majority party proposes a policy strongly opposed by the minority party, but goes on to pass it without making any significant concessions.

The first three of these pathways to success all involve crafting legislation that can be supported by large bipartisan majorities. The first two pathways feature efforts to secure minority party support from the outset of the legislative drive; the third pathway involves the majority party conceding on its controversial provisions in order to win minority party support. Only the fourth approach—the steamroll—yields legislation that will allow the majority party to claim clear partisan credit for the enactment. It is the only pathway to success that does not afford at least some credit-claiming opportunities for the minority party.

Figure 2, below, shows the pathways by which majority parties achieved success on their legislative priorities (those that resulted in the enactment of a new law, 148 in total). As one can see, across the time period, majority parties enacted priority legislation without winning significant minority party support just 14% of the time. They wound up taking the “back down” path almost half the time (46%). Just over 40% of the time, they pursued pathways that accommodated the

² These data are available online at: <https://james-m-curry.com/the-limits-of-party/>

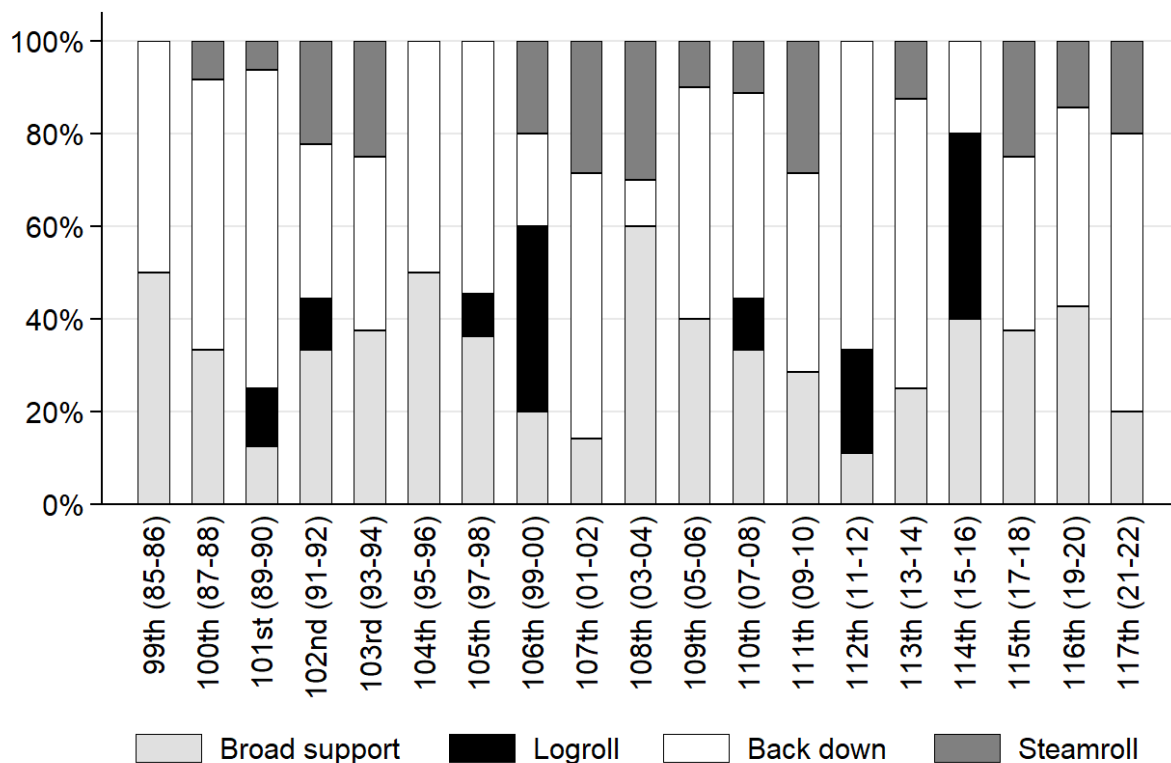
minority party from the start, by either seeking broad support (33%) or by logrolling to incorporate minority party priorities into a larger legislative package (8%).

Majority parties rarely succeed in enacting legislation that constitutes an unambiguous “win” that will allow them to claim exclusive credit for the enactment. In five of the 19 congresses in the dataset, the majority party notched no “steamroll” wins at all. There is no congress in which the majority party achieves most of its successes via the steamroll path. In most congresses, the vast bulk of the majority party’s agenda successes are accomplished by either backing down or by seeking broad support. There is no evident trend line in these data. Pathways to success since the 2010s are much the same as they were in the 1980s and 1990s.

