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Making Deals in Congress*

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There is one unavoidable fact about legislating in a democratic system. No single person, faction, or interest can get everything it wants. Legislating inevitably means compromising, except in the rare circumstances when consensus is so strong that one dominant view can prevail with ease.

Robert Kaiser 2013, p. 174

Compromise may be the “unavoidable fact” about legislating in a democratic system. Yet scholars have few systematic answers to the question: How do legislators “get to yes”? To put the question in language more familiar to students of politics: How do politicians with diverse, often-conflicting interests and policy preferences reach agreements on public policy in a legislative body of co-equals? In this chapter, we offer a perspective on deal making in the contemporary Congress, highlighting the impact of political and partisan considerations on lawmakers’ abilities to secure policy agreements.

Negotiation in Congress is never solely about policy; politics and policy are always intertwined. Congressional negotiations thus differ from those in the private sector, in which actors seek to maximize benefits and minimize costs, and the substantive terms of an offer are paramount. Congressional deal making occurs in a political context that shapes the willingness of party leaders and their “rank and file” to negotiate at all or to accept even favorable offers. Lawmakers must justify votes and policy compromises to their constituencies, whereas party leaders must attend to key groups in the party coalition and to the party’s public image. Given the political context of congressional negotiations, we evaluate the tools and institutional arrangements that make deals in Congress more likely—emphasizing that conflicting incentives and interests place a premium on negotiating out of the public eye. We conclude with a broader assessment of the prospects for negotiation in a party-polarized Congress.

Distributive versus Integrative Models of Negotiation in Congress

Negotiation theorists typically distinguish between distributive and integrative solutions to public problems (see Chapters 4 and 5). Distributive solutions involve zero-sum bargaining over extant benefits. As Riker (1962) emphasized in his work on political coalitions, what one party gains, the other must lose. Distributive models depict congressional bargaining as a matter

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of splitting differences over divisible policies. In contrast, integrative solutions emphasize expanding “the pie” rather than just doling out its pieces. Follett (1925/1942) first developed the logic of integrative solutions—that is, agreements that create value by taking advantage of differences in players’ valuations of problems and solutions. Exploiting differences across players’ priorities—achieved by “logrolling,” vote trading, or crafting multidimensional agreements—allows negotiators to enlarge the pie, moving negotiators past narrow, distributive solutions.

Legislative scholars have developed a robust literature on bargaining and coalition building in Congress, almost all of which is predicated on a distributive model of politics. We suspect that congressional studies favor a distributive framework for both empirical and theoretical reasons. Readily available data and contemporary modes of modeling discourage a focus on integrative solutions. For decades, Sorauf’s (1992, 164) “law of available data” has steered students to design their analyses of Congress at the individual level of the legislator. The entire floor roll-call record across congressional history is readily available, encouraging scholars to make congressional voting the focus of their studies. With the addition of Poole and Rosenthal’s (1997, 2013) NOMINATE data, which provides robust estimates of legislators’ revealed preferences, proxies for legislators’ policy positions over the full course of congressional history are also at scholars’ fingertips.

Analyses of such data yielded a wealth of knowledge about the forces that shape lawmakers’ votes. Costs are also apparent: we know an enormous amount about the choices legislators face when they take positions on policy and procedural questions, but relatively little about the politics and processes that facilitate the underlying deals and terms of policy proposals. Arnold’s (1990) analysis of leaders’ strategies for forming successful coalitions provided an important exception. Focusing on the substance and politics of winning coalitions, of course, is challenging: no comparable databases track the formation of legislative deals. To make matters more difficult, virtually all such deals are negotiated out of the public eye. Subsequent reporting about what terms were offered or refused often is contested; therefore, it may be impossible to construct a consensus account of what transpired. Even if we knew which alternatives were on the table during negotiations, we would still need to know how lawmakers crafted and chose among them.

The influence of formal modeling also has encouraged a focus on distributive policy making. For example, Baron and Ferejohn’s (1989) foundational work in this area—“Bargaining in Legislatures”—focuses on divide-the-dollar games. Elaborations of such formal models include important work on vote buying, coalition formation, coalition sizes, and policy outcomes. These are significant contributions to our understanding of Congress. Still, these models emphasize a view of congressional bargaining as a matter of splitting differences rather than creating value. If successful negotiation often requires enlarging the pie, then existing formal models offer only a limited basis for understanding congressional deal making.

Congressional scholars’ focus on the spatial model of politics also reinforces the primacy of distributive politics: players come to the table with exogenously fixed policy preferences, hold perfect information about fellow players’ preferences, and either accept or reject proposals following a set of rules for play. This basic framework works well for reaching agreement on policy when bargaining occurs over who gets what at whose expense in splitting divisible benefits (e.g., see Krehbiel and Rivers’ exemplary 1988 study of changes to the minimum wage).

The key assumptions of the spatial model—especially fixed, exogenous preferences and complete information—are difficult to fit into models of negotiation that involve integrative solutions. The assumption of fixed preferences is incompatible with a view of politics that suggests lawmakers' preferences are endogenous to the legislative process (Evans 2011). Decades of research suggest that although lawmakers hold a set of core beliefs, their policy preferences (and, hence, the deals to which they are likely to agree) develop as they weigh input from various constituencies and stakeholders. Assuming complete information about players' preferences also limits the reach of the spatial model in settings that entail expanding the number of available solutions. As Arnold (1990) argued, lawmakers with similar preferences might reach different conclusions about the policy and electoral consequences of competing alternatives, raising uncertainty for leaders in negotiating agreements with opponents and partisans alike.

