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### Against Gridlock: The Viability of Interest-Based Legislative Negotiation

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The wide cast of characters whose behavior shapes the creation of federal laws in the United States, from congressional leaders to committee chairs, from lobbyists to constituents, from the President to the media, can all be seen as engaged in a complex, multiparty negotiation. The negotiation has only two possible outcomes: a deal or no deal, the passage of a new bill into law or the maintenance of the legal status quo. This paper attempts to make the case for the viability of interest-based legislative negotiation strategies at the federal level.

What is interest-based, also sometimes called “principled,” negotiation? In a nutshell, it is a set of techniques that attempts to improve the quality and likelihood of negotiated agreement by providing an alternative to traditional “positional” bargaining techniques.<sup>1</sup> The positional or hard-bargaining approach views negotiation on the model of haggling in a market. Each side adopts an extreme position, knowing that it will not be accepted, and then employs a combination of guile, bluffing, and brinksmanship in order to cede as little as possible before reaching a deal. Positional bargainers conceive of negotiation as a process of distributing a fixed amount of value.<sup>2</sup>

By contrast, interest-based negotiation attempts to create value, or at least to prevent it from being destroyed through the failure to reach agreement. It focuses on the underlying interests of the parties rather than their arbitrary starting positions, approaches negotiation as a shared problem rather than a personalized battle, and insists upon adherence to objective, principled criteria as the basis for agreement.<sup>3</sup> Because interest-based negotiation is as much a practical skill as a set of doctrines, it might be best to illustrate it through a concrete example, one that suggests the relevance of interest-based negotiation to the legislative process today.

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<sup>1</sup> On the distinction between positional and interest-based negotiation, see generally ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991). Interest-based negotiation has drawn attention in the legal community as a component of “alternative dispute resolution” (ADR), and increasingly plays a role in legal education through institutions affiliated with law schools, such as Stanford’s Gould Negotiation and Mediation Program and Harvard’s Program on Negotiation.

<sup>2</sup> See ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 11–43 (2000).

<sup>3</sup> See generally FISHER & URY, *supra* note 1.

In 2003, as a state senator in Illinois, Barack Obama helped to negotiate a bill requiring the videotaping of police interrogations in capital cases, in order to provide a disincentive to the coercion of confessions.<sup>4</sup> According to an account in *The New Republic*,

[i]nitially, police, state prosecutors, and the newly elected Democratic governor were strongly opposed, some death-penalty abolitionists viewed the bill as too moderate, and legislators were afraid of being soft on crime. But Obama led daily negotiations (without reporters) during which he emphasized his opponents' common values. At the end, the bill had the support of all parties, passed unanimously, and today has been adopted as a model by four states and the District of Columbia.<sup>5</sup>

During the negotiations, Obama does not appear to have staked out an extreme opening position and then pretended to move, grudgingly, toward a more moderate stance, so that his opponents would feel they had won by extracting concessions from him. Nor did he adopt the equally positional tactic of staking out an arbitrarily moderate position between the police organizations and the civil rights advocates and refusing under any conditions to budge from it. Rather, he appears to have negotiated on the basis of principles, attempting to bypass ideological objections by showing how the recording of interrogations could serve the underlying interests of various parties to the negotiation.

Based on his first few months in office, President Obama appears committed to the continued use of the interest-based strategy he employed in Illinois.<sup>6</sup> The question of whether interest-based negotiation techniques are viable in the federal legislative context is extremely relevant. Indeed, debates over the strategy Obama employed in his first major legislative initiative, a massive economic stimulus package passed in February, often read like the roundtable discussions following a classroom exercise in a negotiation workshop.

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<sup>4</sup> See Charles Peters, Op-Ed., *Judge Him by His Laws*, WASH. POST, Jan. 4, 2008, at A21.

<sup>5</sup> Jeffrey Rosen, *Card-Carrying: The First Civil Libertarian President?*, NEW REPUBLIC, Feb. 27, 2008, at 4. It might also be noted that Obama conducted these negotiations away from public scrutiny, in contrast to his commitment during the 2008 campaign to televise the negotiation of his health care plan on C-SPAN. Transcript of Democratic Debate in Los Angeles, Fed. News Serv. (Jan. 31, 2008), available at <http://www.nytimes.com/2008/01/31/us/politics/31text-debate.html>. Tom Melling emphasizes the importance of negotiations taking place away from public and media scrutiny in Tom Melling, *Dispute Resolution Within Legislative Institutions*, 46 STAN. L. REV. 1677, 1689–91 (1994).