These successful enactments overwhelmingly featured broad bipartisan support on final passage. Fully, 78% of these enactments passed with at least a majority of the opposition party in one or both chambers of Congress voting in support, and 83% of these legislative enactments were endorsed by one or more top elected leaders of the minority party.

Even when majority parties are trying to enact legislation on their partisan agenda priorities, they are rarely able to do so in a manner that maximizes their own party’s credit claiming opportunities (Cox and McCubbins 2005). These pathways to success also do not turn on the majority party using its institutional resources to muscle through legislation over sustained minority party opposition (Aldrich and Rohde 2000).

FIGURE 2: Pathways to Success on Majority Party Agenda Items, 1985-2022



Only the steamroll victories feature any significant amount of success via minimum winning coalition. Majority party successes instead normally occur via lopsided majorities and co-optation of the minority party.

Congressional Problem-Solving

Rather than the zero-sum games that predominate in political science theory, legislation may instead more often take the form of positive-sum or integrative negotiation (see Warren and Mansbridge 2015). Legislative efforts often get underway when members share broad agreement that a problem or need for legislation exists. In such cases, they nevertheless confront either uncertainty about how to address the issues or an array of different ideas about how to do so. Negotiators will need to uncover or develop policy proposals they believe can address the perceived problems or needs while also not crossing anyone's red lines. This is not trivial work. It requires serious effort and creativity. But Congress frequently engages in this kind of work, even if it is not as readily recognized by scholars or observers of the institution, who tend to conceive of legislating as a zero-sum game with winners and losers.

Congressional problem-solving efforts featuring positive-sum, consensus-oriented negotiation are apparent in the legislative histories of a large number of major enactments across recent years: the Bipartisan Infrastructure law (2021) investing in transportation, broadband and electric grid renewal; the CHIPS and Science Act (2022) to foster scientific research and domestic manufacturing of semiconductors; the Great American Outdoors Act (2020) funding national parks and conservation; the SUPPORT for Patients and Communities Act (2018) addressing the opioid crisis; the Bipartisan Safer Communities Act (2022) enhancing background checks and gun safety; the 21st Century Cures Act funding cancer research and streamlining the FDA (2016); the Dingell Act (2019) protecting public lands and expanding wilderness areas, and the Postal Service Reform Act (2022) stabilizing financing of the postal service. Positive-sum dealmaking accommodating diverse interests is also a feature of virtually every appropriations bill that gets enacted.

Below are brief sketches of two such problem-solving efforts in recent years.

Covid Relief in 2020

The Covid pandemic triggered the largest-ever crisis response in United States history. Across four enactments in 2020, Congress authorized more than \$3.1 trillion in new spending, most of which was allocated to keeping businesses and workers afloat through closures. Gauged by the increase in expenditures relative to total gross domestic product, 2020 pandemic aid was bigger than the 2009 stimulus package and the New Deal combined.³ The largest of these enactments was the \$2.2 trillion CARES Act in March, followed by a \$900 billion package in December.

Congressional negotiators had to resolve an array of conflicts amid a fast-moving public health and economic crisis.⁴ Republicans and Democrats disagreed on the size of the aid packages needed, with Democrats favoring larger expenditures. The parties disagreed on the need for aid to

³ The New Deal represented 8.2 percent of GDP for 1933-1939. Covid aid in 2020 was 17.3% of GDP; Data on New Deal expenditures are drawn from Fishback and Kachanovskaya (2015).

⁴ For more detailed analysis of these negotiations, see Lee, Poirier and Bertram (2024).

state and local governments, on the generosity and time limits for unemployment benefits, on shielding businesses, schools and universities from pandemic-related lawsuits, and on direct assistance to corporations, among others matters.

