

Justice at Stake



Sheldon Goldman, University of Massachusetts Amherst

With the House of Representatives safely in Republican control for the foreseeable future, attention is correctly focused on the probability of a Republican takeover of the Senate in the 2014 election. Much of the President's legislative agenda is already stalled because of Republican control of the House. But the Senate alone votes to confirm presidential nominations to the federal courts. And it is here that perhaps the greatest impact of Republican control of the Senate is likely to be felt.

Before Senate Democrats changed the rules in November 2013 to allow lower federal court nominees to be voted on by a simple majority vote to break a filibuster, Senate Republicans, although in the minority, obstructed or delayed dozens of nominations to the federal district and appeals courts, including many non-controversial nominees. This had the effect of diminishing the imprint of President Obama on the courts; but since the change in the Senate rules, confirmations have accelerated. By now, the appointees of Democratic presidents including those forwarded by President Obama dominate most federal appeals courts and district courts. The steady pace of additional confirmations to the lower courts would, however, slow to a crawl should Republicans gain control of the Senate in 2015.

Obama nominees in a Republican controlled Senate would face obstruction or delay first at the Senate Judiciary Committee stage. There, Iowa Senator Charles Grassley, as the new chair of the committee, would be able to slow down the process and use his position to obstruct some, perhaps all, Obama nominees to the appeals courts and some of the nominees to the district courts. Republicans who anticipate winning the presidency in 2016 as well as both houses of Congress would, to the extent possible, seek to keep vacancies open with the expectation that a Republican president should be able to fill them.

A Republican Senate will likely not overturn the rules change that calls for only a majority vote to break a filibuster of lower court nominations. Indeed, in the hope of a 2016 complete sweep of the national elections, Republicans might even extend the change in filibuster rules to Supreme Court nominees. If they did so, Senate Republicans would set the stage for a Republican President along with a GOP-controlled Senate to be able to nominate and confirm by simple majority vote additional activist-oriented conservative Supreme Court justices like Antonin Scalia, Clarence Thomas, and Samuel Alito.

Should such a dream scenario for conservative Republicans come to pass after 2016, at both the Supreme Court and lower court levels this would mean naming jurists who do not believe there is a constitutionally based right to privacy – and consequently no constitutional right for a woman to abort a non-viable fetus or for same-sex couples to marry (or, indeed, for same sex couples to be free from legislation criminalizing their sexual practices).

In addition, the most conservative Supreme Court justices generally take a dim view of the due process rights of people accused or convicted of crimes; instead, they use their ability to interpret the Constitution to back law enforcement. These justices have been skeptical of equal protection claims of racial minorities and women, on the grounds that such claims unfairly disadvantage non-minorities and white males. The most conservative justices are generally unsupportive of campaign finance reform which they see as encroaching upon First Amendment freedoms. And they have displayed hostility to environmental regulation, government regulation of the economy, health care reform, and the rights of organized labor – all of which they believe have little support in the Constitution to justify what they see as overreach by the federal government.

In the short run, then, if the election of 2014 brings about Republican control of the Senate, we can expect obstruction and delay of Obama nominees to the lower federal courts. If a vacancy occurs on the Supreme Court, particularly towards the end of the second term, we can anticipate an effort to deprive Obama of the opportunity to fill it, seeking to keep the position vacant until after the presidential election of 2016.

It is perhaps no exaggeration to claim that nothing less than justice, at least from the perspective of liberals and civil libertarians, is at stake in the 2014 election.

The Two Electorates



Jacob S. Hacker, Yale University

Everyone knows that fewer Americans vote in midterms than in presidential elections. What's less recognized is that midterm voters look increasingly distinct from voters as a whole: They're older, whiter, more affluent – and, yes, more Republican. When the votes are cast this November 4th, a very skewed cross-section of America will have the biggest say. That's not just a problem for one party; it's a problem for American democracy.

Consider turnout by age. In the 1994 midterm – famous for delivering Congress to Republicans for the first time in 40 years – the turnout gap between voters aged 18-44 and voters aged 45 or older was 10 points. By the 2010 midterm, it was nearly 30 points. In the presidential election of 2012, by contrast, the turnout gap was 10 points. In other words, older voters enjoyed a nearly 20 point greater turnout edge in the 2010 midterm compared with the 2012 presidential election.

The swing between the 1994 midterm and 1996 presidential contest, by comparison, was just 5 points.

Older voters look like the America of several decades ago, not the America of today. Less diverse and less pressured by post-1970s economic strains, they are also less tolerant socially, more conservative fiscally (except when it comes to Medicare and Social Security), and much less supportive of President Obama's biggest policy achievement, the Affordable Care Act. They also constitute the base of the Tea Party movement that has reshaped the GOP and pulled the national debate to the right.