Students of Congress recognize that spatial and formal models, by design, offer stylized accounts of legislative politics. The empirical literature on Congress is replete with accounts of the messy dynamics that underlie legislative politics. Here, we note only the tip of the iceberg: in addition to Arnold (1990), Sinclair's (2006) work emphasizes how party leaders exploit procedural tools to construct multidimensional packages, allowing them to assemble complex bargains that meet competing demands. Smith's (2007) treatise on legislative parties in Congress encouraged more careful thought about how legislators' and leaders' multiple goals influence their strategic choices and shape policy outcomes. Evans's (2004) exploration of pork barreling explained how legislative "lard" can be used to buy votes for broad-based national legislation. Arguably, distributive bargaining is more often an instrument for crafting integrative solutions than an end in itself.

Starting Premises

Politics and policy are tightly intertwined on Capitol Hill. Former Representative Barney Frank (D-Mass.) stated it well: "Nobody pushes for unpopular policies." This simple premise has important implications for understanding how coalition leaders build winning coalitions in Congress. Deal making is not merely a matter of finding the ideological "sweet spot" between competing coalitions. Instead, common ground is typically a joint function of lawmakers' policy views and political calculations. As we elaborate herein, three key political premises continually shape congressional negotiations over policy.

First, lawmakers represent constituencies. Stated more accurately, they represent political coalitions within the constituencies that elected them. Officeholders must manage these coalitions. These "intense demanders," who are critical to politicians' fundraising and activist base, often sharply constrain lawmakers' flexibility on key issues (Karol 2009). When legislators or their leaders negotiate over policy, they know that they will have to justify any deals to their active supporters. The catch, as Gilmour (1995, 25-37) explained, is that such constituencies often have little understanding of what is and is not possible in Congress. Constituents will not be happy to hear that they must settle for less than what they wanted or that they must make unpalatable concessions to achieve desired goals. Not being a party to the negotiations themselves, they must trust what their representative tells them about what was achievable. Rather than accept disappointment, they may prefer to listen to other voices—such as those of activist group leaders or congressional hardliners—who tell them that a better deal was

possible. As a consequence, lawmakers must continually cope with constituencies, activists, and supporters who push them to take a tougher line and refuse compromise. “On both sides, the task is dealing with all the people who believe that insufficient purity is the reason why their party hasn’t won more elections,” observed Representative Frank.

Even if a particular deal is the best that can win sufficient support in Congress to pass—and would be an improvement, in their view, over the policy status quo—lawmakers still may conclude that they would be unable to defend it successfully with their constituencies. Lawmakers may well reject “half a loaf” and settle for nothing, if taking the half would be understood by constituents or denounced by important groups or activists as an unacceptable sellout. Pundits today call this a fear of being “primaried,” although the electoral imperative to satisfy activist constituencies has deep roots in congressional politics.

Second, as Mayhew (1974) taught us, individual lawmakers are responsible for the positions they take (i.e., their votes) but not for the resulting policy outcomes. In almost all cases, blame or credit for the outcome of negotiations in Congress does not attach to individual lawmakers, largely because a single lawmaker’s vote rarely decides an outcome. Lawmakers therefore weigh vote decisions for their effects on their reputations as politicians, not only for their effects on public policy. Lawmakers will not necessarily vote for a deal that they support on policy grounds if the vote could harm their public image; conversely, they might vote in favor of a deal to which they object on policy terms if the vote would be helpful to their image.

Third, lawmakers affiliate with political parties in a highly competitive, two-party system. Party leaders are responsible for stewardship of the party “brand”—that is, for protecting the party’s public image on issues. Individual members, for their part, care about the party brand name to the extent that they perceive a favorable party image as important to their party’s majority status in Congress or to their own electoral interests. In promoting a party’s brand name, the question is often whether party leaders and members want a law or a political issue addressed. When a party perceives that it has an advantage with the public on an issue, it may prefer to keep its image unsullied by the compromises that are usually necessary to legislate. The party may see more political benefit in refusing to negotiate and in preserving the issue for future campaigns. Nearly two decades ago, Gilmour (1995, 9) termed this dynamic “strategic disagreement”: parties to a potential deal “avoid the best agreement that can be gotten given the circumstances in order to seek political gain.” In short, explicitly partisan political considerations condition the opportunities for deal making on policy issues.

The 2012 congressional negotiations over the so-called fiscal cliff offer an example of the complex interplay between politics and policy. With the tax cuts originally passed in 2001 under President George W. Bush set to expire at the end of 2012, Speaker of the House John Boehner (R-Ohio) sought support from his party’s conference for legislation that would have made permanent all of the tax cuts for those with taxable incomes less than \$1 million. Preserving the Bush tax cuts was unquestionably a consensus policy objective among congressional Republicans. Passage of Boehner’s so-called Plan B proposal would have strengthened the House Republican leader’s negotiating position vis-à-vis the Democratic-controlled Senate and President Barack Obama, who wanted to raise taxes on taxpayers at a much lower income level of \$250,000. In addition, House passage of the bill would have enhanced the Republican public image by portraying the party as fighting for tax cuts that benefited those outside the richest 1%

of Americans. Under circumstances in which the alternative was the imminent expiration of all of the Bush tax cuts, Boehner's proposal was a vast improvement over the status quo for all lawmakers who wanted low taxes; it also put the party more in tune with national public opinion. Nevertheless, Boehner could not win the support of a key contingent of Republicans who refused to cast a vote that allowed anyone's taxes to rise. As a result, Boehner was sidelined from further negotiation, with the eventual deal worked out between the White House and Senate leadership.