To a considerable extent, these conflicts were resolved by logrolling. Democrats went along with Republican priorities, and vice-versa, as long as those priorities did not cross either party's "red lines." Senate Majority Leader Mitch McConnell (R-KY) kicked off the negotiations by advancing the first proposal. He initiated negotiations among Republicans, aiming to reach internal party agreement before soliciting support from Democrats.⁵ McConnell unveiled his \$1 trillion proposal on March 19, organized around what he called four "pillars": aid to small business, cash payments for individuals, loans for pandemic-impacted industries, and support for the health-care sector.⁶

Democrats denounced McConnell's proposal as grossly inadequate. In a joint statement, Senate Minority Leader Chuck Schumer (D-NY) and Speaker of the House Nancy Pelosi (D-CA) criticized the draft for putting "corporations way ahead of workers."⁷ Democrats had a range of demands: a special pandemic unemployment bonus of \$600 per week, suspension of student loan payments, as well as more aid to hospitals, health systems, and state and local governments, among others. By the time the CARES Act was complete, it had doubled in size, with the final legislation authorizing \$2.2 trillion. The resulting package was a gigantic logroll that included McConnell's four pillars, as well as funding for Democrats' top priorities.

The December 2020 Covid aid package took longer to negotiate. The two parties reached agreement relatively quickly on a \$900 billion top line. But then they deadlocked over a set of priorities, neither of which could win bipartisan support. Democrats wanted a new infusion of aid to state and local governments, which Republicans regarded as an unacceptable "blue state bailout." McConnell's priority was a shield against pandemic-related lawsuits for businesses, universities and other entities, which Democrats regarded as a nonstarter. The parties could never bridge their differences on these priorities. In the end, the December package came together by narrowing the scope of their negotiations. In an "anti-logroll," the parties agreed to set aside each party's most controversial priority. Although the package did not fully satisfy either party, both were willing to move forward with those provisions that could get sufficient support for enactment.

Electoral Count Reform and Presidential Transition Improvement Act (2022)

Donald Trump's efforts to overturn the results of the 2020 election pushed Congress to address the longstanding weaknesses of the Electoral Count Act of 1887. With its antiquated and ambiguous language, the existing Electoral Count Act failed to offer clear guidance on key aspects of the process. The law was especially unclear about how disputed elections were to be handled,

⁵ Erica Werner, Jeff Stein, and Mike DeBonis, "White House Seeks \$1 Trillion Stimulus," *Washington Post*, March 19, 2020, A1.

⁶ Jeffrey Stein, Mike DeBonis, Erica Werner, and Paul Kane, "Senate GOP Releases Massive Stimulus Bill, But Some Oppose Cash Payouts," *Washington Post*, March 20, 2020, A17.

⁷ Emily Cochrane, Jim Tankersley, and Alan Rappeport, "Senate Rescue Bill Includes Corporate Tax Cuts and \$1,200 Checks," *New York Times*, March 20, 2020, A10.

rendering the statute open to the misunderstanding and confusion that Trump’s legal team sought to exploit. There was bipartisan acknowledgement of the problem and support for fixing the law, but there was not agreement on how to do it.

First, there were disagreements about what fixes to the law were preferable. Some thought an expedited judicial review process should be used to resolve disputes, while others thought such a process would be easily abused. Some thought legal challenges should take place in state courts, while others thought federal courts were preferable. Some thought governors should be given the power to certify a state’s winner, while others thought this was too much power in the hands of one individual.

Second, there were turf war considerations dividing the House and Senate. Members of the House’s January 6th Select Committee thought they should lead out on reforms. Senators, on the other hand, believed the Committee had poisoned the well, and that they should take the lead. Third, there were concerns about alienating Republicans, either because the proposal could be interpreted as an attack on Trump, or by succumbing to Democrats’ wishes to tie ECA reforms to unrelated reforms of voting rights, campaign finance, redistricting, or other electoral processes.⁸

Negotiations in the Senate, led by Joe Manchin (D-WV) and Susan Collins (R-ME), lasted for over a year. Unlike in the CARES Act—where coalition leaders built an additive coalition by expanding the scope of a bill and including more members’ priorities—in this case the key to success was narrowing the scope of the negotiations to focus only on the problems with the ECA. The narrower the focus, Collins told reports, the more quickly the 16-senator “gang” could act.⁹

Senate negotiators rolled out a bill draft in summer 2022 that would clarify the vice president’s role in the process as purely ministerial; affirm governors’ power to approve a state’s electors; establish an expedited judicial review to challenge governors’ decisions in federal court; define narrowly what constitutes a valid challenge to state certification; and require one-fifth support in both chambers of Congress to force a vote on objections to state electors.¹⁰

The proposal quickly drew criticism from some Democrats for being too weak. House Democrats on the January 6 Committee were most vocal. But they did not initially provide much detail about their concerns, perhaps because their objections were primarily rooted in the view that they should take the lead. Rep. Jamie Raskin (D-MD) called the proposal, “not remotely sufficient,” but declined to say why.¹¹ Other Democrats, especially elections lawyer Marc Elias,

⁸ On this, see, e.g., Marianne Levine, Nicholas Wu, and Jordain Carney, “Congress’ latest House-Senate wrangle: Preventing the next Jan. 6,” *Politico*, September 19, 2022.

