

DON'T BE SO IMPATIENT

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INTRODUCTION

Sir Humphrey Appleby: If you want to be really sure that the Minister doesn't accept [a proposal], you must say the decision is "courageous."

Bernard Woolley: And that's worse than "controversial"?

Sir Humphrey Appleby: Oh, yes! "Controversial" only means "this will lose you votes." "Courageous" means "this will lose you the election!"

*Yes Minister*¹

This dialogue from the best television comedy on politics captures the question that drives this symposium: Is gridlock the product of elected officials who cannot make tough choices or an electorate that cannot agree about what should be done? While there is one important structural barrier—the Senate filibuster—that should be lowered to facilitate congressional action, my Essay argues that the current stalemate is just a phase that will pass. People are sometimes badly split in a healthy democracy, and papering over those divisions by manipulating the political process is justified only under extreme conditions that are absent today.

Part I explores four definitions of gridlock and concludes that the best one holds that the present electorate does not agree on major issues in an unusual way that prevents compromise. Part II holds that there is no acceptable legal cure for a fractured Congress that is (broadly speaking) accurately representing a torn nation. Like the common law, public opinion just needs time to work itself pure.

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1 *Yes Minister: The Right to Know* (BBC television broadcast Mar. 31, 1980). Sir Humphrey Appleby was the Permanent Secretary (the top civil servant) in the fictional Ministry of Administrative Affairs, and Bernard Woolley was the Principal Private Secretary to the Minister, Jim Hacker. *Id.*

I. WHAT IS GRIDLOCK?

There are at least four reasonable interpretations of what people mean when they say that there is gridlock: (1) there is a national consensus on an issue, but our political structure prevents that view from being enacted; (2) there is a consensus among political elites about a course of action, but party loyalty stymies compromise; (3) political elites are deadlocked, but only because the voting system distorts public opinion; and (4) the nation is genuinely divided and our politicians reflect that view. The first three of these ideas are explored and rejected, while the fourth is defended and explained.

A. *Procedural Gridlock*

One common refrain is that gridlock is a disease caused by a constitutional institution or practice that gives legislative minorities too much power.² In this context, “too much” means that a broad and robust popular majority is repeatedly blocked from changing policy in Congress. During the late-nineteenth century, this concern was centered on the Senate, which was not popularly elected,³ and on the House of Representatives, which had rules that gave the minority wide latitude to frustrate the majority through procedural tactics.⁴ In response, the Seventeenth Amendment was ratified in 1913 to make the Senate more representative,⁵ and the House reformed its rules in the 1890s to make minority obstruction virtually impossible.⁶

The modern wellspring of procedural gridlock is the Senate’s custom of allowing forty-one of its members to stop most legislation and executive nominations with little effort. In an essay published in 2011, I wrote (drawing on the work of others) that this is a relatively new way of doing business.⁷ For most of the Senate’s history, the filibuster was reserved for bills considered in a lame duck session of Congress or for one very controversial topic—civil rights.⁸ Starting in the 1970s, though, the Senate moved towards a norm

2 See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 25–77 (2006) (offering an extended critique of the Constitution’s provisions with respect to Congress).

3 See U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend XVII (“The Senate of the United States shall be composed of two Senators from each state, [chosen by the Legislature thereof] . . .”).

4 See generally JAMES GRANT, *MR. SPEAKER!: THE LIFE AND TIMES OF THOMAS B. REED* (2011) (describing the range of dilatory tactics used in the House during the 1880s).

5 See U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . .”).

6 See Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 *CONN. L. REV.* 1003, 1025–26 (2011) (describing the so-called “Reed Rules” that streamlined House procedures).

7 See Gerard N. Magliocca, *Reforming the Filibuster*, 105 *Nw. U. L. REV.* 303, 308–13 (2011). This is an important point because other structural criticisms of the Constitution, such as the fact that we have a bicameral legislature or a Senate that is not apportioned according to population, are not new and therefore cannot be blamed for any recent upsurge in gridlock.