The Plan B episode illustrates that a proposal's policy effect is not the only matter at stake in congressional deal making. Members and party leaders continually take stock of political stakes as well. Moreover, congressional parties are not unitary actors, and party leaders have limited power to command followership from their rank and file. With respect to Boehner's Plan B, considerations of policy and the party brand pulled in the opposite direction from many lawmakers' political calculations. Regardless of the strength of party leaders' case in favor of Plan B, a group of Republicans would simply not allow themselves to be personally associated with a compromise on the issue: their individual reputations as authentic, principled conservatives took priority.

The premise that policy and political choices are tightly interwoven has implications for how we explain the dynamics of negotiating in Congress. If politics always took a back seat to policy considerations, then deal making in Congress would consist of distributive and integrative bargaining to locate a common zone of policy agreement. However, if both policy and politics matter, then the players' willingness to negotiate or sign onto compromises becomes a threshold matter. In the following section, we explore the politics of crossing that threshold and the implications for negotiations that often ensue.

Getting to Agreement: Key Elements

In this section, we outline key elements of congressional negotiations on major public problems. We explore the central players, the terrain of potential policy solutions, and the dynamics of interparty and intraparty bargaining. Collectively, these elements of congressional deal making lead to the expectation that successful negotiations in Congress usually revolve around the task of building integrative (or at least partially integrative) solutions to policy dilemmas.

Players. Generally, party and committee leaders of the majority party take the lead in negotiating policy deals. The rise of party leaders as pivotal negotiators reflects the emergence of "unorthodox lawmaking," a term coined by Sinclair (2012) to capture the nature of lawmaking in a polarized and increasingly centralized legislative institution. There is certainly room for issue entrepreneurship in some cases (see Volden and Wiseman 2009; Wawro 2000). Most recently, we see entrepreneurs emerging on the complex matter of immigration reform in 2013, although there seems to be more room for such activity in the Senate than in the House. Even when authority to negotiate deals devolves to committee or other coalition leaders and the involvement of party leaders is difficult to detect, in the contemporary Congress those leaders are rarely left uninformed.

Negotiation terrain. One of the most important differences between private negotiations and deal making in Congress is the broad—perhaps limitless—reach of congressional jurisdiction. As Representative Frank framed it, "The key to understanding deal making in

Congress is to remember that the ankle bone is connected to the shoulder bone. Anything can be the basis of a deal. . . . In Congress, the jurisdiction is universal.” The omnicompetence of congressional authority makes possible frequent integrative solutions to policy problems. Congress’s broad reach allows leaders to enlarge the policy pie and to secure positive-sum solutions to otherwise intractable problems. Unrelated or loosely related issues can be addressed simultaneously, giving different lawmakers alternative reasons to sign onto a package. “Different priorities across issues,” Representative Frank noted, “are often the basis of an agreement.”

In a book subtitled “How Congress Really Works,” Representative Henry Waxman (D-Calif.) views integrative, win-win negotiation as the basis of most successful congressional deals. “The greatest misconception about making laws is the assumption that most problems have clear solutions, and reaching compromise mainly entails splitting the difference between partisan extremes,” he wrote (2009, 77). Waxman offered the Food Quality Protection Act of 1996 as one example. This law, a comprehensive new set of regulations governing pesticides in food, was passed during conditions of divided government, despite long-standing partisan stalemate over regulatory policy in this area. According to Waxman, he and Representative Tom Bliley (R-Va.), chair of the House Commerce Committee, were able to negotiate a deal that took advantage of their different priorities. Conservative Republican Bliley prioritized repealing a strict regulation of carcinogens in processed food—a regulation that experts expected would be more rigorously enforced in the wake of a court ruling. Liberal Democrat Waxman was most concerned with the lack of regulations on carcinogens in raw foods—to his mind, a greater problem given the impact of such pesticides on children. Waxman, Bliley, and representatives of the affected industries struck an accord that established a single standard governing pesticides in food—raw or processed—that required a reasonable certainty of “no harm” to consumers (including special considerations for infants and children). Their solution won unanimous approval in the House, verbatim acceptance in the Senate, and President Bill Clinton’s signature.

The search for win-win solutions is labor-intensive, as this and other case studies recount. Information must be gathered from many sources—for example, interest groups, affected industries, policy experts, activists, and government agencies—before members and their staffs can understand the causes and dimensions of a policy problem and see a pathway to possible solutions. Lengthy discussions and negotiations are often needed for the different actors and stakeholders to understand one another’s interests. Many, probably most, such negotiations fail. However, these processes of information gathering, consultation, and discussion lay the groundwork for creative problem solving that can address the concerns of all key interests at once. The result can be legislation that commands widespread support, even from players who initially saw their interests and preferences as opposed.

Interparty negotiations. In interparty negotiations, there is no default presumption of cooperation. Given the two parties’ diametrically opposed electoral interests in winning and retaining control of Congress, members generally regard initiatives sponsored by the opposing party with suspicion and skepticism. In the contemporary Congress, there may even be a default presumption of opposition, such that the minority party will resist the majority’s proposals unless it is actively courted and successfully co-opted. As one experienced congressional negotiator noted, “It is not uncommon for members of one party to oppose legislation merely because the other political party champions it” (Barry 2003).

