

8-2014

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Recommended Citation

Fechner, Holly (2014) "Managing Political Polarization in Congress: A Case Study on the Use of the Hastert Rule," *Utah Law Review*: Vol. 2014 : No. 4 , Article 3.
Available at: <https://dc.law.utah.edu/ulr/vol2014/iss4/3>

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MANAGING POLITICAL POLARIZATION IN CONGRESS: A CASE STUDY ON THE USE OF THE HASTERT RULE

Holly Fechner*

INTRODUCTION

Fast-paced, collegial, productive, rewarding: just a few words that describe my time working in the United States Congress from 1999 to 2007. Although my experience may be somewhat atypical because I worked for Senator Edward Kennedy, considered to be one of the greatest legislators of his era, most of my colleagues in other congressional offices felt the same way.¹

Fast forward to the fall of 2013. “SHUTDOWN, Congress stuck in funding stalemate,” screamed the front page of *The Washington Post* on October 1, 2013.² Few would disagree that Congress sunk to a low point. What happened? Did Congress hit bottom? How will it function in the coming years?

In recent years, critics have routinely called out the “do-nothing,” dysfunctional, unproductive Congress. Over the past year, “broken” has replaced do-nothing. The 112th Congress proved the least productive in modern history as measured by laws passed. The dramatic standoff over funding the federal government and extending the debt ceiling in the 113th Congress served as the

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¹ On a number of important bills, Senator Kennedy had a partner—his dear friend and colleague Senator Orrin Hatch, the Senior Senator from Utah. Quite the unlikely couple, Senators Kennedy and Hatch became close during their years trading the roles of chairing and ranking on the Health and Judiciary Committees. The two teamed up to pass groundbreaking legislation, including the Children’s Health Insurance Program, and they shared a genuine friendship. Senator Hatch wrote and performed a love song for the Senator and his wife Vicki and spoke movingly at his memorial service. But Senators Hatch and Kennedy were ideological opposites and often ripped into one another’s arguments on the Senate floor. I recall one day when the two were debating labor issues—a hot-button topic. After a particularly heated back-and-forth, Senator Kennedy walked over to the other side of the aisle to Senator Hatch and gave him a bear hug. The entire Senate chamber broke out in applause to see those two embracing.

² Lori Montgomery & Paul Kane, *Shutdown: Congress Stuck in Funding Stalemate*, WASH. POST, Oct. 1, 2013, at A1.

most egregious example of congressional dysfunction. The sixteen-day, \$24 billion federal government shutdown drove approval of Congress to its lowest level ever.³

Congress's dysfunction manifested itself in inaction on major policy priorities and also in gridlock on issues that are normally treated as noncontroversial. Three times within two years, Congress teetered on the brink of failing to pass an extension of the debt ceiling. Historically, passage was never in doubt even if such votes were sometimes a forum for partisan grandstanding. In fact, Congress has voted ninety-four times to extend the debt ceiling since 1944.⁴ In the summer before the shutdown, the House voted down the farm bill, considered "must-pass" legislation for forty years.⁵ And the House went through a series of gyrations to pass a transportation bill, historically one of the most bipartisan issues.

From the perspective of supporters of limited government, however, an unproductive Congress is not an unsuccessful one. The spokesman for the House of Representatives, Speaker John Boehner, noted that in divided government, a "big part of our job has been to stop bad things from happening."⁶ Speaker Boehner set the bar even higher for Republicans when he said that Congress "should not be judged on how many new laws we create, we ought to be judged on how many laws we repeal."⁷ Divided government prevented Republicans from succeeding in repealing laws outright, although they tried repeatedly, including voting over fifty times to repeal the Patient Protection and Affordable Care Act.⁸

This Article discusses the ideological polarization of Congress and of the Republican Party in particular. The rise of the Tea Party widened the ideological spectrum of members of the Republican caucus in Congress, especially in the House. To retain his leadership position and balance the competing factions in his caucus, Speaker Boehner routinely used a political and procedural tool known as

³ Frank Newport, *Congressional Approval Sinks to Record Low*, GALLUP (Nov. 12, 2013), <http://www.gallup.com/poll/165809/congressional-approval-sinks-record-low.aspx>.

⁴ Simon Rogers, *US Debt Ceiling: How Big Is It and How Has It Changed?*, THE GUARDIAN (Jan. 2, 2013, 9:00 AM), <http://www.theguardian.com/news/datablog/2011/jul/15/us-debt-ceiling-historic>.

⁵ See Ed O'Keefe, *Farm Bill Talks Continue with Deadline Approaching*, WASH. POST, Dec. 2, 2013, http://www.washingtonpost.com/politics/farm-bill-talks-continue-with-deadline-approaching/2013/12/02/da9efa56-5b72-11e3-a66d-156b463c78aa_story.html.

⁶ Chuck Todd et al., *First Thoughts: Unpopular and, So Far, Unproductive*, NBC NEWS (July 1, 2013, 6:18 AM), http://firstread.nbcnews.com/_news/2013/07/01/19232708-first-thoughts-unpopular-and-so-far-unproductive.

⁷ Marshall Cohen, *Boehner Interview Still Making Waves*, CBS NEWS (July 24, 2013, 5:25 PM), http://www.cbsnews.com/8301-3460_162-57595374/boehner-interview-still-making-waves/.