This skew affects not just House and Senate races, but all the down-ballot contests in midterm years, from gubernatorial and state legislative races to city elections. What's more, the restrictive voter identification laws that many states have adopted – which tend to depress minority and youth turnout – are likely to make this disparity worse, because the laws typically specify types of official photo identification such as driver's licenses or passports that older whites almost always have but which younger, minority people may not have or be readily able to get.

When citizens don't vote, their influence is diminished. More and more research studies show that politicians are much more responsive to higher-income and better-educated voters. The main counterweight, according to these studies, is the general tendency for less affluent voters to be represented by Democrats, who are generally more responsive to them. The sharp skew of the midterm electorate thus weakens the political voice of younger, less affluent, and minority voters – both directly, because people who do not vote have less influence on politicians, and indirectly, because the narrower midterm electorate hurts chances for Democrats to win office.

What's more, a growing divide between the preferences of midterm and presidential-year voters is likely to lead to greater conflict between the president and Congress and stronger swings of the governing agenda after midterms. It's hard enough to tackle pressing national problems given our government's many checks and balances and frequent elections. Add to this the clash between two fundamentally different electorates, and you have a system in which serious policymaking only happens – if it happens at all – in the first two years of a president's term.

We know how to fix this problem. For starters, restrictive voter identification laws should be labeled what they are: efforts at vote suppression, with almost no effect on the tiny amount of fraud by individual voters at the polls. Instead of restricting turnout, we should be expanding it through measures that make it easier to register and vote, that free up political organizations to do more voter education and mobilization, and that encourage donations and other forms of participation among younger, less affluent, and minority voters. According to a growing body of research, turnout efforts based on direct contact with voters are highly effective at bringing people to the polls. In the meantime, states and localities should be working to time their elections so the biggest races coincide with presidential elections when turnout is highest and most representative.

All this will help ensure that the broadest American electorate picks our leaders – every two years, not just every four.

Midterm Malaise



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As in every election, the civic health of American democracy – and by extension, Americans’ happiness with government – is at stake in November 2014. As Election Day approaches, pundits complain that the midterm elections have yet to come down to any central issue or theme. Advertising in a number of races focuses mostly on character attacks and the personal qualities of candidates, often ignoring or muddling issues.

From the perspective of Republican and Democratic strategists, this focus might not be ill-founded. For many voters, party and personal characteristics trump careful consideration of issue positions. And, the issue that most Americans say will chiefly influence their votes is the economy – as is the case in almost every election. But the candidates and parties are not giving voters much to choose from on that score, especially because Americans on the whole have little faith in Congress to accomplish much. Over three quarters of Americans disapprove of the way Congress is handling its job. And, while many pay little attention to politics, and only a minority can correctly describe the party affiliation of their representative in the U.S. House, people are sensing correctly that, as official statistics show, the number of public laws in each successive two-year Congressional term has trended sharply downward in recent decades.

Most Americans say they would prefer to vote for a new face instead of reelecting their current representative. If large numbers of Americans were to follow through on this sentiment, the composition of Congress might change significantly. However, this sort of public sentiment is nothing new, yet 1948 was the last time voters reelected less than 80% of the incumbents seeking to return for additional terms in the House of Representatives.

What is more, even though large numbers of Americans say they are upset with Congress, their disgust is unlikely to drive them to the polls in high numbers. If history is any guide, turnout in this “midterm” election year, when the presidency is not at stake, will be significantly lower than it was in 2008 or 2012, and lower than it will be in 2016. Since 1948, the average turnout of eligible voters in midterm elections sits around 43%, roughly sixteen percent less than turnout in presidential election years. Turnout of eligible voters in midterm elections during this period has never reached fifty percent – which means that well over half of eligible voters do not register their preferences for Congressional and state offices at the polls. Typically, midterm voter turnout is even lower when two-term presidents reach the last midterm election of their eight years in the White House, as President Barack Obama is now about to do. When Ronald Reagan and Bill Clinton were in this position, turnout among the voting-eligible population was only 39%, while at the close of George W. Bush’s two-term presidency it was 41%.

Who are the voters that actually do make it to the polls in midterm elections? They tend to be more strongly partisan-minded than the average American – more committed conservative Republicans or liberal Democrats – and strong partisans are known to see the world differently than less convinced partisans or middle-of-the-roaders. Overall, strong partisans are less likely to oppose reelection of their own representative than are independents. Strong partisans also currently have higher opinions of Congress than other Americans do. Both of these strong partisan orientations work in favor of re-electing incumbents.

November 2014 will, nevertheless, probably bring some changes to Congress. History tells us the president's party tends to lose seats in midterm elections, and current polls of likely voters support this trend. They suggest Republicans may gain seats in the Senate and keep control of the House. If this holds true, President Obama will have an even harder time influencing Congress in 2015 and 2016. But this is nothing new for presidents in his position. Presidents facing a divided government have a hard time with Congress, and their problems are magnified during the last two years in office. Strategic minded partisans of the opposite party prefer to await the next presidential election, in hopes that their party will claim the White House then.