<sup>6</sup> Obama's commitment to interest-based legislative negotiation should not be a surprise, given his frequent calls for bipartisanship during the campaign. See, e.g., Senator Barack Obama, Remarks: The Past Versus the Future, Jan. 30, 2008, available at [http://www.barackobama.com/2008/01/30/remarks\\_of\\_senator\\_barack\\_obam\\_45.php](http://www.barackobama.com/2008/01/30/remarks_of_senator_barack_obam_45.php) (“We can be a Party that tries to beat the other side by practicing the same do-anything, say-anything, divisive politics that has stood in the way of progress; or we can be a Party that puts an end to it.”). Interest-based negotiation may be one way of giving content to the often vague notion of bipartisanship.

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Skeptics of the interest-based strategy, such as Paul Krugman, criticized the President for “coming in with such a low initial bid.”<sup>7</sup> Viewing the stimulus negotiation in positional terms, Krugman argued that the President’s weak opening position “guaranteed that the final deal would be much too small.”<sup>8</sup> President Obama’s Chief of Staff Rahm Emanuel, who may be a closet skeptic of interest-based negotiation,<sup>9</sup> nevertheless defended the administration’s approach by suggesting that no better outcome could have been achieved under the circumstances. He compared the stimulus negotiation to the Clinton administration’s positional bargaining with Republicans over passage of the State Children’s Health Insurance Program (S-CHIP):

President Clinton had pediatric care, eye, and dental, *inside* Medicaid. The Republicans had pediatric care, no eye and dental, *outside* of Medicaid. The deal [we] cut for President Clinton was eye, dental, and pediatric, but the Republican way—outside of Medicaid. . . . That was the swap. Now, my view is that Krugman as an economist is not wrong. But in the art of the possible, of the deal, he *is* wrong. He couldn’t get his legislation.<sup>10</sup>

Meanwhile, the President continued to speak of shifting the culture of legislative negotiation toward something like an interest-based approach. “[T]here have been a lot of bad habits built up here in Washington,” Obama remarked at a press conference after the stimulus package received zero Republican votes in the House and three in the Senate. “And it’s going to take time to break down some of those bad habits. . . . [W]hen I made a series of overtures to the Republicans . . . [t]hey were designed to try to build up some trust over time.”<sup>11</sup> But even Obama seemed to recognize that positional tactics could have improved the outcome in the stimulus negotiation, at least when viewed in isolation.

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<sup>7</sup> Paul Krugman, Op-Ed., *The Destructive Center*, N.Y. TIMES, Feb. 9, 2009, at A23.

<sup>8</sup> *Id.* Similarly, during the Democratic primaries, Krugman suggested that Democratic candidates should lay out sharply progressive health care plans, even if such plans had less chance of succeeding than moderate ones, so that the debate on health care would be anchored from a progressive position. See Paul Krugman, Op-Ed., *Clinton, Obama, Insurance*, N.Y. TIMES, Feb. 4, 2008, at A23 (“[T]he legislation presidents actually manage to get enacted often bears little resemblance to their campaign proposals. . . . But while it’s easy to see how the Clinton plan could end up being eviscerated, it’s hard to see how the hole in the Obama plan can be repaired.”); Paul Krugman, Op-Ed., *Mandates and Mudslinging*, N.Y. TIMES, Nov. 30, 2007, at A23 (“What seems to have happened is that Mr. Obama’s caution, his reluctance to stake out a clearly partisan position, led him to propose a relatively weak, incomplete health care plan.”).

<sup>9</sup> Speaking in general terms, Emanuel has suggested that the appearance of an effort to be bipartisan may be more important than actual bipartisanship. “We just have to *try*. We don’t have to *succeed*.” Ryan Lizza, *The Gatekeeper: Rahm Emanuel on the Job*, NEW YORKER, Mar. 2, 2009, at 26.

<sup>10</sup> *Id.*

<sup>11</sup> Transcript of Obama’s Prime-Time Press Briefing, Fed. News Serv. (Feb. 9, 2009), available at <http://www.nytimes.com/2009/02/09/us/politics/09text-obama.html>.

Referring to the inclusion of tax cuts favored by Republicans in his initial stimulus proposal, Obama noted, “I suppose what I could have done is started off with no tax cuts, knowing that I was going to want some, and then let them take credit for all of them. And maybe that’s the lesson I learned.”<sup>12</sup>

Can interest-based negotiation succeed in the context of federal legislation? The answer may play some role in determining the success or failure of initiatives from health care reform to the regulation of carbon emissions. Unfortunately, the scholarly literature offers little guidance. Despite the mass of publications on legislative processes, and the equally expansive literature on negotiation, surprisingly few works have explicitly attempted to analyze lawmaking through the lens of negotiation theory.<sup>13</sup> Moreover, of the handful of publications that have made the attempt to connect legislation and negotiation, nearly all have assumed a positional, rather than interest-based, model of bargaining.<sup>14</sup> Legislative bargaining is generally taken to be a process of haggling over distributional gains, as in Emanuel’s presentation of the negotiation over S-CHIP, or in the dispute over reforming the Social Security system in the 1980s. President Reagan, it is said, sought to resolve the problem entirely by cutting benefits, congressional Democrats led by Tip O’Neill sought to resolve the problem entirely by raising taxes, and the dispute was eventually settled by the two sides meeting somewhere in the middle.<sup>15</sup> Virtually no attention has been paid to the possibility that interest-based negotiation strategies might lead to more efficient, welfare-maximizing outcomes in the legislative context, just as they have in many other contexts, from contractual negotiations to divorce settlements.<sup>16</sup>