Before commencing negotiations across party lines, members and leaders of both parties ask: What are the political consequences of refusing negotiation? Who will suffer more politically from a deal not being done? The answers to those questions determine each side's bargaining power. The greater (lower) is the cost to the minority of saying no, the greater (lower) is the majority's bargaining leverage. Because both parties gauge the political fallout from a failure to produce a deal, Representative Frank explained, "It boils down to which side can message it better." Those who perceive themselves on the right side of public opinion will see themselves as having political leverage. A minority party that expects to win the message battle may disengage altogether. A majority party that expects to win the message battle will see less need for policy concessions to the opposition. In contrast, anticipation of losing the "blame game" can drive partisans to the negotiating table.

From the majority's perspective, coalition leaders must decide whether to try to include the minority. Given the differences in House and Senate rules, bipartisanship is typically more necessary in the upper chamber than in the House. A Senate majority party rarely can hope to legislate without at least some support from the minority. Reflecting on his long Senate career (1981–2011), former Senator Chris Dodd (D-Conn.) observed that on every major legislative success, "I've always had a Republican partner, every time" (quoted in Kaiser 2013, 204). Strictly speaking, a House majority party that can hold its ranks together does not need support from the minority to get legislation through the chamber. Even so, House majority leaders may nevertheless prefer to seek support from the minority party. Having bipartisan support in the House sends signals that can be beneficial for winning the necessary support elsewhere in the legislative process. As Waxman (2009, 136) recounted about the Food Quality Protection Act of 1996, when his staffer called President Clinton's Chief of Staff, Leon Panetta, to inform him of the deal, Panetta stopped him. "If Waxman and Bliley are together on this, I don't need to know any more. We're for it."

Bipartisanship can also confer political legitimacy on a majority party's legislative efforts. A majority party may well be prepared to pay for such legitimacy by making substantive policy concessions to the minority. Barry (2003, 442) described the many efforts that House Judiciary Chairman F. James Sensenbrenner, Jr. (R-Wisc.) made to obtain bipartisan support for the USA-PATRIOT Act in 2001. "The [George W. Bush] Administration wanted and needed overwhelming bipartisan support for its anti-terrorism proposal," she described. "Thus, the proposal's opponents were aware that in making public their disagreement with many of the provisions—and threatening the legitimacy of the Administration's proposal—they would receive some degree of leverage in the negotiations." Sensenbrenner and the Bush administration made policy concessions that were not strictly essential for House passage in order to secure broad bipartisan backing. Recognizing a similar political logic, Senate Minority Leader Mitch McConnell (R-Ky.) explained the strategy behind systematically withholding Republican support across the board for healthcare-reform legislation in 2009–2010: "It was absolutely critical that everybody be together because if the proponents of the bill were able to say it was bipartisan, it tended to convey to the public that this is O.K., they must have figured it out," said McConnell. "It's either bipartisan or it isn't" (quoted in Hulse and Nagourney 2010). The minority party's ability to confer or withhold this kind of political legitimacy gives it leverage in interparty negotiations.

The majority must ask how much it has to give away to achieve its goals. As Representative Frank described the logic, "You start with the rational people. You order your preferences.

You hope that you care more about more different things than they do, which gives you more flexibility in bargaining.” A majority party may well decide that the price being demanded by the minority is too high. It may try to go it alone, even though it is rare that major legislation in the United States passes with support from only one party (Mayhew 2005). A majority party may eschew compromise altogether to keep an issue alive for the next election campaign, especially if it expects to gain additional seats in Congress.

At the same time, the opposition has its own calculations. As with the majority, the minority party also faces explicit tradeoffs between politics and policy. As Representative Frank stated it, “You think to yourself: ‘They have the votes anyway. Am I better off making a deal and improving the policy? Or am I better off just opposing?’” In other words, do we want to use the issue to draw clear political distinctions between the parties, even at the cost of diminishing our influence over the substantive policy outcomes? Or do we prefer to influence the policy by trading our support in exchange for concessions, recognizing that doing so comes at the price of not being able to campaign as forcefully against the majority party on that issue? The minority may well prefer to use an issue for campaign purposes, even when the majority is willing to offer favorable substantive concessions on policy. Kaiser (2013, 206-207), for example, reported that Senator McConnell was uninterested in a bipartisan deal on new Wall Street regulations in 2009–2010. Instead, McConnell considered Democrats’ reform efforts a major opportunity for the Republican Party to raise campaign funds from financial interests.

In short, both parties must be willing to cross a threshold before any real bargaining is possible. When there are few or no political costs to saying no (or even benefits to saying no), then interparty negotiation will probably not even take place. How do the parties make their calculations about the costs of saying no to a pending matter? The desire to avoid blame for killing a deal strongly shapes lawmakers’ and their leaders’ incentives to cooperate. Past experience and polling results often lead both parties to come to the same conclusions about which side will shoulder the blame for failing to legislate. The government shutdown in 1995 under Speaker Newt Gingrich (R-Ga.) illustrates the consequence of underestimating the political costs of saying no. Gingrich grossly miscalculated who would be blamed for a government shutdown. Polling turned sharply against congressional Republicans, who eventually came to the table to negotiate an agreement with President Clinton and the Democrats. Since then, almost all lawmakers in Congress understand that the public may well assign blame to one party or the other if the government is shut down.