⁸ Puneet Kollipara, *Wonkbook: More Obamacare Delays, and Another Repeal Vote by GOP*, WASH. POST: WONKBLOG (Mar. 6, 2014, 8:35 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/03/06/wonkbook-more-obamacare-delays-and-another-repeal-vote-by-gop/>.

the Hastert Rule.⁹ The Hastert Rule provides that the Speaker of the House will not schedule a bill for a floor vote unless a “majority of the majority” favors the legislation.¹⁰

The routine use of the Hastert Rule in recent Congresses magnified the influence of the Tea Party. They wielded significantly greater power over the Republican caucus than over the House as a whole both as a function of their visibility and outspokenness in policy debates and because of their vigor in challenging Republican incumbents in primary elections. The Tea Party members succeeded in furthering their substantive agenda by shutting down the federal government, drastically cutting federal spending for domestic programs, and stopping reauthorization of significant, long-standing federal legislation.¹¹ Ultimately, however, to avoid complete dysfunction and preserve the future political viability of the Republican Party, Speaker Boehner chose to break the Hastert Rule and allow critical legislation to pass with a majority of Democratic votes, not the majority of the majority. Strategically controlling the use of the Hastert Rule allowed Speaker Boehner to relieve some of the political pressure that the Tea Party members exerted. Analyzing the House Republican caucus and its use of the Hastert Rule is key to understanding Congress now and in the future.

This case study of the 112th and 113th Congresses demonstrates how informal, but accepted, procedural tools can serve political and substantive purposes. The Hastert Rule allowed Speaker Boehner to delicately and successfully navigate a treacherous political path of managing his divergent caucus and preserving his leadership position. At the same time, the routine use of the Hastert Rule gave Tea Party members outsized influence to push legislation further to the right. Speaker Boehner ignored the Hastert Rule when it was necessary to allow critical legislation to pass and avoid long-term political harm to his party. As a general matter, Speaker Boehner invoked the Hastert Rule to tell his caucus that they were in charge because a majority of the majority would determine the fate of

⁹ Although the Senate filibuster rules have received the lion’s share of attention, consideration of Hastert Rule is critical for those who seek to understand Congress now.

¹⁰ See Timothy Noah, *The Absurdity of the Hastert Rule*, MSNBC (Sept. 27, 2013), <http://www.msnbc.com/msnbc/the-absurdity-the-hastert-rule>.

¹¹ See Steve LaTourette, *Don’t Blame Boehner for House Dysfunction*, WASH. POST, Sept. 20, 2013, http://www.washingtonpost.com/opinions/dont-blame-boehner-for-house-dysfunction/2013/09/20/511aa3a0-2208-11e3-a358-1144dee636dd_story.html. Former Republican member of Congress Steve LaTourette posited:

It is [Tea Party] members who are largely responsible for the dysfunction in Washington and the failure of the legislative process. They have gleefully ground to a halt the work of the people. Because of them, agreement cannot be reached on legislation once deemed too important not to pass, such as the farm bill or the transportation bill.

Id.

legislation. In rare circumstances, however, and often with the tacit support of his caucus, Speaker Boehner overrode the majority of the majority.

Part I of this Article provides evidence of increased dysfunction in Congress that emanates in significant part from heightened ideological polarization of the political parties and the members. Part II introduces the substantive and political uses of the Hastert Rule and argues that the routine use of the Hastert Rule in the 112th and 113th Congresses magnified the influence of Tea Party members. An in-depth examination of Speaker Boehner's recent use of the Hastert Rule is offered in Part III.

I. THE BROKEN CONGRESS AND IDEOLOGICAL POLARIZATION

"Do-nothing" is just one of many terms that have been used to describe Congress in the past few years.¹² This and other derogatory phrases express the popular belief that Congress's effectiveness is at an all-time low. Recent data from Gallup shows that public approval of Congress is at one of its lowest points in history.¹³ Similarly, Gallup's polling data also shows that the public's faith in Congress has declined precipitously in recent years.¹⁴ In November 2013, the approval rating for Congress dropped to its lowest level ever.¹⁵

The productivity of Congress also has declined. At the time, the 112th Congress was the least productive in modern history in terms of laws passed.¹⁶ Congressional productivity has been trending down for decades.¹⁷ The 113th Congress has been even less productive, passing just over half of the average amount of laws passed in the previous nine Congresses.¹⁸ What is striking about congressional failures now are the high stakes. As one commentator noted, "The chaos and dysfunction have set in so deeply that Washington now lurches from crisis to crisis, and once-dull, keep-the-lights-on rituals of government procedure are transformed into white-knuckle dramas that threaten national or even global catastrophe."¹⁹ The failure to pass the most basic legislation to fund the

¹² See, e.g., John E. Porter, *A Do-Nothing Congress Isn't Healthy*, CNN: OPINION (Aug. 16, 2013, 10:50 AM), <http://www.cnn.com/2013/08/16/opinion/porter-health-research-congress/index.html>.

¹³ *Congress and the Public*, GALLUP, <http://www.gallup.com/poll/1600/congress-public.aspx#1> (last visited June 1, 2014).