Determining whether interest-based negotiation is in fact superior to positional negotiation in specific legislative contexts would require a more detailed analysis than this

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<sup>12</sup> *Id.* Providing further evidence that Obama may be conceiving of the legislative process explicitly in negotiation terms, he criticized the unrealistically extreme bargaining positions of his opponents. “[T]here seems to be a set of folks who . . . just believe that we should do nothing. Now, if that’s their opening position or their closing position in negotiations, then we’re probably not going to make much progress . . .” *Id.*

<sup>13</sup> For notable exceptions, see JOHN B. GILMOUR, *STRATEGIC DISAGREEMENT: STALEMATE IN AMERICAN POLITICS* (1995); David C. King & Richard J. Zeckhauser, *Legislators as Negotiators*, in *NEGOTIATING ON BEHALF OF OTHERS* 203 (Robert H. Mnookin & Lawrence E. Susskind eds., 1999); Melling, *supra* note 5.

<sup>14</sup> For one exception, see Melling, *supra* note 5, at 1682 n.36 (recognizing legislators’ ability to “enlarge the pie” through cooperative bargaining).

<sup>15</sup> See GILMOUR, *supra* note 13, at 132–164.

<sup>16</sup> Even studies analyzing historical examples of what appear to be interest-based, value-creating bargains approach the bargains as though they were the outcome of strictly positional negotiations. See, e.g., John Ferejohn, *Logrolling in an Institutional Context: A Case Study of Food Stamp Legislation*, in *CONGRESS AND POLICY CHANGE* 223 (Gerald C. Wright, Jr. et al. eds., 1986). Ferejohn presents food stamp legislation and farm legislation as “two unconnected policies,” *id.* at 223, bound together solely through vote-trading. In fact, the channeling of agricultural surpluses through the food stamp program could be seen as an example of a value-creating bargain. Both sides achieved their desired outcomes through a single policy, whereas neither would have supported the other side’s policy standing alone.

paper attempts. Given the almost complete absence of the interest-based approach from the scholarly literature, as well as from public discussion, my aim will simply be to suggest a few reasons why interest-based strategies might be worth pursuing. Interest-based legislative negotiation could lead to better outcomes in at least two ways. First, because interest-based negotiations tend to result in agreement more often than positional negotiations, the use of interest-based strategies will tend to increase the likelihood that desired bills will be passed into law. The importance of this factor can hardly be overstated given the institutional incentives for gridlock in the contemporary American political system.<sup>17</sup> Second, interest-based strategies could improve the quality of the legislation that is passed, both by satisfying a wider range of the legitimate underlying interests of the parties involved, and by lessening the need for inefficient legislative pork.

After examining the structural hurdles that now stand in the way of successful legislation in Part I, the paper will turn in Part II to an examination of how interest-based legislative negotiation could serve as at least a partial solution to these structural flaws, and thereby lead to the passage of legislation that is superior in terms of both quality and quantity to what would be produced through a positional process.

## I. The Problem: Party unity and gridlock

Before taking a closer look at the structural origins of gridlock in the contemporary American political system, it may be worthwhile to consider a paradigmatic example of such legislative inertia. The failed negotiations over health care reform in 1993 and 1994 were arguably the most substantively significant and politically consequential legislative debacle of the past three decades. The Clinton administration's inability to pass its health care reform plan, despite Democratic control of both houses of Congress, has been blamed on many factors, from the depletion of President Clinton's less-than-bountiful political capital through the controversy over gays in the military, to the heavily funded publicity campaign directed against the plan by its opponents in the health insurance industry, to the insularity and miscommunications of then-First Lady Hillary Clinton's health care task force.<sup>18</sup>

But part of the reason undoubtedly also lies in a political strategy promoted by conservative columnist William Kristol. In a highly influential 1993 memo circulated to congressional Republicans, Kristol argued that "[a]ny Republican urge to negotiate a 'least bad' compromise with the Democrats . . . should be resisted," because "[p]assage in the short run will do nothing to hurt and everything to help Democratic electoral prospects in 1996."<sup>19</sup> Rather than seek to reach a mutually satisfactory agreement with congressional Democrats, Kristol argued that Republicans in Congress should strive to kill the bill

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<sup>17</sup> See Sarah A. Binder, *The Dynamics of Legislative Gridlock*, 93 AM. POL. SCI. REV. 519 (1999) (listing eight potential sources of legislative gridlock, ranging from institutional structures established by the Constitution to temporary budget constraints).