Party members will nevertheless sometimes reach different conclusions about the costs of saying no than party leaders. We consider, for example, the uncertain prospects for immigration reform in the summer of 2013. Many Republican elites and party strategists concluded that the electoral costs of blocking a deal on immigration reform are too great for the Republican Party over the long term. In this context, a bipartisan Senate “gang” was able to drive a comprehensive immigration reform to passage in the Senate Judiciary Committee and on the Senate floor. To be sure, less than a third of Senate Republicans signed on to the deal. However, the package safely cleared the Senate’s supermajority requirements that in the past had blocked immigration reform. Given both parties’ willingness to negotiate, the final Senate package was an integrative, win-win solution. Democrats cared the most about securing a path to citizenship for the nation’s undocumented millions; the GOP cared most about securing the borders. A deal was reached

when Democrats offered to *double* spending on border security. Even the prime GOP sponsor of the deal-making amendment called the border spending “almost overkill” (quoted in Blake 2013). Whether House GOP members reach the same conclusion about the costs of saying no remains to be seen. So far, rank-and-file Republicans in the House seem interested only in parts of immigration reform that are popular with conservative constituencies and business interests back home. Can party elites convince their members that blame for blocking reform would be too costly for the party as a whole to shoulder? How Republicans answer that question will help determine when or if Congress will “get to yes” on immigration reform.

Intraparty negotiations. Rank-and-file members have many reasons to sign on to deals advocated by party and committee leaders. We might say that it is a default position for members to support their party leaders; they “go along to get along” and vote no only when they have a specific reason to do so. Members have a political interest in seeing the leaders of their party succeed. Party unity is usually seen as helpful to a party’s brand-name reputation for competence and policy coherence. Substantive policy negotiation is also easier among party members because the barriers of mistrust and suspicion are lower than between the parties. Beyond the generalized trust and goodwill that are stronger within the political parties than between them, there are many extra-legislative favors that coalition leaders can provide to facilitate intraparty deal making.

First, leaders have procedural powers that can offer political benefits to members. As Representative Frank stated, “Members need protection.” Sometimes such protection comes in the form of assurances that members will not have to face votes on controversial issues. Again, from Representative Frank:

I’d often have members come to me to say, “Can you guarantee that a particular issue will not come up for a vote?” I’ll say, “Well, it’s kind of a crazy idea, and it won’t come up.” They’ll respond, “If you can guarantee that it won’t come up, I can announce I’m for it.”

Smoothing the way for a member on a difficult issue helps leaders to curry support on other issues. Similarly, party leaders can sometimes win support from recalcitrant members without making policy concessions to them. For example, they may grant a member a recorded vote on a favorite issue. The member may well be satisfied with winning political visibility as a “player” and a champion on that issue, even if his or her amendment fails in adoption. As Representative Frank explained with respect to House floor votes on Dodd–Frank financial regulatory reform:

I would go to leaders to ask for an amendment from Walt Minnick or Melissa Bean. The leadership will permit it if it can be defeated. . . . If so, then it can be offered. It’s like the situation in *Catch-22*: “Only schedule appointments when I’m not in the office.”

Second, leaders’ control of resources allows them to do favors for their rank and file that increase the likelihood of support from fellow partisans. Such favors include guaranteeing consideration of members’ minor bills on the House floor, contributions from leadership political action committees (PACs) to members’ campaign coffers, and even seemingly minor gestures such as showing up for members’ fundraisers. “Always give people a vested interest in maintaining a good relationship with you,” advised Representative Frank.

In summary, the prospects and likely outcomes of congressional negotiation are very different within and between the congressional parties. With rare exceptions, rank-and-file partisans willingly engage in negotiations with their own party leaders. After all, members usually have a political interest in seeing their party leaders succeed. Furthermore, party leaders possess many resources to please their rank-and-file members even without making substantive policy concessions on a pending issue. Interparty dealing is far more limited: the opposition must first weigh the political incentives to negotiate at all. If they are unwilling to cross that threshold, strategic disagreement kicks in. Under such conditions, legislative deals are out of reach except for unusual political circumstances (e.g., the short “window” running from 2009 into early 2010 when Democrats controlled both ends of Pennsylvania Avenue, bolstered by a filibuster-proof majority in the Senate). Under normal circumstances, interparty negotiations can begin and have a chance at success only when sufficient numbers of the opposition decide that they want to “get to yes.”

Successful Negotiating: Instruments

This report identifies a set of institutional arrangements and policy tools that have facilitated successful negotiations in other contexts, including private meetings, penalty defaults, expertise, and repeated interactions (Martin 2013). In this section, we explore the relevance and effectiveness of these factors in the congressional context, as well as other factors informed by the congressional literature.

Secrecy. The move toward greater transparency in congressional operations—starting in the 1970s with a burst of “sunshine” laws for committees and the House floor in particular—has proven to be a double-edged sword. Greater openness of a legislative body might be considered a normative good: it increases the ability of the public and organized interests to hold accountable individual lawmakers and the institution as a whole for its decisions. However, the more transparent the legislative process is, the more the public dislikes Congress (Hibbing and Theiss-Morse 1995). Most people prefer to be “out of the kitchen” when legislators “grind sausage.” Transparency does not necessarily lead to greater institutional legitimacy; in some cases, it may undermine it.