8 See *id.*; see also John Copeland Nagle, *Lame Duck Logic*, 45 *U.C. DAVIS L. REV.* 1177, 1218 (2012) (“Filibusters actually preserve the will of the majority of the people during

that almost all pending items could be filibustered and that a refusal to invoke cloture (the motion bringing debate to an end) did not require the minority to hold the floor continuously.⁹ Thus, the minority's power within the Senate is now at an all-time high because filibusters are no longer considered exceptional and are easy to maintain.

There is no doubt in my mind that the filibuster should be restored to something closer to its original form—a device to delay rather than defeat—but this will not completely solve the problem of gridlock.¹⁰ A more majoritarian Senate does not promote bipartisan cooperation. If anything, the filibuster encourages consensus by forcing the parties to agree. Nor does filibuster reform resolve the paralysis that occurs when one party has the White House and the other holds all or part of Congress, as has been the case since 2011.

B. *Party Gridlock*

Another understanding of gridlock could rest on a view that our representatives are not as brave as their forefathers. In a past golden age, the story goes, the United States possessed statesmen who soared above party squabbles and made unpopular choices for the greater good.¹¹ Now members of Congress know what must be done but fail to act because they care more about partisan advantage or personal vendettas. As a legal historian who spends a lot of time studying politics, I can confidently say that this is a myth. The public servants of today are no worse, and are probably better, than they were in the 1800s or in the 1900s.¹²

A more nuanced version of this “party before country” idea is that partisan loyalty blocks like-minded members of Congress from bargaining. Let us compare two hypotheticals. In the first scenario, Senator A and Senator B have different preferences but belong to the same party caucus. In the other scenario, these same senators belong to different parties. The costs of negotiating are higher in the second example. Why? Presumably because there is a stigma attached to reaching across the aisle (at least on high-profile issues). The party whips often discourage this sort of collaboration, and primary vot-

lame-duck sessions because they prevent Congress from acting after the People have elected new representatives.”).

9 See Magliocca, *supra* note 7, at 313–16; see also AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 365 (2012) (“In the late twentieth and early twenty-first centuries, routine filibustering practices have skyrocketed.”).

10 My proposal is that the Senate filibuster should be changed into a suspensory veto, much like the one held by the British House of Lords, which would let the minority delay pending business for only a limited period of time (for example, one year during a given Congress). See Magliocca, *supra* note 7, at 316–23.

11 See generally JOHN F. KENNEDY, *PROFILES IN COURAGE* (1955) (providing the most hyperbolic version of this story).

12 The enactment of the financial bailout by a Democratic Congress and a Republican President in 2008 is a good recent example, as that was definitely not popular but was necessary.

ers punish members who stray too often from the party line. This did not used to be true to the same degree. What changed?

The answer is that the parties are now more ideologically homogenous. As Rick Pildes explains in a convincing article, this development can be traced to the Voting Rights Act of 1965, which ended one-party rule in the South and undermined the Civil War legacy that gave both parties a strong conservative and liberal wing.¹³ Prior to that realignment, there were many members of Congress in each party with overlapping views, and bipartisanship was not seen as a grave flaw. Party labels and loyalty mattered less. Today there is much less overlap between the most conservative Democrat and the most liberal Republican, and party identification within Congress matters a great deal.¹⁴ Put another way, there are fewer people who agree with the views of the other party, and there is more pressure against coalition building. That is not because of a sudden decline in leadership, but the party system of our parents is not coming back.¹⁵ As a result, we must look elsewhere to solve the gridlock problem.

C. Electoral Gridlock

A related explanation of gridlock is that our voting system is exacerbating party polarization.¹⁶ In other words, the cure for a party system that is too rigid involves reengineering the electoral rules so that they do a better job of representing the country as a whole. For instance, states could insist on open primaries instead of closed ones, with the idea that a broader voting pool would elect more centrist candidates. Or states could reform districts that are gerrymandered into safe House seats for one party or the other, which will produce members who are more strident. California is trying a more radical experiment by providing that the top two vote getters (regard-

13 See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 276 (2011) (“[T]his polarization reflects a maturation of American democracy, rather than a state that should be considered temporary or aberrational.”).

14 See THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS* 45 (2012) (presenting this conclusion with the support of extensive data).