⁹ Burgess Everett, “Schumer gives Senate’s newest bipartisan gang breathing room on post-Jan. 6 reform,” *Politico*, January 27, 2022.

¹⁰ The only permissible challenges to the governor’s certification of electors are (1) that the process by which electors were appointed did not follow state law or (2) that particular electors’ votes were not “regularly given,” such as they went to an ineligible candidate or were influenced by bribery. See, e.g., Marianne Levine, “Senators finalize bipartisan proposal designed to prevent another Jan. 6,” *Politico* July 20, 2022; Marianne Levine, “Senators in both parties want to prevent the next Jan. 6. They’re not looking for the select panel’s help,” *Politico*, July 24, 2022.

¹¹ Marianne Levine and Nicholas Wu, “Jan. 6 panel Dems throw shade at Senate’s bipartisan foray into their turf,” *Politico*, July 26, 2022.

argued that it gave governors too much power, did not leave enough time for adequate legal challenges, and placed too much faith in federal courts.¹²

The House Committee then rolled out a more complex bill that included a list of “catastrophic” events permitting a state to prolong its voting period; a process for candidates to sue state election officials; a longer list of valid challenges to a state’s selection of electors—including barring electors who supported a candidate who had “engaged in insurrection or rebellion”—and a threshold to challenge certification in Congress at one-third of both chambers.¹³

Republicans overwhelmingly rejected the House bill. “I take it for what it is,” said Rep. Jim Banks (R-IN), Republican Study Committee chair, “a political weapon to beat up on Donald Trump and not about preventing a Jan. 6 from ever happening again.”¹⁴ It received just 10 Republican votes on the floor. Senate negotiators were left with a challenge: make enough changes to satisfy House Democrats without adding detail that would alienate Senate Republicans.

Negotiations, now led by Senator Amy Klobuchar (D-MN), chair of the Senate Rules and Administration Committee, involved discussions with legal scholars and practitioners about what might work. The final bill kept the structure of the original Senate proposal, but made changes to address Democrats’ concerns. Among other things the bill made clear that gubernatorial decisions were subject to a narrowly defined set of legal challenges and review; emphasized that state laws were the primary basis for legal challenges; and made Supreme Court review optional.

In the end, the law was able to pass as part of an omnibus spending package in December because it no longer elicited *any* significant controversy. Congress had succeeded in building universal support for a major law that resolved the most serious problems with the ECA. Leading legal scholar Cass Sunstein (2022) called it a “phenomenal achievement” that clarified essentially all the ambiguities. It was praised on the right, left, and center: by the Center for American Progress,¹⁵ the Cato Institute,¹⁶ and the Campaign Legal Center.¹⁷

Legislative Activism in the Polarized Congress

The formidable difficulties of forging consensus in the polarized Congress could reasonably be expected to yield institutional paralysis. Stalemate undoubtedly prevails on important issues. But real-world data on legislative activity are much more ambiguous. The contemporary Congress overall is not less legislatively active than the Congress of the 20th century. As gauged by sheer

¹² See, Marc Elias, “Reforms to the Electoral Count Act Miss the Mark,” *Democracy Docket*, July 22, 2022

¹³ See, Marianne Levine, Nicholas Wu, and Jordain Carney, “Congress’ latest House-Senate wrangle: Preventing the next Jan. 6,” *Politico*, September 19, 2022.

¹⁴ Nicholas Wu and Jordain Carney, “House passes plan to head off future Trumpian election challenges,” *Politico*, September 21, 2022.