More worrisome, transparency often imposes direct costs on successful deal making. First, public attention increases the incentive of lawmakers to adhere to party messages, a step rarely conducive to setting aside differences and negotiating a deal. We consider, for example, what senators said as they emerged from the Senate’s bipartisan retreat behind the closed doors of the old Senate Chamber in the summer of 2013, when Democrats were considering “going nuclear” to change the Senate’s filibuster rule. “There was no rancor at all,” Senator John Boozman (R-Ark.) noted about the closed-door session with 98 senators in attendance. “I think if the American people were watching, the whole tone would have been different. It’s different when the TV cameras are on. That might be part of the problem” (quoted in O’Keefe and Johnson 2013). Along these lines, Bessette (1994, 221) contended, “The duty to deliberate well may often be inconsistent with attempts to conduct policy deliberations on the plane of public opinion.” Public settings encourage members to posture before external audiences rather than engage directly with their congressional interlocutors.

Second, transparency interferes with the search for solutions. Conducting negotiations of multidimensional, integrative solutions behind closed doors gives lawmakers more freedom to explore policy options. The genius of integrative solutions is that negotiating parties care unequally about different parts of the deal, requiring enlargement of the pie to secure competing parties' consent. The common mantra surrounding such negotiations is "Nothing is agreed to until everything is agreed to" (Yglesias 2011), which reflects the conditional nature of most integrative solutions. Support for a provision that might be unpopular with your side is contingent on including a provision about which your side cares more. Leaking a less popular part of a deal—without linking it to what your party really cares about—is likely to kill the viability of the leaked provision, weakening the prospects for a deal. Waxman (2009, 137) attributed his successful pesticide negotiations with Bliley to a good mutual relationship and a common commitment to secrecy: "We implicitly trusted one another not to go public, had things not worked out, with the details of what the other had been willing to concede." Keeping negotiations secret until the whole package is unveiled allows both sides to justify the broader deal to constituencies and, in theory, avoid blame for unpopular giveaways. "The only way this type of negotiation can succeed is to tackle the whole problem in one fell swoop so that news of the deal arrives concurrently with the endorsements of all the major interests" (Waxman 2009, 137). This is also why—Representative Frank reminds us—serious negotiations rarely take place until very late in the game: early negotiations risk leaks of the parts of an integrative solution.

Despite the costs of transparency, private negotiations in Congress are increasingly difficult to secure. Repeated efforts to negotiate grand bargains on deficit reduction in the 112th Congress (2011–2012) were undermined each time by successful leaks about potential elements of a deal. Democratic-affiliated activists rejected reworking how the government calculates inflation for federal benefits (i.e., the so-called chained Consumer Price Index proposal), whereas Republican-affiliated activists rejected any provisions that would raise revenue by increasing tax rates. Exceptions to the rule include the most recent bipartisan Senate gang on immigration reform, whose negotiations were shrouded in secrecy to the extent that participants could engineer it. The gang essentially made a pact to oppose deal-threatening amendments in committee and again during Senate-floor consideration. Critical to the deal's success was its initial crafting in secret: that move gave senators the space to knit separate dimensions of immigration reform into a single package, exploiting the variation in senators' weighting of key issues and making support of one another's priorities conditional on support for the whole. The rarity with which House and Senate leaders can secure privacy complicates negotiations in Congress.

*Penalty defaults*¹. Congress rarely acts in the absence of a deadline. Congress seems to recognize this and therefore regularly builds deadlines into the design of policies. Such deadlines often take the form of "sunset dates," which are limited authorizations for public programs that force the parties to reconsider policies when an appointed time arrives (Adler and Wilkerson 2013). At times, Congress crafts temporary fixes, requiring reconsideration at a later date. Congress tries to "rig" many such penalty defaults to guarantee action from itself at a future date, such as when it agrees to only a small increase in the government's legal borrowing limit. Other times, penalty defaults are beyond Congress's control: courts or states can impose policy changes that create an unacceptable status quo. Perhaps the most familiar penalty default is embedded

1 The origins of the concept of penalty defaults stem from contract law (Ayres and Gertner 1989).

in the US Constitution: “No money shall be drawn from the Treasury but in consequence of appropriations made by law.”² Failure to enact annual spending bills to fund the government’s discretionary programs forces a government shutdown.

Regardless of the origin or structure of a penalty default, the underlying concept is the same. In the congressional context, such default provisions are expected to be action forcing. In theory, Congress will move to avert an unacceptable penalty imposed by the default. The default fall-back provisions create “must-pass” bills because failure to legislate would produce what is deemed to be an extreme (and, thus, politically unacceptable) reversion policy. However, as we argue herein, policy and politics are always intertwined. When we think about the potential for penalty defaults to force lawmakers to make a deal, we must consider the political consequences of blocking an agreement.