<sup>18</sup> For an analysis of the failure of the Clinton health care plan, see Ezra Klein, *The Lessons of '94*, AM. PROSPECT, Jan. 22, 2008, [http://www.prospect.org/cs/articles?article=the\\_lessons\\_of\\_94](http://www.prospect.org/cs/articles?article=the_lessons_of_94).

<sup>19</sup> Jeanne Cummings, *Health Care Reform: GOP Urged to Kill Health Plan to Help Electoral Chances*, ATLANTA J. & CONST., Dec. 8, 1993, at B4.

outright in order to avoid partisan political losses. “[T]he long-term political effects of a successful Clinton health care bill,” Kristol predicted, would be the revival of the reputation of “the Democrats as the generous protector of middle-class interests. And it will at the same time strike a punishing blow against Republican claims to defend the middle class by restraining government.”<sup>20</sup>

By the end of the following year, health care reform had collapsed in the face of united Republican opposition, despite the Democratic majorities in both houses. (As the veto-proof Democratic House and filibuster-proof Democratic Senate under President Carter also demonstrated, numerical dominance does not guarantee legislative success.<sup>21</sup> An effective negotiation strategy remains crucial.) Helped in part by a public and media perception of Democratic incompetence during the health care fiasco, the Republicans also succeeded in regaining the majority in Congress after forty years of Democratic rule.<sup>22</sup> Anecdotaly, Kristol’s advice—to use partisan legislative gridlock as a tool for gaining, or at least preserving, congressional seats—appears to have been effective.

In order to understand how interest-based negotiation techniques could be used to weaken the forces of partisan gridlock, such as the strategies advocated in Kristol’s memo, we need first to understand what gives rise to those forces in the first place. The genius of the American political system was supposed to lie in its transformation of the self-interested motives of political actors into behavior that would serve the greater public good. The result would be achieved, as Madison put it in Federalist 51, through a “policy of supplying, by opposite and rival interests, the defect of better motives.”<sup>23</sup> Unlike in earlier governing regimes, the ambition of individual officials and the interests of factions would be checked by the countervailing ambitions and interests of other officials and factions. As though under the guidance of an invisible hand, the self-interested motives of individual political actors would be transmuted into the beneficial policies of the government as a whole.

But the framers of the Constitution, notoriously, did not anticipate the dominant role of political parties in American politics, nor their consequences for legislative effectiveness.<sup>24</sup> Empirical study has demonstrated that party unity, a prominent feature of contemporary American politics, is correlated with legislative gridlock.<sup>25</sup> To understand why this should be, we must first consider what motivates legislators to vote as they do. Three primary factors have been proposed: (1) *self-interest* in being reelected, which entails voting in line with the preferences of constituents, donors, or those who influence the votes of constituents, such as the media; (2) *ideology*, which could entail voting against

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<sup>20</sup> *Id.*

<sup>21</sup> See SEAN M. THERIAULT, THE POWER OF THE PEOPLE: CONGRESSIONAL COMPETITION, PUBLIC ATTENTION, AND VOTER RETRIBUTION 93–94 (2005).

<sup>22</sup> PBS.org, A Detailed Timeline of the Healthcare Debate Portrayed in “The System”, [http://www.pbs.org/newshour/forum/may96/background/health\\_debate\\_page3.html](http://www.pbs.org/newshour/forum/may96/background/health_debate_page3.html) (last visited Apr. 15, 2009).

<sup>23</sup> THE FEDERALIST No. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961).

<sup>24</sup> See, e.g., DEAN MCSWEENEY & JOHN ZVESPER, AMERICAN POLITICAL PARTIES 6–7 (1991).

<sup>25</sup> See Fang-Yi Chiou & Lawrence S. Rothenberg, *When Pivotal Politics Meets Partisan Politics*, 47 AM. J. POL. SCI. 503 (2003).

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the stated preferences of constituents on the basis of personal beliefs, or perhaps out of other personal motives, such as the desire for a legacy; and (3) *strategic voting*, which could entail voting against both one's ideological interests and the stated preferences of constituents in order to achieve a separate end. Strategic voting can take many forms, from "logrolling" (the trading of votes with other legislators), to attempts to kill a bill with unacceptable amendments that one does not actually support, to voting for an undesired bill in order to prevent the passage of an even less desired alternative.<sup>26</sup>

But why should any of these motives, by themselves, lead to gridlock? We can see that a legislator might have many reasons to obstruct the passage of any number of *particular* bills. She might do so for ideological reasons, or in exchange for votes on other bills that matter more to her, or in order to please her constituents. But the legislator would have no apparent motive to oppose the passage of bills *as such*. She would have no obvious incentive to contribute to gridlock for its own sake.