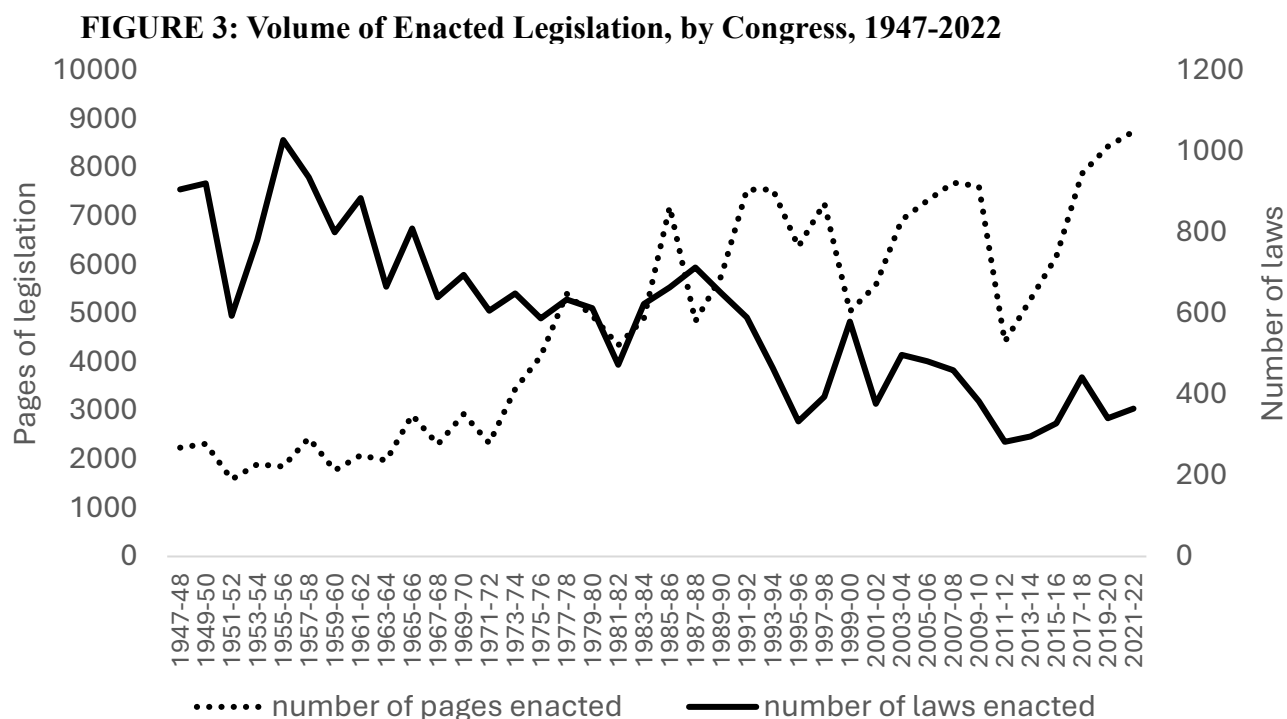
¹⁵ See, “Electoral Count Act Reform Is Now Within Reach,” September 27, 2022, <https://www.americanprogress.org/article/electoral-count-act-reform-is-now-within-reach/>

¹⁶ Walter Olson, “To Strengthen the Electoral College, Enact Electoral Count Act Reform,” Cato Institute, December 19, 2022.

¹⁷ Jo Deutsch, “Congress Takes Historic Action to Update the Electoral Count Act,” Campaign Legal Center, December 23, 2022.

volume, recent Congresses have passed just as much legislation as Congresses of the 1970s and 1980s.

Figure 3 displays data from the Brookings Institution’s *Vital Statistics on Congress*.¹⁸ As is clear here, the number of individual laws passed per Congress has declined since the middle of the 20th century. At the same time, however, the number of pages of legislative text enacted in each two-year Congress has not decreased. The polarized Congress makes much greater use of omnibus legislating (Curry 2015; Curry and Lee 2020; Krutz 2001). In other words, individual laws have grown much longer such that the total volume of lawmaking is not less. Indeed, both the 116th Congress (2019-2020) and the 117th Congress (2021-22) set new, all-time records for the total amount of enacted legislation. Consistent with Mayhew (2005), high levels of activism in recent congresses extended across episodes of divided (116th Congress) and unified (117th Congress) party control. There is no clear evidence that the laws the polarized Congress enacts are less substantively significant than those of previous eras (Farhang 2021).



Discussion and Unanswered Questions

Consider an image that routinely appears in national news reporting: a photo of a “four corners” meeting of the president along with the bicameral bipartisan leaders of Congress. Such meetings are how big decisions about domestic policy routinely get made, especially but not exclusively under conditions of divided party control. Such meetings routinely handle the omnibus appropriations packages that keep the federal government functioning.

¹⁸ *Vital Statistics on Congress*, Brookings Institution, <https://www.brookings.edu/articles/vital-statistics-on-congress/>.