15 In a sense, one could say that the problem is not that the congressional parties are too disciplined, but that they are not disciplined enough. If Barack Obama and John Boehner could just make a deal and force their supporters in Congress to march in lock-step, then gridlock would only be an obstacle if party leaders did not get along. Alas, our politicians cannot expect the obedience that would be commonplace within a parliamentary system.

16 Campaign finance regulation (or the lack thereof) could be part of the problem. See *Citizens United v. Fed. Elec. Comm’n*, 558 U.S. 310 (2010) (barring limits on most campaign expenditures by corporations). But there is not enough empirical evidence to draw a conclusion. Moreover, the gridlock problem predates *Citizens United*, so that decision cannot be the cause.

less of party affiliation) in a primary advance to the general election,¹⁷ which is getting closer to eliminating the party primary entirely.¹⁸

While there is some merit in these proposals, they rely on the questionable premise that when the “real voters” show up they will elect members of Congress who will work together more often. But that is probably just wishful thinking. Partisanship in the Senate is increasing¹⁹ even though Senate seats cannot be gerrymandered and the electorate that chooses most Senators is far larger than for House members. Years of polling data also suggest that there is something real behind the idea that there are red-state and blue-state voters who are not inclined to renounce their differences.²⁰ I do not believe that this is a stable equilibrium, but the point is that there is no convincing proof that the voting system is significantly misrepresenting the state of public opinion and creating gridlock.²¹

D. Actual Gridlock

We are now driven to a final explanation—Congress cannot get many things done because the voters that they represent do not agree on what should be done. This is straightforward enough, but there is one wrinkle that deserves attention. Our political system may really be suffering from too little gridlock rather than too much. Each party is refusing to budge from its principles because it believes that it can win unified control of Congress and

17 Norimitsu Onishi, *New Rules Upend House Re-Election Races in California*, N.Y. TIMES, Sept. 25, 2012, at A12, available at <http://www.nytimes.com/2012/09/25/us/politics/new-rules-upend-house-re-election-races-in-california.html>.

18 See, e.g., William B. Jackson, Note, *A Blanket Too Short and Too Narrow: California's Nonpartisan Blanket Primary*, 23 STAN. L. & POL'Y REV. 535 (2012) (describing the operation of Proposition 14). Louisiana has used a system like this for years. See Chenwei Zhang, Note, *Towards a More Perfect Election: Improving the Top-Two Primary for Congressional and State Races*, 73 OHIO ST. L.J. 615, 625 (2012).

19 See Pildes, *supra* note 13, at 276–78.

20 Lydia Saad, *In the U.S., Blue States Outnumber Red States, 20 to 12*, GALLUP (Jan. 30, 2013), <http://www.gallup.com/poll/160175/blue-states-outnumber-red-states.aspx> (presenting polling data on the entrenchment of red and blue states).

21 In fairness, Republicans retained their majority in the House of Representatives in 2012 even though Democrats received more votes in House races across the country. Aaron Blake, *Democratic House Candidates Winning the Popular Vote, Despite Big GOP Majority*, WASH. POST THE FIX BLOG (Nov. 9, 2012, 11:52 AM), <http://www.washingtonpost.com/blogs/the-fix/wp/2012/11/09/democratic-house-candidates-winning-the-popular-vote-despite-big-gop-majority/>. This odd result has occurred before and seems to reflect the distribution of votes rather than gerrymandering (in other words, there are more lopsided Democratic districts), though this is not clear. Another factor is that the House is malapportioned since each state is entitled to one member even though a perfectly proportional formula would assign less than one member to the smallest states. See generally Jeffrey W. Ladewig, *One Person, One Vote, 435 Seats: Interstate Malapportionment and Constitutional Requirements*, 43 CONN. L. REV. 1125 (2011) (explaining this problem).

the White House soon.²² As long as that is a viable hope, there is no incentive to make a deal.²³