¹⁴ *Id.*

¹⁵ Newport, *supra* note 3 ("Americans' approval of the way Congress is handling its job has dropped to 9%, the lowest in Gallup's 39-year history of asking the question.").

¹⁶ Drew DeSilver, *Congress Ends Least-Productive Year in Recent History*, PEW RES. CTR. (Dec. 23, 2013), <http://www.pewresearch.org/fact-tank/2013/12/23/congress-ends-least-productive-year-in-recent-history/>.

¹⁷ *Id.*

¹⁸ See *id.*

¹⁹ Jonathan Chait, *Anarchists of the House*, N.Y. MAG. (July 21, 2013), <http://nymag.com/news/features/republican-congress-2013-7/>.

government and ensure that the United States does not default on its debts undermines fundamental confidence in Congress as an effective institution.

A major source of dysfunction in the Congress is the inability of members of the two political parties to compromise and reach agreement on major issues. The increasingly polarized political complexion of congressional districts contributes significantly to this dynamic. Fewer and fewer members of the House of Representatives live outside “safe” districts. The result is that they rarely face credible challengers from the other party.²⁰

Some have argued that the increasing polarization of House districts is due to gerrymandering at the state level,²¹ while others argue that data suggests gerrymandering is less important than the shifting political preferences of the electorate²² or the party nomination process.²³ Two scholars have attempted to quantify the extremism of political positions using a formula they refer to as DW-NOMINATE, which shows that increasing polarization in Congress is substantial and quantifiable.²⁴

The data show steady growth in the ideological distance between the two parties in Congress over time, with a notable jump in the last segment between

²⁰ Nate Silver, *As Swing Districts Dwindle, Can a Divided House Stand?*, N.Y. TIMES: FIVETHIRTYEIGHT BLOG (Dec. 27, 2012, 9:46 AM), <http://fivethirtyeight.blogs.nytimes.com/2012/12/27/as-swing-districts-dwindle-can-a-divided-house-stand/>. Mr. Silver categorizes these districts based on how much more Democratic or Republican each district’s presidential vote was than the country as a whole; “lean” districts are between 5% and 10% more partisan, “strong” districts are between 10% and 20% more partisan, and “landslide” districts are over 20% more partisan than the country on average. *Id.*

²¹ Alex Isenstadt, *GOP Could Pay Price for Gerrymandering*, POLITICO (July 1, 2013, 4:59 AM), <http://www.politico.com/story/2013/07/gop-could-pay-price-for-gerrymandering-93597.html> (finding that the Republican House majority is a result of gerrymandered districts, created by GOP legislators after the 2010 Census); Harold Meyerson, Op-Ed., *Permanent Republican Minority*, WASH. POST (Oct. 1, 2013), http://www.washingtonpost.com/opinions/harold-meyerson-building-a-permanent-republican-minority/2013/10/01/bde96d78-2ac7-11e3-8ade-a1f23cda135e_story.html (finding that House Democrats won nearly 1.4 million more popular votes than House Republicans, despite not winning a majority of the House seats).

²² Sean Trende, *Gerrymandering and the Republican House*, REAL CLEAR POL. (July 1, 2013), http://www.realclearpolitics.com/articles/2013/07/01/gerrymandering_isnt_the_real_cause_of_polarization.html (“We have an ideologically polarized House and Senate because our *country* has become politically more polarized.”).

²³ See John Sides, *Gerrymandering Is Not What’s Wrong with American Politics*, WASH. POST: WONKBLOG (Feb. 3, 2013, 12:29 PM), <http://www.washingtonpost.com/blog/s/wonkblog/wp/2013/02/03/gerrymandering-is-not-whats-wrong-with-american-politics/> (citing research that suggests “local party organizations have been captured by activists for whom ideological fealty is paramount”).

²⁴ *The Polarization of the Congressional Parties*, VOTEVIEW.COM, http://voteview.com/political_polarization.asp (showing charts that illustrate party polarization from 1879 to 2012 and showing the parties on a liberal-conservative dimension over time) (last updated Jan. 19, 2014).

2010 and 2012.²⁵ Similarly, each house of Congress has been losing its population of moderates.²⁶ This trend is not the result of equal and symmetrical movement by both parties, however. The entire Republican spectrum, including both the most moderate and most conservative wings of the party, has been moving rightward at a much steeper pace than their Democratic counterparts.²⁷ The two parties are more divided ideologically than at any point in the past two decades.²⁸ Members and staff who have worked in Congress can attest to these developments.

The rise of the Tea Party has led to a period of intense infighting within the Republican Party. Numerous Republican members of Congress have faced primary or caucus challenges from Tea Party members. The arc of the Tea Party may be close to its peak. Almost forty members of the House of Representatives, as well as a handful of prominent senators, identify with this movement.²⁹ In a historic loss, Tea Party candidate Dave Brat defeated House Majority Leader Eric Cantor in a primary election. Even Senate Republican Leader Mitch McConnell faced a primary challenge from a Tea Party member—an almost unheard of phenomenon for decades as party discipline would protect a Senate or House leader from an intraparty challenge.