When we introduce political parties to the picture, however, we can see a powerful motive for some legislators to obstruct the effectiveness of the legislative branch as a whole. It is the same motive that lay behind Kristol's memo. In a system of two political parties, where each party competes in a zero-sum game for the maximal number of seats in the legislature, each party will have a strong incentive to see the other party fail at achieving its legislative goals, regardless of what these goals are. Legislative failure by the majority party is likely to have a number of positive effects for the minority. The majority may appear ineffectual and lose voter support, contributions, or the favorable coverage of the media. Some portion of these voters and sources of funding and publicity may even transfer their support to the obstructing minority party, increasing that party's chances of gaining seats from the majority in future elections.

Based on anecdotal evidence, partisan obstruction is an actual, widespread motive in the behavior of contemporary American legislators. In a description of the incentives of Congressional leaders, former Representative Tom Davis suggests that gridlock is systematically generated for partisan ends:

When you get the majority, the leadership team sits around the table, and the first question the winners ask, sitting in this ornate room, is "How do we stay in the majority?" . . . Now the members, a lot of them, are willing to tackle these issues, but they elect leaders, and the leaders' report card is: Do they get their members re-elected? . . . And the minority. . . sits in a little less ornate room, a little smaller room in the Capitol, and they say, "How do we get it back?" *And so for every issue it's "Do we cooperate or do we try to embarrass them?" Very few times they cooperate.*<sup>27</sup>

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<sup>26</sup> The list of motivators is adapted from James B. Kau & Paul H. Rubin, *Self-Interest, Ideology, and Logrolling in Congressional Voting*, 22 J.L. & ECON. 365 (1979). *But see* Thomas Stratmann, *The Effects of Logrolling on Congressional Voting*, 82 AM. ECON. REV. 1162 (1992) (arguing that ideology is not a significant determinative factor in legislative voting behavior).

<sup>27</sup> Peter Baker, *Tom Davis Gives Up*, N.Y. TIMES MAG., Oct. 5, 2008, at 63 (emphasis added).

Davis' anecdote illustrates how the existence of political parties drives legislators toward a positional mindset, one focused overwhelmingly on distributional gains in power. By contrast, consider that in the absence of political parties, a legislator's political power would largely track his ability to pass desired legislation and his ability to be reelected. These might be the two greatest measures of political power, and neither would represent an inherently zero-sum game. Theoretically, all of the seated legislators might gain, simultaneously, in political power relative to the future opponents for their seats, just as, theoretically, all could become better able to pass bills—for example, if a more streamlined voting process were developed.

But once political parties enter the picture, the total political power available in the legislature comes to resemble, in important respects, a fixed quantity. The power of the individual legislator to pass desired bills will largely depend on the relative power of her party, especially insofar as party unity exists on both sides of the aisle. (In fact, party unity today appears to have reached historically high levels, thanks to recent trends in demographics and redistricting.<sup>28</sup>) In a situation of perfect party discipline, the legislator's only chance of passing a bill opposed by the other party's leadership would be if her own party possessed sufficient votes to pass the bill on its own. The power of her party will, in turn, almost entirely depend on the number of seats that her party possesses relative to the opposition. Further, the committee system will compound the correlation between the power of the legislator's party and her ability to pass desired bills and achieve reelection. If the legislator's party possesses the majority of the seats in her chamber, she may receive a committee seat or chair that will give her much greater power to draft and push for the passage of desired legislation, and to obstruct undesired legislation.

The political scientist John Gilmour has identified a phenomenon related to the partisan gridlock described above. He calls it “strategic disagreement.”<sup>29</sup> In his book of the same name, Gilmour examines various reasons why legislators refuse compromise, such as their interest in maintaining a distinctive political brand, the desire to avoid the appearance of weakness or “selling out,” and a belief that “accepting half a loaf today may preclude getting the whole thing at a later date.”<sup>30</sup> Gilmour also identifies more specific forms of partisan strategy that result in gridlock, such as “pursuit and avoidance,” in which Party A moves toward the policies of Party B, and Party B responds by refusing compromise in order to maintain its distinctiveness; and “stalemate,” in which a disaster looms but neither side is willing to be the one who makes the necessary compromises to avoid it. In both cases, “one group, or possibly two, . . . avoid the best agreement that can be gotten under the circumstances in order to seek political gain.”<sup>31</sup>

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<sup>28</sup> *See id.* (“Most lawmakers represent safe districts, giving them little incentive to tack to the center and work together. Indeed, many incumbents worry more about . . . drawing a primary challenge from within their own parties for being insufficiently orthodox”), *citing* SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS (2008) (arguing that Congress was more polarized in 2005–6 than it had been at any time since 1905–6).

<sup>29</sup> *See generally* GILMOUR, *supra* note 13.

<sup>30</sup> GILMOUR, *supra* note 13, at 10.