Still, governing processes go on. Bills have continued to be introduced in years of divided as well as partisan-unified government, despite the downward trend in Congressional enactments in recent decades – and that includes bills introduced in the last two years of two-term presidencies. So that means that fights over legislation, at least, will continue in Congress, even if Republicans take full control. Fights between President Obama and Congressional Republicans have raged for years, so to most Americans it may well look like little changes with respect to public policy in November 2014.

Democracy goes on no matter what, as well, and unfortunately, many voters may take that as yet another good reason to stay home on Election Day. But, if large numbers of Americans are unhappy with Congress yet do not bother to vote, then they will share blame with those who do turn out for whatever happens next in Washington DC and state capitols – or does not happen.

Stop Hyperventilating. 2014 is Not 1994.



Daniel Paul Franklin, Georgia State University

The last truly consequential midterm election was in 1994. Absent the most unexpected outcome on November 4, 2014 will not be 1994.

Remember 1994? Republicans won control of the House of Representatives for the first time in 40 years. Under the leadership of Speaker Newt Gingrich, the Republicans passed much of their Contract with America, forcing President Bill Clinton to assert in 1995 that he was as President “still relevant.” Postscript: Bill Clinton went on to win reelection in 1996 in a walk and most of the Contract with America was passed to little or no effect.

The truth is that American elections rarely produce dramatic change – and midterm elections almost never do. The number of elections that have sharply turned the course of American history can probably be counted on one hand and they were all elections with the presidential race at the top of the ticket.

Why don't elections bring that much change? As one of my professors was fond of saying, "the Framers set out to design a government that didn't work very well, and they were enormously successful." The separation of powers, including staggered elections and the Checks and Balances including the President's veto, slow the pace of policymaking under most conditions. American public policy changes incrementally, just a little bit at a time. (And, given the success of the United States in comparison to other countries, the slow pace of American policymaking seems to have served us in good stead.)

Thus, history makes it easy to predict how the upcoming midterm elections will change the direction of American public policy. The bad news is that not much will happen. The good news is that not much will happen. What this election will do is move the political thermometer a little to the right. The midterm elections for second term presidents almost always bring setbacks for the president's party. As a result, we can expect that the Republicans will pick up seats in both the House and the Senate.

Republicans already control the House of Representatives, so a small GOP increase there will have no significant impact on policy. In the Senate, Democrats are likely to lose their slim majority, but that doesn't mean much either.

Why wouldn't Republican control of the Senate mean much? Because all presidents who have served a second term since 1952 have presided over a divided government. Consequently, President Obama will have the same problems every other modern lame duck president has had. His days of appointing Supreme Court justices and large numbers of federal judges are probably over. So are his chances of passing groundbreaking legislation and of getting Senate ratification of treaties. Only his substantial powers as Chief Executive and Commander in Chief will remain intact.

A Republican majority in Congress may try to force the President to sign legislation he doesn't want in order to get something the President desperately needs; for example, an increase in the debt limit. But these moves rarely redound to Congress' favor and a lame duck President doesn't have to play to the polls. The reality is that as long as the President has the veto and one third plus one vote in either House, he doesn't have to accept any legislation he doesn't want.

Gridlock is an inaccurate term to describe all this because the most essential government functions will still get done. Despite the rhetoric of the extremes, the President and members of Congress are loyal Americans, and they will make sure the military and most domestic programs continue to be funded.

Sadly, however, the divided government of today is not the divided government of the 1950s, 60s, 70s, or 80s, when Democrats and Republicans worked together more frequently. Yesterday's gentle pace of policy change has slowed to an almost complete halt. As a result, lingering problems fester, rendering harm to America by a thousand cuts and furthering the public's loss of faith in the political system. In the long run, that disappointment will be the real consequence of this year's election.

What to Look for After November 4



Theda Skocpol, Harvard University

Just weeks before the November 4, 2014, midterm elections, national media coverage tells us, breathlessly, that it is coming down to the wire with the GOP Senate horses winning the race. We are being asked to focus only on six to eight contests for U.S. Senate seats that were always fated to be determined in mostly conservative-leaning states where Republicans are likely to win.

Which party ends up with a majority of 100 Senate seats does matter, of course, especially for the theatrics of President Barack Obama's last two years in office. Republican control of the Senate would enable Mitch McConnell of Kentucky to set much of the agenda. President Obama's judicial and executive branch nominees would come up for confirmation votes only slowly, if at all; Senate committees would follow the lead of House GOP committees in holding endless "investigations" of alleged wrongdoing by Obama administration officials and by former Secretary of State Hillary Clinton; and budget shenanigans would certainly be unleashed.