As Speaker of the House, John Boehner is charged with leading his caucus and managing legislation on the House floor. The rise of the Tea Party and the corresponding rightward shift of the Republican Party have made that job more challenging as the ideological divisions in the Republican caucus widens and deepens. Some moderate Republican members of Congress identify ideological extremism as a source of congressional dysfunction. According to New York Representative Richard Hanna: “We render ourselves incapable of governing when all we do is take severe sides . . . I’m frustrated by how much we—I mean the Republican Party—are willing to give deferential treatment to our extremes in this moment in history.”³⁰ The tension among different generations of the Republican

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* See in particular the chart entitled, “Party Means on Liberal-Conservative Dimension,” which illustrates the liberal-conservative dimension of the House from 1879 to 2012. The chart shows that the Republican Party has become significantly more conservative in recent years. *Id.*

²⁸ *Political Polarization in the American Public*, PEW RES. CTR. FOR THE PEOPLE & THE PRESS (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>.

²⁹ See Claire Gordon, *By the Numbers: The Tea Party*, AL JAZEERA AM. (Nov. 5, 2013), <http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/11/5/the-tea-party-bythenumbers.html> (discussing five Senate Tea Party members); Earl Ofari Hutchinson, *Why a Shrinking Tea Party Still Holds the Nation Hostage*, HUFFINGTON POST (Oct. 2, 2013, 4:17 PM), http://www.huffingtonpost.com/earl-ofari-hutchinson/why-a-shrinking-tea-party_b_4026098.html (discussing House Tea Party members).

³⁰ Alicia M. Cohn, *Freshman Republican Says House GOP “Angry,” “Incapable of Governing”*, THE HILL (July 31, 2012, 2:36 PM), <http://thehill.com/blogs/blog-briefing-roo> (continued...)

Party is palpable. Former Senate Majority Leader Robert Dole when asked whether:

Republicans of years past, many of whom had a more diplomatic approach to compromise and governance than today's Republicans, would be able to make it in the modern GOP, Dole said, "I doubt it. Reagan wouldn't have made it. Certainly Nixon couldn't have made it, because he had ideas. . . . We might have made it, but I doubt it. . . . It seems to be almost unreal that we can't get together on a budget or legislation. . . . [When I was in Congress] [w]e weren't perfect by a long shot, but at least we got our work done."³¹

Dole also stated, "I think they ought to put a sign on the [Republican] national committee doors that says 'closed for repairs' until New Year's Day next year and spend that time going over ideas and positive agendas."³²

Intense infighting has made Speaker Boehner's job even more challenging. One Republican member described the looming threat to sitting Republicans from the Tea Party: "The [Tea Party's] idea is not simply to boost the Republican Party but it is to purify the party, and if this requires two or four or six years, so be it The need to move the middle-of-the-roaders, moderates, out of the picture is an insistent one."³³ Not surprisingly, some of the most outspoken Republicans have been those who have been challenged by Tea Party members in primary elections and lost. "You can win an election on screaming and anger but you cannot hold and govern for a significant period of time on screaming and anger," said former Utah Senator Robert Bennett, who was defeated in the state Republican caucus in 2010.³⁴ Former Indiana Senator Richard Lugar, who was defeated in a primary by a Tea Party challenger, said that while President Ronald Reagan would recognize the Republican Party today, "he would find it a much

m/news/241245-freshman-republican-calls-fellow-gop-angry-warns-house-republicans-becoming-incapable-of-governing.

³¹ Jake Miller, *GOP Ought to Be "Closed for Repairs," Says Bob Dole*, CBS NEWS (May 26, 2013, 1:05 PM), http://www.cbsnews.com/8301-250_162-57586242/gop-ought-to-be-closed-for-repairs-says-bob-dole/.

³² *Id.*

³³ Michael Tackett, *Hero Reagan's Compromise Would Collide with Tea Party Certitude*, BLOOMBERG BUSINESSWEEK (Aug. 28, 2012), <http://www.businessweek.com/news/2012-08-27/hero-reagan-s-compromise-would-collide-with-tea-party-certitude> (internal quotation marks omitted).

³⁴ Kristina Wong, *GOP Sen. Bob Bennett Blasts Tea Party: You Can't Govern with "Screaming and Anger"*, ABC NEWS (May 17, 2010, 6:00 AM), <http://abcnews.go.com/blogs/politics/2010/05/abc-news-bob-bennett-utah-excommunicated-utah-republican/>. Tea Party challenger and now-Senator Mike Lee defeated Bennett in the Utah Republican Caucus in 2010. David Catanese, *Sen. Bennett Loses Republican Nomination*, POLITICO (May 8, 2010, 3:59 PM), <http://www.politico.com/news/stories/0510/36960.html>.

more difficult group of people with whom to work.”³⁵ Some long-time Republican members of Congress chose to retire rather than face Tea Party challengers. “[My retirement] is about frustration The debt-ceiling debacle of 2011 and the recent fiscal-cliff vote showed Congress at its worst and, sadly, I don’t see the legislative gridlock and partisan posturing improving anytime soon,” said Georgia Senator Saxby Chambliss, who chose to retire at the end of the 113th Congress, rather than face a Tea Party challenge.³⁶

II. THE HASTERT RULE AND ITS SUBSTANTIVE AND POLITICAL USES

The so-called Hastert Rule is not an official rule at all. As discussed above, it is a practice under which the Speaker will proceed to a floor vote on a bill only if a majority of the majority has indicated support for passage. In short, “no bill is brought up for a vote when Republicans control the House unless a majority of their caucus supports it.”³⁷ The Hastert Rule is designed to protect the Speaker’s control of the House and to ensure that no bills become law without broad support from the majority party.