At times, the penalty defaults engineered by Congress work. Hacker and Pierson (2005, 61-62) called them policy “time bombs.” The fiscal cliff “worked” to get Congress to act on tax policy because the restoration of Clinton-era middle-class income-tax rates was deemed a political nonstarter by both parties; neither party wanted to shoulder the blame for raising middle-class taxes. Other times, penalty defaults are a bust. The Joint Committee on Deficit Reduction (aka the “Supercommittee”) of 2011 failed to produce a budget grand bargain even when the penalty default was *sequestration*—that is, blanket cuts across discretionary federal spending. Sequestration—at the time considered a “sword of Damocles” that would give both parties an incentive to cooperate—failed in practice as a penalty default. Lawmakers individually escaped blame for the draconian cuts, even as Congress came under fire for its failure to act. In short, there was little incentive for Republicans (and perhaps for Democrats) to avoid the penalty outcome. Congress did act to avert cuts at the Federal Aviation Administration but only after a well-organized air-travel industry (including pilots, flight attendants, passengers, and shippers) raised the political costs of saying no for both parties. The conditional success of penalty defaults keeps them from being an easy solution for securing major deals in Congress.

Expertise. Congress relies on information and expertise but not of a technocratic sort. Neutral expertise bodies established within the legislative branch, including the Government Accountability Office and the Congressional Budget Office, have limited impact on negotiating deals in Congress. Lawmakers cite these agencies when the experts produce favorable results for their own agenda; however, such expertise is heavily discounted when unfavorable.

That said, Congress is anxious for expertise of a more politicized sort. It seeks out input from affected interests on the possible effects of legislative proposals. It wants to know whether interest groups are “on board.” Kaiser (2013, 166) wrote that the first responsibility of congressional staff in crafting major legislation is “to hear out and sometimes to seek out the opinions of every party that would be significantly affected by it.” Information gathering (e.g., from groups, industry, and agencies) allows members to discern different valuations across issues that allow potential win-win deals to be made. If all affected groups can coalesce around a policy—and settle the controversies among themselves—Congress often will ratify the result.

Repeated interactions. Current and former members and staff testify to the importance of relationships and getting to know one another on a personal basis. Political scientists are often

2 Article I, Section 9, Clause 7.

skeptical of such claims. However, a sizeable literature shows that senior legislators are more legislatively successful (Cox and Terry 2008) and that their effectiveness in office increases across their careers in the House (Volden and Wiseman 2009). Lawmakers who have been in office longer have more specific human capital that enhances their legislative success. Female legislators in the minority party seem to outshine their male colleagues in legislative effectiveness (Volden, Wiseman, and Wittmer 2013), a function perhaps of their superior collaborative skills (see, e.g., Rosenthal 1998).

Institutional arrangements that encourage repeated interactions may thus promote successful deal making in Congress. The standing committees of Congress comprise the primary congressional institution fostering repeated interactions and expertise among members, although committee-chair term limits imposed by Senate Republicans and by House chamber and Republican Party rules have disrupted repeated relationships in both chambers. Most major legislative deals emerge from committee work. In the case of the Dodd–Frank financial-regulatory reforms, the key committee chairs—Representative Frank and Senator Dodd, both longtime institutional loyalists—had built relationships of trust during their many years of service that assisted them in constructing durable coalitions (Kaiser 2013). All else equal, repeated interactions—across lawmakers, their staffs, and lobbyists for key organized interests—undoubtedly facilitate deal making.

The rise of partisanship, however, has weakened congressional committees and contributed to the breakdown of “regular order.” For example, the Senate Finance panel’s slow start in 2013 in getting tax reform off the ground testifies to the difficulties that committee leaders now face in tackling policy challenges without the support of party leaders (Lesniewski 2013). Lawmakers often resort to ad hoc or “unorthodox” procedures to achieve major deals in the contemporary context. Sometimes small bipartisan groups of legislators (or “gangs”) assume responsibility outside of the formal committee system for generating bipartisan measures. Some of these are successful (e.g., the Finance Committee gang that worked to generate the Senate healthcare proposal in 2009); others are not (e.g., the Gang of Six that met in 2011 and 2012 to negotiate a grand bargain on debt and deficit reduction). Ad hoc arrangements sacrifice many of the negotiating advantages afforded by long-standing repeated interactions, but they are sometimes the only pathways to success under contemporary conditions.

Messaging and communications. The “messaging game” shapes the public’s views of legislative battles in Washington (Malecha and Reagan 2012; Sellers 2010). Episodes of messaging and communication strategies more generally can put pressure on the opposition party to come to the table to negotiate a deal. However, messaging typically must be blunt and often becomes little more than an effort to demonize the opposition; it then can impede negotiations. This is yet another reason why secrecy often improves the prospects for a deal, although party messaging tends to continue right up to the eleventh hour, even when lawmakers find themselves cloistered behind closed doors in the final moments before an impending deadline.

Leadership from the president. The president unquestionably has a central role in setting the stage for congressional negotiations. When presidents focus on an issue, they can set the legislative agenda “single-handedly” (Kingdon 1995, 23). Presidents surpass any individual lawmaker in their ability to garner media attention. Strategic appeals from the president—which, in turn, are shaped partially by the disposition of public opinion on an issue (Canes-Wrone

2001)—can help a president win more in bargaining with Congress (at least with respect to budget battles over spending). At the same time, presidential appeals can be a double-edged sword: they potentially commit lawmakers to particular positions, a move that limits legislators’ bargaining flexibility (Kernell 2006). More generally, Edwards (2003) in his book, *On Deaf Ears*, warns that presidential appeals almost always fail to move public opinion.