But beyond the issue of marginal Senate control, here are several things to ponder about the larger impacts of the November 4 outcomes.

Will the Senate battle really end in November? What happens if "Independents" win Senate seats in Kansas or South Dakota, even as Senate contenders in Louisiana and Georgia fall short of outright majority victories triggering new run-off elections in those states? Under this scenario, party control of the Senate could remain up in the air for months, especially if middle of the road Independent Senate incumbent Angus King of Maine plus the one or two remaining moderate partisans in the Senate (such as Susan Collins of Maine and Joe Manchin of West Virginia) decide to hang back from committing to one party or the other until after the run-off contests are resolved and after newly elected Independents make their choices. Under this scenario, the GOP will probably still end up running the Senate in the end, but maybe with less room to push extreme measures. Because so many Senate rules favor solo prima-donnas, this is one institution in U.S. government where a middle of the road Independent caucus could dictate outcomes.

State outcomes may matter more. Big, secret money may have an easier time capturing state legislative offices and elected judgeships than it does swaying national or big state-wide contests.

Will U.S. state legislatures become even more right-leaning after 2014? Conversely, what will happen in governor races? Democrats could very possibly lose their Senate majority but win some very important governor contests.

Perhaps the most important single governorship contest in 2014 is happening in Wisconsin, where Scott Walker, a Republican backed by the Koch brothers is seeking reelection after faithfully instituting an extreme agenda of union bashing, upward tilted tax cuts, and blocking the expansion of Medicaid under the Affordable Care Act. If Walker wins reelection, he will become a national advocate for that agenda; if he loses, that agenda will be set back. In addition, Democratic candidates have strong prospects to win governor elections in Florida, Pennsylvania, Michigan, Kansas, and Maine – and in some of these states, Democratic victories would cement or allow the expansion of Medicaid coverage for many tens of thousands of low-income Americans.

If the GOP does take the Senate, by how much? A simple majority of even one vote gives Republicans basic agenda-setting powers. But it still matters whether Senate Republicans hold more than 52 seats in 2015 and 2016. That is because the next round of Senate contests will occur in a presidential election year, when pro-Democratic voters are much more likely to participate, and when many more seats in liberal or moderate states will be at stake. On a crucial issue such as how much damage Congressional Republicans will attempt to do to the Affordable Care Act of 2010, the size of the GOP Senate margin would matter. That landmark health reform law is here to stay; Republicans in control of Congress would hold a symbolic total repeal vote, let President Obama veto it if it squeaks through, and then move on to the real business of trying to gut crucial regulations and subsidies in the law. The key question is how far will they try to go in eliminating cushions for insurance companies, trimming tax credits for consumers who purchase plans on the exchanges, and slashing funds for Medicaid and community health centers that help low-income Americans? With larger majorities, the GOP will be tempted to go for the jugular of eviscerating the core subsidies that pay for expanded health insurance coverage. That might not succeed as a matter of policy – given President Obama’s veto pen – but it would succeed in raising the stakes about health reform going into 2016. Ironically, raising the stakes could backfire on Republicans, because tens of millions of Americans could come to realize that subsidized insurance coverage they now enjoy is at risk if Republicans make further gains.

Will GOP civil wars intensify leading into 2016? If the Republicans win the Senate on November 4, a tidal wave of press coverage will talk about how the “adults are back in charge” and the “Tea Party wing was vanquished in 2014.” Poppycock. Many GOP candidates who may win on November 4 are extraordinarily extreme on many issues, far from where most Americans stand on matters such as funding for health and education, support for environmental regulations, and support for compromise approaches to immigration reform and taxes and spending. Furthermore, many business interests hoping for GOP majorities – to help them push through particular provisions they have lobbied for – also hope that Republicans will drop many populist stands that businesses do not like; business interests want some sort of immigration reform and they want subsidies for businesses left in place. But the fact of the matter is that the Republican

Party has moved in very extreme policy directions since 2009, and if Republicans have solid majorities in both chambers in 2015, their extreme populist and ideological wings will be empowered, not chastened. The intra-Republican civil wars will deepen just as the party heads into 2016 elections where it must appeal to moderates and to Latino voters, in competition, very likely with Democratic candidates who have strong business ties. Party leaders will want to soft-peddle extreme stands on everything from opposition to gay marriage, to moves to cut subsidies under health reform that insurance companies favor, to harsh stands on deporting undocumented immigrants. But they won't be able to control their own extremists – such as Senator Ted Cruz of Texas, who promises to push hot-button far right positions across the board during GOP presidential debates and nominating contests unfolding in 2015 and early 2016.

The bigger the GOP victories on November 4, the wilder the ride will be in U.S. politics over the next two years.