Though commonly associated with Dennis Hastert, Republican Speaker of the House from 1999 to 2007, the practice can be traced back as early as the 1970s to a principle called “Conditional Party Government,” termed by political scientist David W. Rohde.³⁸ Rohde argued that

the reforms of the 1970s increased the power of party leadership and created a situation where Members of the majority party believe their political opportunities are enhanced by supporting the position of the party leadership. In turn, the leaders will not propose a bill unless a consensus exists within the party.³⁹

Former Republican Speaker Newt Gingrich stated that he learned this principle from a few of his predecessors in the House: “Speaker Hastert made very clear a principle, which I frankly learned from [Democratic] Speaker O’Neill and Speaker Wright and Speaker Foley. And that is, if you can’t get a majority of your own members to vote yes, then a pretty prudent speaker doesn’t bring a bill up.”⁴⁰

³⁵ See Tackett, *supra* note 33.

³⁶ Kyle Trystad & Joshua Miller, *Chambliss to Retire*, ROLL CALL (Jan. 25, 2013, 10:12 AM), <http://atr.rollcall.com/report-georgia-sen-saxby-chambliss-to-retire/>.

³⁷ David Welna, *The 3 Unofficial GOP Rules that Are Making a Deficit Deal Even Harder*, NPR (Dec. 2, 2012, 3:20 AM), <http://www.npr.org/blogs/itsallpolitics/2012/12/02/166268748/the-3-unofficial-gop-rules-that-are-making-a-deficit-deal-even-harder>.

³⁸ Mark Strand & Tim Lang, *The Hastert Rule*, CONG. INST. (July 17, 2013), <http://congress.org/2013/07/17/the-hastert-rule/>.

³⁹ *Id.*

⁴⁰ *Congress Reaches Deal on Intelligence Bill*, PBS NEWSHOUR, (Dec. 6, 2004, 12:00 AM), http://www.pbs.org/newshour/bb/politics/july-dec04/bill_12-6.html.

Facing his own controversial procedural disputes in the Senate, Democratic Majority Leader Harry Reid remembers and likely romanticizes the past in the House:

When I served in the House of Representatives [1983–1987], no one would ever consider pushing something through with a majority of the majority. When I served there, Bob Michel was the Republican leader, Tip O’Neill was the Speaker, Jim Wright was the majority leader and the speaker, and they always worked together on a bipartisan basis to get legislation passed. It is only a new thing that now the Republicans are saying: We are not going to pass anything unless we can do it on our own. That is unfortunate.⁴¹

Substantive and political reasons underpin the practice. Substantively, following the Hastert Rule ensures that legislation reflects the will of the majority party and places the Speaker in a stronger position to negotiate with the Senate. In 2003, then-Speaker Dennis Hastert loaned his name to the policy when he stated: “On occasion, a particular issue might excite a majority made up mostly of the minority. . . . Campaign finance is a particularly good example of this phenomenon. [But] [t]he job of speaker is not to expedite legislation that runs counter to the wishes of the majority of his majority.”⁴² While acknowledging that this policy thwarts the legislative will of a majority of the House, Hastert asserted that his job was to focus on bills supported by a majority of his caucus, not the majority of the House.

The Hastert Rule also serves political objectives. The staff member who coined the term laid bare the self-preservation instinct motivating the policy, “[f]rom an internal perspective, half plus one gives you the votes to keep your job. And [if] you have half plus one, it is doubtful that anyone will attempt to challenge

⁴¹ 157 CONG. REC. S8493 (daily ed. Dec. 13, 2011) (statement of Senator Harry Reid); *see also* 158 CONG. REC. S7365 (daily ed. Dec. 4, 2012) (statement of Senator Harry Reid) (“I served in the House . . . under the leadership of Speaker O’Neill, Majority Leader Michel, and then Jim Wright and Michel, a Republican, there was no way they would ever consider doing a vote with the majority of the majority. They wanted to get 218 votes. That is what they did on reforming Social Security; that is what they did on virtually everything—get Democrats and Republicans together and get 218 votes.”); 158 CONG. REC. S1584 (daily ed. Mar. 13, 2012) (statement of Senator Harry Reid) (“I served in the House, and that is not how things were done with Bob Michel, who was the Republican leader at the time, Tip O’Neill, who was the Democratic leader at the time, and Jim Wright thereafter. Bob Michel worked with both of them to get legislation done. What they tried to do was get to the magic number 218—that is the majority in the House—and they got those votes from Democrats and Republicans.”).