In recent years, party turnover in Washington has been a frequent event. For instance, in 2000 Republicans narrowly won the Presidency and a majority in Congress.²⁴ In 2001, however, the Senate switched to the Democrats when James Jeffords of Vermont changed parties.²⁵ A year later, the Senate returned to Republican hands.²⁶ Then in 2006, the Democrats captured both houses of Congress.²⁷ Two years after that, President Obama prevailed, but in 2010 Republicans swept back into the House of Representatives.²⁸ Contrast all of this with the state of affairs from 1981 to 1993. During that span, Republicans held the White House and Democrats controlled the House the entire time.²⁹

The irony is that institutional party stability, which was the norm prior to 2000 and may be here again following the results in 2010 and 2012, reduces gridlock by lowering the expectations of both sides.³⁰ When each party has a power base that is circumscribed for the foreseeable future, legislative bargains become more attractive. When the chances of getting everything that you want are nil, getting some of what you want becomes the best option. The problem prior to 2012 is that both parties believed based on recent history and on polls that they could have it all if they just waited two years.³¹ Until that belief is dispelled, there is no reason for them to accept less. Accordingly, the current level of inaction in Congress is a rational response to voter preferences and the rules of the game. While those rules can and should be improved, that will not end gridlock. What, then, should be done to bring voters together?

22 The possibility of filibuster reform increases this temptation. If people thought that they would clearly need sixty senators to do anything, then they would probably give up any hope of achieving total victory.

23 In effect, there are two ways of thinking about political concessions. They could be a product of high-minded self-sacrifice, or they could be the product of sheer exhaustion. The latter is more realistic.

24 U.S. CENSUS BUREAU, THE 2012 STATISTICAL ABSTRACT: THE NATIONAL DATA BOOK, ELECTIONS: CONGRESSIONAL, tbl.411 (2012) [hereinafter ELECTIONS: CONGRESSIONAL], <http://www.census.gov/compendia/statab/2012/tables/12s0411.pdf>.

25 See Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 968 n.203 (2008) (noting the Jeffords switch).

26 ELECTIONS: CONGRESSIONAL, *supra* note 24.

27 *Id.*

28 *Id.*

29 *Id.*

30 Recall that the Democrats controlled the House of Representatives from 1954 to 1994, which is an astounding result by modern standards. U.S. HOUSE OF REP.: HISTORY, ART & ARCHIVES, PARTY DIVISIONS OF THE HOUSE OF REPRESENTATIVES, <http://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (last visited Apr. 1, 2013).

31 This belief is not true for a President in his second term, as he has only a few more years to establish his legacy, but it is true for his party.

II. CONJURING CONSENSUS

In the movie *Chinatown*, J.J. Gittes explains that when he was a policeman he was advised to do “as little as possible” in a neighborhood where nobody knows the truth.³² That is the same advice that should apply to most efforts to fix gridlock. When public opinion is split, the best response is to change hearts and minds through ordinary persuasion. Anything more than that involves slanting the playing field to get an outcome rather than letting that result develop on its own.³³ Such an approach violates basic principles of self-government and is justified only in a dire emergency. Lawyers are used to waiting a long time for the common law to find coherence; the same virtue is required for democratic politics.

The most prominent era in which representation rules were changed to obscure voter preferences was Reconstruction.³⁴ People who praise bipartisanship must acknowledge that the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments was a highly partisan process supported by only one party.³⁵ While Republicans may have been a majority in the country, they lacked support (among whites) in the former rebel states and did not have universal support in the North. Under a normal process, no constitutional amendment could have won the support of two-thirds of each house of Congress as required by Article V.³⁶ The Republican leadership responded in 1865 by excluding the southern Congressmen and Senators—who were all Democrats—to create a supermajority.³⁷ In one fell swoop, gridlock turned into a Republican juggernaut.

Excluding politicians who would definitely vote the “wrong” way was strong medicine, but in the aftermath of the Civil War that decision was appropriate. First, the Union could not readmit the ex-rebels without some real assurances of good faith. Second, African-Americans could not vote in these southern states, which undercut the democratic credentials of any members elected there. Third, the abolition of slavery actually increased the ranks of ex-secessionists in Congress because non-voting African-Americans counted as a full person instead of as three-fifths of one for enumeration

32 See *CHINATOWN* (Paramount Pictures 1974). Of course, Gittes does not take this advice in the movie, with tragic consequences.