<sup>31</sup> GILMOUR, *supra* note 13, at 9. Gilmour describes a third partisan strategy of disagreement, “strategic encroachment.” In this strategy, Party A expects that Party B will

But unlike the strategies described by Gilmour, which he acknowledges may not be “extremely common,”<sup>32</sup> the incentive to thwart an opposing party’s legislative efforts in order to achieve marginal distributive gains in political power would seem to be ever-present, as Davis’ anecdote suggests. The latter phenomenon has almost certainly continued to some degree in the most recent Congress, as the party-line votes on the stimulus package illustrate. Representative Pete Sessions, a Republican of Texas, went so far as to compare his party’s obstructive prowess to that of the Taliban insurgency in Afghanistan.<sup>33</sup> After an election in which moderate Republicans lost out overwhelmingly to Democrats, the House Republicans may be more ideologically conservative as a group than they have been in decades.<sup>34</sup> As a result, ideological disagreement no doubt plays a strong role in Republican opposition to the President’s proposals. But it also seems plausible that purely strategic political calculations are playing a significant role. As one political commentator put it, “[t]he Republicans in Congress do not want Obama to be a successful president,” because doing so could very well mean “dooming their party to minority status for quite a while.”<sup>35</sup> In other words, what Kristol warned against in 1993 remains a risk for Republicans today. And if Tom Davis is right, congressional Republican leaders may have decided that obstructing the administration’s legislative goals is the most politically promising avenue forward.

## II. A Partial Solution: Interest-based legislative negotiation

The observation that partisanship can lead to gridlock in American politics is not new, and many scholars have advocated sweeping structural reforms to overcome the problem. Among the more ambitious negotiation-focused reforms is Lawrence Susskind’s proposal for the establishment of ad hoc negotiating committees in Congress featuring representatives of the various blocs of legislators who share common stances on an issue.<sup>36</sup> Others would simply transfer more responsibility and discretion from Congress to administrative agencies.<sup>37</sup> Some place their faith in organizing widespread civic demand

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refuse agreement and offers legislative proposals that Party A does not want passed, in the hope of currying favor with constituencies supporting the proposals. But as Gilmour notes, “strategic encroachment is not a bargaining failure; the behavior of one side only makes it appear that there is a zone of agreement when in fact there is none.” GILMOUR, *supra* note 13, at 9. Strategic encroachment contributes only to the *appearance* of gridlock, not to gridlock itself.

<sup>32</sup> GILMOUR, *supra* note 13, at 4.

<sup>33</sup> See Alec MacGillis & Perry Bacon, Jr., *GOP Sees Positives in Negative Stand*, WASH. POST, Feb. 9, 2009, at A01.

<sup>34</sup> See Elizabeth Drew, *The Thirty Days of Barack Obama*, N.Y. REV. BOOKS, Mar. 26, 2009, at 10, 12.

<sup>35</sup> *Id.*

<sup>36</sup> See Sol Erdman & Lawrence Susskind, *Congress Can Win Respect, Legislate Better, By Learning About Consensus From Business*, 13 ALTERNATIVES TO HIGH COST LITIG. 139, 139 (1995).

<sup>37</sup> For the classic statement of this position, see JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 10 (1938) (arguing that effective governance in a modern economy requires

for practical, nonideological solutions to policy problems.<sup>38</sup> But in order to succeed, many of these proposals would require the sort of large-scale, altruistic cooperation whose necessity the framers had hoped to avoid.<sup>39</sup> Susskind's reform in particular would seem to fall victim to a potential Catch-22. Because changes to the Senate's internal rules require a two-third majority, the establishment of negotiating committees would require overcoming an even greater hurdle than the one confronted by the vast majority of bills. Before the committees could be established, gridlock would apparently have to be overcome; but before gridlock could be overcome, the committees might have to be established.

In comparison with structural reforms, the use of interest-based strategies by those involved in legislative negotiations is a partial solution, but it is one that can be exploited immediately and without necessarily mustering any prior cooperation. As always with interest-based negotiation, it would be necessary to coax the other parties in the negotiation into adopting an interest-based approach as well, so as to avoid exploitation.<sup>40</sup> There is a constant risk in interest-based negotiation, to take only one example, that a reasonable, principle-based offer will be treated as an aspirational position by the other party, who will then attempt to bargain downwards. But there are numerous techniques for countering such tactics, from explicitly negotiating the rules of negotiation to calling upon the services of a trusted third party.<sup>41</sup> Problems of reciprocity and cooperation exist in all areas of negotiation and hardly constitute a categorical objection to attempting an interest-based approach in the legislative arena.<sup>42</sup>

It must also be acknowledged that positional negotiation by one party could, under certain circumstances, result in a better one-time outcome for that party than might be possible using interest-based strategies, as Obama recognized after the first round of stimulus negotiations.<sup>43</sup> For example, in a purely distributional one-shot game where agreement of some kind is highly likely, such as a game where the opposing side has a strong incentive to settle before an early deadline, a hard-bargaining positional strategy would almost certainly be best. But according to Article I, Section 7 of the U.S. Constitution, no bill can become law without passing through both houses of Congress. One of those houses is the Senate, which usually requires a three-fifths majority to achieve cloture on debate. At first glance, the risk of nonagreement on Senate bills would seem to vastly outweigh the risk of distributionally less-than-ideal outcomes within the zone of

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delegation of authority from Congress to executive agencies capable of imitating modern industrial management practices).