⁴² Charles Babington, *Hastert Launches a Partisan Policy*, WASH. POST, Nov. 27, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A15423-2004Nov26.html> (internal quotation marks omitted).

you.”⁴³ Former Ohio Representative Steve LaTourette made a similar point when he said that Speaker Boehner is “the leader of the GOP caucus, so he has to pick and choose the times he is willing to move forward without a majority of Republicans—or risk not being their leader much longer.”⁴⁴

The Hastert Rule does not make effective bipartisanship in the House impossible, but it does make it more challenging. With a Democratic-controlled Senate and a Republican-controlled House, the routine use of the Hastert Rule means that the House will often produce legislation that is not appealing to Senate Democrats and is unlikely to pass the Senate. Because “[t]he rule is designed to limit the ability of minority members to co-opt a few majority members and pass legislation,” it is less likely for Hastert Rule legislation to become law when government is divided.⁴⁵ One longtime observer stated that the “Hastert rule assumes we have a parliamentary system which doesn’t work in our politics.”⁴⁶

The routine use of the Hastert rule magnifies the influence of the Tea Party members and makes it extremely difficult to pass legislation in a divided Congress, thereby facilitating gridlock. Senate Majority Leader Reid explained the challenge of passing legislation in the current divided Congress when he stated, “You cannot pass anything in the House unless you get Democratic votes because anything you pass with strictly Republican votes fails over here; and over here we cannot pass anything unless we get Republican votes.”⁴⁷

III. SPEAKER BOEHNER’S USE OF THE HASTERT RULE

Speaker Boehner has been a strong adherent to the Hastert Rule. Given the current political make-up of the House, he routinely avoids bills that would garner a majority of votes and pass if that majority was composed primarily of Democrats with some Republicans. However, while Speaker Boehner continues to voice his intent to follow the Hastert Rule, he has loosened his grip and allowed five bills to pass without a majority of Republicans in 2013 and 2014, the most since 2008.⁴⁸

⁴³ John Feehery, *Majority of the Majority*, THE HILL (Aug. 1, 2011, 10:32 PM), <http://thehill.com/opinion/columnists/john-feeherly/174849-majority-of-the-majority->

⁴⁴ LaTourette, *supra* note 11.

⁴⁵ Luke Johnson, *Dennis Hastert Warns John Boehner About Leadership After Fiscal Cliff Deal*, HUFFINGTON POST, (Jan. 3, 2013, 12:30 PM), http://www.huffingtonpost.com/2013/01/03/dennis-hastert-john-boehner_n_2403108.html.

⁴⁶ Albert R. Hunt, *Tip O’Neill’s Tip for Boehner*, BLOOMBERGVIEW (Aug. 29, 2013, 11:04 AM), <http://www.bloombergview.com/articles/2013-08-29/tip-o-neill-s-tip-for-boehner>.

⁴⁷ 157 CONG. REC. S8493–94 (daily ed. Dec. 13, 2011) (statement of Senator Harry Reid).

⁴⁸ Derek Willis, *Tracking Hastert Rule Violations in the House*, N.Y. TIMES: THE CAUCUS (Apr. 11, 2013, 12:50 PM), http://thecaucus.blogs.nytimes.com/2013/04/11/tracking-hastert-rule-violations-in-the-hous/?_r=0.

The list of bills that merited special treatment is instructive and demonstrates the Speaker's skill at navigating the challenging internal and external politics of his party. First, the fiscal cliff bill passed the House on January 1, 2013, with only eighty-five Republican supporters.⁴⁹ A few weeks later, the Hurricane Sandy relief bill passed with even fewer Republican votes: forty-nine Republicans in favor and 179 Republicans opposed.⁵⁰ At the end of February 2013, the Violence Against Women Reauthorization Act received a minority of Republican votes, with eighty-seven Republicans in favor and 138 Republicans opposed.⁵¹ In April 2013, the bill to protect nationally significant battlefields of the Revolutionary War and the War of 1812 passed with only 101 Republicans in favor and 122 opposed.⁵² Finally, in October 2013, after sixteen days of a federal government shutdown that cost \$24 billion, the House passed a continuing resolution to fund the government and legislation to extend the debt ceiling with eighty-seven Republicans in favor and 144 opposed.⁵³ And finally, in February 2014, the bill to raise the debt limit through March 15, 2015, passed with only twenty-eight Republicans in favor and 199 opposed.⁵⁴

The 112th and 113th Congresses were a tumultuous time to manage the House of Representatives. Without implying that Speaker Boehner had a comprehensive plan that he followed step-by-step, it is clear that he used the Hastert Rule as a tool to navigate the challenges he faced. He needed to appease the powerful Tea Party faction of his caucus, but he also needed to safeguard the economy from harm and protect his political party from significant missteps that could diminish their electoral chances in the future. The occasions he dispensed with the Hastert Rule were arguably times when he was trying to save his party from itself, often with a wink and a nod from his members that they wanted to be saved.⁵⁵

Bills that address government spending dominate the list of bills that Speaker Boehner exempted from the Hastert Rule. On fiscal matters, the Republicans, and

⁴⁹ *Final Vote Results for Roll Call 659*, CLERK OF THE U.S. HOUSE OF REPRESENTATIVES (Jan. 1, 2013), <http://clerk.house.gov/evs/2012/roll659.xml>.

⁵⁰ *Final Vote Results for Roll Call 23*, CLERK OF THE U.S. HOUSE OF REPRESENTATIVES (Jan. 15, 2013), <http://clerk.house.gov/evs/2013/roll023.xml>.

⁵¹ *Final Vote Results for Roll Call 55*, CLERK OF THE U.S. HOUSE OF REPRESENTATIVES (Feb. 28, 2013), <http://clerk.house.gov/evs/2013/roll055.xml>.