33 For an example of a state legislature where gridlock was eliminated, see Gerard N. Magliocca, *Huey P. Long and the Guarantee Clause*, 83 *TUL. L. REV.* 1, 13–14 (2008) (describing the Louisiana legislature of the early 1930s where bills were passed “at the rate of one every few minutes”).

34 I examine these issues in my forthcoming biography on the author of the Equal Protection Clause. See GERARD N. MAGLIOCCA, *AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT* (forthcoming 2013).

35 See AMAR, *supra* note 9, at 398–400 (discussing how the Republican Party moved these amendments through Congress over total Democratic opposition).

36 See U.S. CONST. art. V. Moreover, Congress would have been unable to override the vetoes of President Andrew Johnson, who was a strong critic of Republican Reconstruction. See John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 *U. CHI. L. REV.* 375, 404–05 (2001).

37 Harrison, *supra* note 36, at 399–400.

purposes.³⁸ As a result, the gridlock that would have resulted if the South had returned in force to the Capitol would have rested on an illegitimate foundation inconsistent with the outcome of the war.³⁹

Needless to say, no equivalent crisis confronts us in 2013, and therefore we must look to other precedents. Our present stalemate looks unusual because it comes in a partisan package, but Congress has been deadlocked on key issues before. One vivid example is the stalemate between internationalists and isolationists that lasted from the end of World War One until the bombing of Pearl Harbor.⁴⁰ This was a debate that crossed party lines, and congressional inaction had dreadful consequences for the world.⁴¹ The civil rights movement is another example, as Republican and Democratic friends of equality were frustrated for decades by their inability to get legislation passed that was vital to the freedom of so many citizens.⁴² Why should we expect to fail where they ultimately succeeded?

The common law method that all lawyers learn provides the most helpful analogy. It typically takes a long time for the cases in a given area to coalesce around a clear or workable rule. This is a very inefficient process, but it has the advantage of airing a wide variety of views by a broad swath of the legal elite.⁴³ Consequently, whatever emerges tends to have broad support from that constituency. In the meantime, attorneys, judges, and scholars just cope with uncertainty and do their best to shape the conversation. Legislatures can, of course, cut this process short by passing a statute, but that could produce a hasty or incomplete answer to a complex question.

A similar thought should govern our attitude toward public opinion and its expression in Congress. Deadlock that is the result of a divided electorate is not really different from splits in case law that are the result of disagreements among lawyers. Nobody, however, is organizing a symposium on how to solve the stalemate between, say, originalists and living constitutionalists. Instead, the assumption is that some consensus will eventually come from that debate. Why is Congress any different from the courts?

38 See U.S. CONST. art. I, § 2, cl. 3 (containing the Three-Fifths Clause), *amended by* U.S. CONST. amend. XIV, § 2; see also Harrison, *supra* note 36, at 400–01.

39 The failure of Reconstruction to achieve many of its aims for nearly one hundred years, though, suggests that evasions of public opinion, no matter how wrong that opinion may be, are probably doomed.

40 See, e.g., DORIS KEARNS GOODWIN, *NO ORDINARY TIME* 22–23 (1994) (offering a sketch of the debate between internationalists and isolationists).

41 Part of this congressional deadlock was caused by a structural flaw—the Constitution’s requirement that a supermajority of the Senate was required to ratify any major international agreement. See U.S. CONST. art. II, § 2, cl. 2. But there was also a very real and very intense divide in America about getting involved in Europe. Even Pearl Harbor did not resolve that debate; only Hitler’s declaration of war against us did.

42 See generally ROBERT MANN, *THE WALLS OF JERICO: LYNDON JOHNSON, HUBERT HUMPHREY, RICHARD RUSSELL, AND THE STRUGGLE FOR CIVIL RIGHTS* (1996) (describing this long march for justice).

43 Granted, this comparison is not comforting if you think that problems such as our national debt or climate change are urgent.

CONCLUSION

The right not to agree is fundamental. Though there are costs to congressional paralysis and filibuster reform is essential to protect the majority party's right to legislate, aggressive action to transcend partisan divisions in the country would be unwise.