<sup>38</sup> See *The Common Interest: Government by the People*, <http://www.thecommoninterest.org> (last visited Apr. 15, 2009). The Common Interest has attempted to improve governance in Idaho by organizing a broad-based, nonpartisan membership, soliciting their opinions and proposals, and then lobbying on behalf of proposals that receive the support of two-thirds or more of the membership.

<sup>39</sup> See *supra* text accompanying note 23.

<sup>40</sup> See MNOOKIN, *supra* note 2, at 9 ("Without sharing information, it is difficult to find trades that might create value. . . . But if unreciprocated, openness can be exploited").

<sup>41</sup> See generally FISHER & URY, *supra* note 1, at 95–144; Mnookin, *supra* note 2, 9–92.

<sup>42</sup> For strategies to counteract positional tactics in negotiation, see, e.g., Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325 (1996).

<sup>43</sup> See *supra* text accompanying note 12.

possible agreement.<sup>44</sup> Given the difficulties of passing legislation in our committee-based, bicameral system, it would appear unwise to adopt any set of negotiating tactics that systematically tended to decrease the occurrence of legislative agreement, especially if the tactics were uncertain to achieve any gains in the quality of legislation.

Interest-based negotiation can increase the likelihood of the passage of legislation by helping to counteract the partisan incentives for gridlock described in the previous section. To begin with, interest-based negotiators will tend to arrive at agreements that satisfy the “ideological” and “self-interested” motivations for voting in favor of a bill more fully than legislation that results from positional negotiation. Legislation produced through interest-based negotiation will not only be of a higher general quality, measured in terms of the relative satisfaction of the negotiating parties’ underlying interests.<sup>45</sup> It will also tend to take more account of the specific ideological commitments of all participating legislators, or at least be drafted so as to avoid *unnecessarily* offending those commitments. For the same reason, such legislation will have a better chance of satisfying, or at least not offending, the interests of participating legislators’ constituents or donors, which will further increase the legislator’s “self-interested” motivation to vote for the bill. These factors will in turn make the legislation less likely to include pork-barrel spending. If legislators have fewer ideological or self-interested motives to vote against a bill as it stands, there will be less need to coax them to vote for the bill through the inclusion of inefficient, narrowly targeted economic incentives. As a result, other legislators will have less reason to oppose the bill as wasteful spending.

It remains an open question how often the substantive advantages of legislation produced through interest-based negotiation would be able to overcome the partisan incentives for gridlock. But any negotiation strategy that sweetens the “ideological” and “self-interested” motivations to vote for a bill will have a marginally better chance of overcoming any “strategic” motivations to vote against the bill, such as the desire to achieve partisan benefit by embarrassing the other party. Even if strategic partisan motivations continue to outweigh ideological and self-interested motivations nine times

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<sup>44</sup> As part of his attempt to determine the characteristics of the “ideal negotiator” in a congressional leadership setting, King, *supra* note 13, at 218, creates an abstract model estimating the trade-off between the probability of a legislative deal and its quality. He arrives at the conclusion that the ideal negotiator would be more ideologically extreme than the median party caucus member, so as to serve as a better “anchor” in negotiations. But King’s model takes no account of the institutional factors that impede the passage of legislation, as described by Binder, *supra* note 17. Once these factors are incorporated, it is possible that an ideal legislative negotiator might be more *moderate* than the median member of the party caucus.

<sup>45</sup> The research into the effects of various negotiation strategies on outcomes is extensive. See, e.g., DOUGLAS R. HOFSTADTER, *The Prisoner’s Dilemma: Computer Tournaments and the Evolution of Cooperation*, in METAMAGICAL THEMAS: QUESTING FOR THE ESSENCE OF MIND AND PATTERN 715–34 (1985) (summary of computational simulations demonstrating long-term superior outcomes of firm but cooperative as opposed to competitive strategies in negotiation-like games). See generally Leigh Thompson et al., *The Evolution of Cognition and Biases in Negotiation Research*, in THE HANDBOOK OF NEGOTIATION AND CULTURE 7 (Michele J. Gelfand & Jeanne M. Brett eds., 2004).

out of ten, it might be possible in the marginal tenth case—where the ideological or self-interested motivations are already especially strong and the strategic partisan motivations are already especially weak—for a negotiator’s strategy in shaping the bill to make the difference between passage and defeat.