⁵² In April, the American Battlefield Protection Program was passed with only 101 Republican votes. *Final Vote Results for Roll Call 91*, CLERK OF THE U.S. HOUSE OF REPRESENTATIVES (Apr. 9, 2013), <http://clerk.house.gov/evs/2013/roll091.xml>.

⁵³ *Final Vote Results for Roll Call 550*, CLERK OF THE U.S. HOUSE OF REPRESENTATIVES (Oct. 16, 2013), <http://clerk.house.gov/evs/2013/roll550.xml>.

⁵⁴ *Final Vote Results for Roll Call 61*, CLERK OF THE U.S. HOUSE OF REPRESENTATIVES (Feb. 11, 2014), <http://clerk.house.gov/evs/2014/roll061.xml>.

⁵⁵ Carl Hulse, "Vote No, Hope Yes" Defines Dysfunction in Congress, N.Y. TIMES, Feb. 12, 2014, http://www.nytimes.com/2014/02/13/us/politics/vote-no-hope-yes-defines-dysfunction-in-congress.html?_r=0.

the Tea Party in particular, stand for shrinking the size of the federal government and decreasing spending. Bills to extend the debt ceiling, fund the federal government, and provide additional funds for natural disaster relief without offsets are substantively and politically unpopular for Republicans, especially for Tea Party members. On the other hand, Speaker Boehner must weigh the potential harm to the United States economy by not acting. This is a very real consideration. For example, a Treasury Department report showed that the debt limit standoff in 2011 lowered household wealth and stock market value and harmed consumer and small business confidence.⁵⁶ These trends constrained lending and slowed the country's economic recovery.⁵⁷ Moreover, a prominent agency downgraded the United States credit rating for the first time after Congress failed to address fiscal challenges in April 2011.⁵⁸ In its report, the agency criticized the "political brinkmanship" and characterized the government's ability to manage its finances as "less stable, less effective and less predictable."⁵⁹ And politically, the Republican Party paid an enormous price in the polls for shutting down the federal government in the fall of 2013.⁶⁰ Speaker Boehner wanted to do everything he could to ensure that the Republicans mitigated the political repercussions of these actions. He achieved this goal by selectively passing bills with majority Democratic support.

The other notable occasion that Speaker Boehner dispensed with the Hastert Rule was when he allowed a vote on reauthorizing the Violence Against Women

⁵⁶ See U.S. DEP'T OF THE TREASURY, THE POTENTIAL MACROECONOMIC EFFECT OF DEBT CEILING BRINKMANSHIP 2 (Oct. 2013), available at <http://www.treasury.gov/initiatives/Documents/POTENTIAL%20MACROECONOMIC%20IMPACT%20OF%20DEBT%20CEILING%20BRINKMANSHIP.pdf>.

⁵⁷ *Id.* at 1–2.

⁵⁸ See *United States of America Long-Term Rating Lowered to "AA+" Due to Political Risks, Rising Debt Burden; Outlook Negative*, STANDARD AND POORS (Aug. 5, 2011, 8:13 PM), <http://www.standardandpoors.com/ratings/articles/en/us/?assetID=1245316529563> ("We lowered our long-term rating on the U.S. because we believe that the prolonged controversy over raising the statutory debt ceiling and the related fiscal policy debate indicate that further near-term progress containing the growth in public spending, especially on entitlements, or on reaching an agreement on raising revenues is less likely than we previously assumed and will remain a contentious and fitful process.").

⁵⁹ See *id.* ("The political brinkmanship of recent months highlights what we see as America's governance and policymaking becoming less stable, less effective, and less predictable than what we previously believed.").

⁶⁰ See Andrew Dugan, *Republican Party Favorability Sinks to Record Low*, GALLUP (Oct. 9, 2013), <http://www.gallup.com/poll/165317/republican-party-favorability-sinks-record-low.aspx> (showing that the Republican Party's favorability rating dropped 10% between September 2013 and the U.S. government shutdown in October 2013 to 28%); Tal Kopan, *Polls: Shutdown Nightmare for Republicans*, POLITICO (Oct. 22, 2013, 6:23 PM), <http://www.politico.com/story/2013/10/congress-approval-rating-government-shutdown-98657.html> (reporting GOP received its lowest ever ratings in *The Washington Post* and CNN/ORC International polls).

Act. Only eighty-seven Republicans supported the bill, while 137 opposed it.⁶¹ But Speaker Boehner was responding to a serious political weakness of his party. The Republicans have faced a substantial gender gap in elections since 1990.⁶² They likely lost a few key races in recent election cycles due to candidate comments about women, contraception, and rape that fell outside the mainstream, which received mostly unfavorable national media attention.⁶³ Speaker Boehner knew that in swing (or “purple”) districts, Republicans seek to rectify the substantial gender gap in elections. Allowing a vote on the Violence Against Women Reauthorization Act was a step in that direction.