We normally conceive of Congress as an arena of conflict. There is no shortage of conflict, to be sure. But it is a mistake to stop with this fact. Congress's main contribution to American politics is to bring the parties to terms. The process has some fundamental features of fairness. Parties receive representation in Congress that accords well with their levels of national public support. Not even a regime of proportional representation could much improve on it. Today's Congress is also more representationally diverse than ever. It operates under procedures that allow both parties to have input. To the extent that we expect Congress to confront important issues in American politics, it is as well positioned in representational terms to do so as it has ever been.

Year in, year out—and amidst high levels of polarization and political fragmentation—Congress achieves broad-based agreements to keep the federal government operating and to address broadly perceived problems and needs. Despite polarization, congressional majority parties rarely succeed in enacting legislation without winning bipartisan support. Instead, majority parties usually succeed on their agenda items—when they succeed at all—by getting buy-in from the minority party. Data on the volume of legislation enacted over time do not show that the polarized Congress is paralyzed or inactive. Instead, it enacts as much legislation as it did when levels of polarization were much lower.

We need better theorizing about how Congress reaches broadly-supported agreements for legislative action. The case examples examined here point to the need for scholars to conduct more close analysis of real-world congressional negotiation. We need many more such cases systematically analyzed. Looking to the cases considered here, one factor that seems quite relevant is Congress's freedom to define the scope of negotiations for itself. In these cases, the range of included policies was subject to negotiation, not fixed within any pre-existing choice space. Agreements could be achieved by building an “additive coalition” that logrolled each party's priorities. It could also be reached by narrowly focusing on just those provisions acceptable to both parties and excluding contentious matters. We are not aware of research that investigates how Congress engages in negotiations about the scope of enactments.

What is clear is that these cases are not well-suited to interpretation within the framework of a zero-sum game, in which opposing sides seek gains at each other's expense. Neither the Covid aid enactments of 2020 nor the Electoral Count Reform Act of 2022 entailed negotiators adjusting policy along a fixed continuum from left to right. They were also not “divide the dollars” negotiations over a fixed pie. They certainly did not represent one party getting a “win” over the opposition of the other.

These were complex, multi-dimensional negotiations where the scope and range of issues included in the negotiations was endogenous to the negotiation itself. These enactments only came together when both parties agreed that there was a real problem that needed addressing and also agreed that the packages they had assembled could be construed as an improvement on the status quo. In reaching these conclusions, Democratic and Republican negotiators probably focused on different aspects of the packages as they went back to their party colleagues to ask for support on final passage. But as on most legislation that gets enacted, today as in the 20th century, members were able to come together as part of broad, bipartisan coalition.

Accommodation and conflict resolution are arguably what is most needed in a polarized country where neither major party commands majority support most of the time. These are Congress's great strengths. It is a messy process. But what Congress is good at doing is arriving at acceptable political settlements.