Presidential leadership is more helpful with members of the president’s party than with the opposition. Members of the president’s party have a political stake in the president’s success, separate from their views on the underlying policy issues involved. As a consequence, a president who is publicly championing an issue undoubtedly puts pressure on members of his party in Congress. By the same logic, however, presidential leadership alienates the opposition party (Lee 2009). After all, a president’s policy successes are not politically beneficial to his party opposition. As one White House aide in the George W. Bush administration observed, “It seems like if the President is publicly ‘for’ something, the Democratic leaders [in Congress] are automatically against it” (quoted in Andres 2005, 764). Senator Pat Toomey (R-Pa.) observed this dynamic among his fellow Republicans during the Obama presidency: “There were some on my side who did not want to be seen helping the president do something he wanted to get done, just because the president wanted to do it” (quoted in Brandt 2013). Do quieter appeals make a difference for congressional negotiations? Perhaps, although it is a more difficult conjecture to evaluate, given the low visibility and traceability of an administration’s behind-the-scenes role in deliberations over policy.

Conclusions

In tribute to one of his principal staff negotiators, Senator Mitch McConnell (R-Ky.) said, “I assure you it is rare in this business to come across somebody who combines a brilliant mind for policy and a brilliant mind for politics in one package.”³ McConnell’s comment captures a truth about negotiation in Congress. The outcome of congressional negotiations depends on more than policy considerations. Negotiation in Congress is also driven by politics. Members and leaders negotiate with an eye to deals that they can defend successfully to constituencies outside of Congress. In this light, a good deal on policy merits still may be judged too politically risky. Members and leaders also consider whether it is in their party’s interests to strike a deal or whether it seems more politically advantageous to preserve the disagreement for electoral purposes. Politics will often lead members to reject compromises that would be acceptable if public policy were the only consideration. By the same token, members sometimes accede to undesirable policies when the politics of holding out becomes too difficult to sustain.

One obvious implication is that negotiation in Congress is far more complex than negotiation in the private sector. As Chapter 4 points out, many cognitive obstacles stand in the way of successful negotiation, including fixed-pie bias, self-serving bias, and general difficulties of perspective taking. All of these difficulties inevitably affect negotiation in Congress as well. Making success even more problematic, congressional negotiation also occurs in a political context, in which members must evaluate deals for their effects on their individual reelection efforts and political reputations, as well as for their party’s broader interests in winning and

3 Congressional Record, July 31, 2013, S6085.

maintaining institutional control. Members of Congress frequently confront tradeoffs between their political interests and their policy goals.

On the other side of the ledger, there is more room in Congress for integrative solutions than in most other negotiation settings. Congress's broad jurisdiction allows for a wide array of unrelated issues to be considered simultaneously, affording players with different priorities a reason to come together and shake hands on a deal. This basic fact suggests that scholars need to do more to investigate how integrative negotiation works in Congress rather than relying so heavily on a congressional literature that emphasizes models of "splitting the difference." Undoubtedly, splitting the difference can be the basis of agreement in Congress when the conflict is over divisible goods, such as budgets, appropriations, and taxes. However, many issues are not amenable to this kind of resolution. At the same time, the broad range of issues available to congressional negotiators gives wide scope for creative legislators to strike deals.

The contemporary Congress labors under remarkably high barriers to success in negotiations. As described by Barber and McCarty see Chapter 2, Congress today is strongly polarized by party in terms of members' policy preferences. During the 1950s, 1960s, and 1970s, the broader range of policy positions held by members of both parties in Congress facilitated interparty negotiation. In the contemporary Congress, there is far less overlap between the policy preferences of Republicans and Democrats. As the parties have moved farther apart in policy terms, they also have tended to become internally more homogeneous. Increased party cohesion in the House can make intraparty negotiation in the House more efficient and successful. (Indeed, since 2011, a House GOP majority increasingly *divided* between mainstream and hardline elements has struggled to reach deals within their conference.) However, increased party cohesion can undermine deal making in the Senate. Given the Senate's supermajority procedures, increased intraparty homogeneity coupled with partisan conflict has rendered Senate obstruction rampant, with the minority party deploying the filibuster as a veto against the majority party's legislative agenda. Even parties under unified government rarely have a clear shot to legislative success. In short, party polarization has greatly complicated the task of legislating (Binder 2003; Sinclair 2006, 2012).

Today's political context is unfavorable for congressional negotiations. Political competition between the parties for control of national institutions creates electoral incentives for the parties to engage in "strategic disagreement." The United States is also in the midst of a ferociously party-competitive era, in which the two major parties stand at near parity in terms of their prospects for winning or holding control of national institutions. Since 1980, control of the Senate shifted six times, with Democrats in the majority for nine Congresses and Republicans for eight. Control of the House of Representatives reversed three times, also with Democrats in the majority for nine Congresses and Republicans for eight. Between 1981 and 2017, Republicans will have held the presidency for 20 years and Democrats for 16 years. When control of Congress or the White House hangs in the balance, lawmakers weigh more heavily the partisan political consequences of negotiations. Such zero-sum competition fuels antagonism between the parties beyond the policy-based obstacles to agreement fostered by ideological polarization.

In the United States, both political and policy considerations complicate successful negotiation, especially in periods of polarized parties. Our political system's many veto points and extensive array of checks and balances demand considerable negotiating skill

among officeholders to make government function. Yet, “Congress is becoming more like a parliamentary system,” observed former Senator Olympia Snowe (R-Maine), “where everyone simply votes with their party and those in charge employ every possible tactic to block the other side” (quoted in Kaiser 2013, 398). The outcome is a Congress and a national government in which deals are more elusive than ever.

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