In a related issue, the Republican Party is grappling with how to address demographic and cultural changes over the past decade. The growth of Latino and Asian voting populations has increased the Democrat’s base of voters.⁶⁴ Whether Speaker Boehner would abide by the Hastert Rule on immigration was a hotly contested issue implicating this political challenge. Some commentators have suggested that the House could pass the Senate version of the immigration bill with mostly Democratic votes. On June 11, 2013, Speaker Boehner “strongly indicated that he was open to passing an immigration bill in violation of the Hastert rule, telling ABC News’s George Stephanopoulos that ‘it’s about what the House wants. And my job is, as Speaker . . . to ensure that all members on both sides have a fair shot at their ideas.’”⁶⁵ Conservative Republican representatives, however, expressed their dissatisfaction; for example, California Representative Dana Rohrabacher “warned Boehner that he should be ‘removed as Speaker’ if he violated the Hastert rule on immigration.”⁶⁶ Speaker Boehner relented, and on June

⁶¹ *Final Vote Results for Roll Call 55*, *supra* note 51.

⁶² *The Gender Gap: Three Decades Old, as Wide as Ever*, PEW RES. CTR. (Mar. 29, 2012), <http://www.people-press.org/2012/03/29/the-gender-gap-three-decades-old-as-wide-as-ever/> (explaining that “the gender gap in party identification dat[es] back to 1990”).

⁶³ Greg Jaffe, *GOP’s Akin, Mourdock Lose Senate Elections*, WASH. POST, Nov. 7, 2012, http://www.washingtonpost.com/politics/decision2012/gops-akin-mourdock-lose-senate-elections/2012/11/07/2b48954c-27b3-11e2-b2a0-ae18d6159439_story.html. Representatives Todd Akin (R-MS) and Richard Mourdock (R-IN) lost Senate races in Missouri and Indiana, respectively, after making “controversial remarks on rape, pregnancy and abortion that appeared to cost them the support of more-moderate voters in [the Republican] party.” *Id.*

⁶⁴ See Michael D. Shear, *Demographic Shift Brings New Worry for Republicans*, N.Y. TIMES, Nov. 7, 2012, <http://www.nytimes.com/2012/11/08/us/politics/obamas-victory-presents-gop-with-demographic-test.html> (explaining that President Obama’s “surprisingly large victory in Virginia” during the 2012 Presidential Election was due to “winning Hispanic voters, but also by winning strong majorities of the growing number of Asian-American voters and of voters under age 40,” making “[t]he central problem for Republicans . . . that the Democrats’ biggest constituencies are growing”).

⁶⁵ Jonathan Strong, *Immigration and the Hastert Rule: The Anatomy of a Promise*, NAT’L REV. ONLINE (July 3, 2013, 4:00 AM), <http://www.nationalreview.com/article/352631/immigration-and-hastert-rule-jonathan-strong>.

⁶⁶ *Id.*

27 stated, “For any legislation—including a conference report—to pass the House, it’s going to have to be a bill that has the support of a majority of our members.”⁶⁷

Some House Republicans have expressed dissatisfaction with Speaker Boehner’s willingness to bypass the Hastert Rule and are pushing to codify the accepted practice. The proposal would require an internal vote before bringing a bill to the House floor if at least twenty-five Republicans signed a letter requesting one and legislation without majority Republican support would not be considered on the floor.⁶⁸ One of the supporters of the codification, Arizona freshman Representative Matt Salmon, stated, “Codifying the Hastert Rule reinforces our resolve to consider legislation that doesn’t grow government and doesn’t cede legislative power to the minority party . . . I believe this will actually strengthen the hands of our Republican leadership by fostering a unified voice among our conference.”⁶⁹ Some posit that the push to codify is actually intended as a warning to Speaker Boehner not to “roll” Republicans on immigration and budget issues. Other members are pushing for the codification to “restore and foster unity in the GOP conference” and “strengthen the hand of our leadership in negotiations—knowing that legislation cannot pass the House without significant Republican support.”⁷⁰

CONCLUSION

The rise of the Tea Party and the ideological divisions within the Republican Party created challenging conditions for Speaker Boehner. The strategic use of the “go-it-alone” Hastert Rule allowed Speaker Boehner to successfully navigate a treacherous political path of managing his divergent caucus, preserving his leadership position, and passing selective legislation when necessary even when the majority of his caucus did not support it. This manufactured procedural tool served substantive and political purposes. The routine use of the Hastert Rule strengthened the hand of the Tea Party members to influence legislation. At the same time, selectively ignoring the Hastert Rule allowed Speaker Boehner to relieve some of the political pressure that the Tea Party members exerted in an effort to preserve the future electoral viability of his party. The Hastert Rule, an informal but accepted practice in the House of Representatives, created the latitude for Speaker Boehner to maneuver through this difficult period. It is an example of

⁶⁷ *Id.*

⁶⁸ Paul Kane, *What the “Hastert Rule” Fight Tells Us About House Republicans*, WASH. POST: THE FIX (June 17, 2013, 3:04 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/17/what-the-hastert-rule-fight-tells-us-about-house-republicans/>.

⁶⁹ *Id.*

⁷⁰ Press Release, Heritage Action for Am., Conservative Action Project: Formally Pass Hastert Rule, Remain United (June 11, 2013), *available at* <http://heritageaction.com/press-releases/conservative-groups-to-house-republicans-formally-pass-hastert-rule-remain-united/>.

the remarkable ability of Congress to adapt and address internal challenges and threats.