Works Cited

- Adler, E. Scott., and John D. Wilkerson. *Congress and the Politics of Problem Solving*. New York: Cambridge University Press, 2012.
- Aldrich, John H., and David W. Rohde. 2000. "The Consequences of Party Organization in the House: The Role of the Majority and Minority Parties in Conditional Party Government." In *Polarized Politics: Congress and the President in a Partisan Era*, edited by Jon R. Bond and Richard Fleisher,. 31-72. Washington, DC: CQ Press.
- Ballard, Andrew O., Ryan DeTamble, Spencer Dorsey, Michael Heseltine, and Marcus Johnson. "Dynamics of Polarizing Rhetoric in Congressional Tweets." *Legislative Studies Quarterly* 48 (2023): 105–144.
- Baron, David and John Ferejohn. 1989. "Bargaining in Legislatures." *American Political Science Review* 83(4):1181-1206.
- Binder, Sarah A. *Stalemate: Causes and Consequences of Legislative Gridlock*. Washington, DC: The Brookings Institution Press, 2003.
- Carnes, Nicholas. *White-Collar Government: The Hidden Role of Class In Economic Policy Making*. Chicago: The University of Chicago Press, 2013.
- Costa, Mia. *How Politicians Polarize: Political Representation in an Age of Negative Partisanship*. Chicago: University of Chicago Press, 2025.
- Cox, Gary W., and Mathew D McCubbins. *Setting the Agenda: Responsible Party Government In the U.S. House of Representatives*. Cambridge: Cambridge University Press, 2005.
- Crosson, Jesse M., Alexander C. Furnas, Timothy Lapira, and Casey Burgat. "Partisan Competition and the Decline in Legislative Capacity among Congressional Offices." *Legislative Studies Quarterly* 46 (2021): 745-789.
- Curry, James M. *Legislating In the Dark: Information and Power In the House of Representatives*. Chicago: The University of Chicago Press, 2015.
- Curry, James M., and Frances E. Lee. *The Limits of Party: Congress and Lawmaking In a Polarized Era*. Chicago: University of Chicago Press, 2020.
- Evans, C. Lawrence. "Senate Countermajoritarianism." *American Political Science Review*, First View, 1–18, May 23, 2024, <https://doi.org/10.1017/S0003055424000510>.
- Farhang, Sean. "Legislative Capacity & Administrative Power Under Divided Polarization." *Daedalus* 150 (3, 2021): 49–67.
- Fishback, Price and Valentina Kachanovskaya, "The Multiplier for Federal Spending in the States During the Great Depression," *Journal of Economic History* 75 (1, 2015): 125–162.
- Fisher, Patrick. *Insufficient Representation: The Disconnect Between Congress and Its Citizens*. Rowman & Littlefield, 2020.
- Groseclose, Tim, and James M. Snyder. "Buying Supermajorities." *American Political Science Review* 90 (2, 1996): 303–15.
- Hall, Richard L., and Frank W. Wayman. "Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees." *American Political Science Review* 84 (3, 1990): 797–820.
- Howell, William G., and Terry M. Moe. *Relic: How Our Constitution Undermines Effective Government, and Why We Need a More Powerful Presidency*. New York: Basic Books A Member of the Perseus Books Group, 2016.
- Kalla, Joshua L., and David E. Broockman. "Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment." *American Journal of Political Science* 60 (3, 2016): 545–58.

- Krehbiel, Keith, *Pivotal Politics: A Theory of U.S. Lawmaking*. Chicago: University of Chicago Press, 1998.
- Krutz, Glen S. *Hitching a Ride: Omnibus Legislating in the US Congress*. Columbus: Ohio State University Press, 2001.
- Lawless, Jennifer L., Richard Logan Fox. *It Still Takes a Candidate: Why Women Don't Run for Office*. Rev. ed. New York: Cambridge University Press, 2010.
- Lee, Frances E., and Bruce I. Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: University of Chicago Press, 1999.
- Lee, Frances E., Bettina Poirier, and Christopher Bertram. "High Stakes Negotiation: Reaching Agreement on Pandemic Aid in 2020." In *Disruption? The Senate During the Trump Era*, Sean Theriault, ed. New York: Oxford University Press, 2024, pp. 87–113.
- Mayhew, David R. *Divided We Govern: Party Control, Lawmaking and Investigations, 1946-2002*. 2nd ed. New Haven: Yale University Press, 2005.
- Mayhew, David R. *The Imprint of Congress*. New Haven: Yale University Press, 2017.
- McCarty, Nolan M. *Polarization: What Everyone Needs to Know*. New York, NY: Oxford University Press, 2019.
- Olson, David M. *Democratic Legislative Institutions: A Comparative View*. Armonk, N.Y.: M.E. Sharpe, 1994.
- Sinclair, Barbara. *Unorthodox lawmaking: New legislative processes in the US Congress*. Washington DC: CQ Press, 2016.
- Smith, Steven S. *The Senate Syndrome: The Evolution of Procedural Warfare In the Modern U.S. Senate*. Norman: University of Oklahoma Press, 2014.
- Snyder, James M., Jr. 1991. "On Buying Legislatures." *Economics and Politics* 3 (July): 93–109.
- Sunstein, Cass R., The Rule of Law vs. 'Party Nature': Presidential Elections, the U.S. Constitution, the Electoral Count Act of 1887, the Horror of January 6, and the Electoral Count Reform Act of 2022 (December 27, 2022). Harvard Public Law Working Paper No. 23-16, Available at SSRN: <https://ssrn.com/abstract=4313291> or <http://dx.doi.org/10.2139/ssrn.4313291>.
- Thomsen, Danielle M. and Aaron S. King. "Women's Representation and the Gendered Pipeline to Power." *American Political Science Review* 114 (4, 2020): 989–1000.
- Warren, Mark E., and Jane Mansbridge. "Deliberative Negotiation." In *Political Negotiation: A Handbook*, Jane Mansbridge and Cathie Jo Martin, eds. Washinton, DC: Brookings Institution Press, 2016, 141–96.