Strategic considerations point to the second reason why interest-based techniques might increase the likelihood of passing a bill. Legislation produced through interest-based negotiation will be less likely to provoke obstructionist voting strategies because the passage of such legislation will likely result in *less distributional power changes* than the passage of a positionally-negotiated bill. In theory at least, the minority party will be more able to take partial credit for legislation produced through interest-based negotiation.

Take, for example, a hypothetical piece of legislation providing incentives for the residential adoption of solar panels. At first glance, the passage of such an environmentally-conscious bill by a Democratic majority would seem to be a clear political victory for Democrats. As a result, the Republican minority would have a strategic incentive to oppose it. If we assume in this hypothetical scenario that Republicans have enough votes to defeat the bill, they might do so on strategic grounds.

If the legislation had been developed through an interest-based negotiating process, on the other hand, the interests of both parties might be reflected in the language of the bill and the way in which it is presented to the public, especially if it has bipartisan sponsorship. Republicans could present the bill to their constituents as a homeland security initiative since private, residential solar panels are much less susceptible to terrorist attack than a centralized power station, and a network of such panels could strengthen the national energy infrastructure by taking pressure off the grid.<sup>46</sup> Democrats could present the legislation as part of the struggle to reduce carbon emissions. Both parties could conceivably present the outcome as a legislative victory, or at least not a defeat. Because there might be no significant gains or losses in terms of the parties’ *relative* political power, the minority party would have less motive to oppose the bill for strategic reasons.

The passage of the hypothetical solar panel bill could even be viewed as an instance of value being created through the divergent perspectives of the two parties, a common technique in interest-based negotiation.<sup>47</sup> Republicans might believe themselves to be the net winners from passage of the legislation, based on the theory that voters care more about homeland security than climate change. Democrats might believe the opposite.

Interest-based negotiation would be especially effective at overcoming strategic opposition when combined with efforts to reduce the appeal of the opposing party’s alternatives to a negotiated agreement. For example, the majority party, especially if it controls the Presidency, could build public support for taking immediate action to address a problem. If the President’s efforts are sufficiently successful, the minority party could find itself forced to choose between two unappealing options. It could either engage in good faith, interest-based negotiations over the drafting of a bill that would then be passed with bipartisan support, at which point the President would receive credit for spearheading

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<sup>46</sup> For the possibility of interest-based bargaining in the areas of national security and the environment, see generally R. James Woolsey, *A Partnership Deal: Malevolent and Malignant Threats*, in CLIMATIC CATAclysm: THE FOREIGN POLICY AND NATIONAL SECURITY IMPLICATIONS OF CLIMATE CHANGE 169, 179–188 (Kurt M. Campbell ed., 2008).

<sup>47</sup> See MNOOKIN, *supra* note 2, at 14–15.

the bill and the distribution of political power in the country would almost inevitably slant further toward the President's party. Or the minority party could refuse to engage in negotiations over the bill and oppose its passage. Whether or not the minority succeeds in blocking the bill, if the President's efforts at building public support have been sufficiently successful, the minority party might lose even more political power through its opposition to the bill than it would have lost through cooperation in the bill's successful passage. In other words, even if successful passage of a bill supported by the President would result in a relative shift in power from the minority to the majority, the minority might still cooperate in the bill's passage in order to avoid an even greater political loss.<sup>48</sup> Past presidents have used this technique, and in the wake of the Republican opposition to his stimulus plan, Obama drew upon it as well.<sup>49</sup>

### III. Conclusion

Interest-based legislative negotiation is not an entirely new idea. It has been practiced periodically at the national level, and some of what has been labeled "logrolling" might even be viewed as interest-based, value-creating legislative negotiation.<sup>50</sup> On other occasions, interest-based negotiation has been utilized almost explicitly, as in the drafting and passage of the Civil Justice Reform Act of 1990.<sup>51</sup> The primary barrier standing in the way of the adoption of interest-based strategies in the legislative context may simply be the widespread sense that such strategies are a sign of weakness, in contrast to hard-nosed positional bargaining. Or legislators may feel that interest-based strategies are dangerously idealistic and in practice would only lead to the strengthening of the opposing party and the promotion of its ideological goals.

As noted at the outset, it may ultimately be the case that given the structure of America's political institutions and the current political cultures of the two parties, a positional approach would produce the best outcomes for the party using it, even in the long term. Even if interest-based strategies have some role to play in the legislative arena,

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<sup>48</sup> In negotiation terms, the majority party would have improved its own position by undermining the minority party's "best alternative to negotiation" (BATNA). *See generally* FISHER & URY, *supra* note 1, at 97.

<sup>49</sup> *See* Peter Baker, *Obama Sternly Takes on His Critics*, N.Y. TIMES, Feb. 10, 2009, at A15. Melling describes Reagan's use of the technique, Melling, *supra* note 5, at 1689. Noting President Clinton's failure to achieve health care reform despite Democratic control of Congress, Doris Kearns Goodwin said, "History suggests that unless a progressive president is able to mobilize widespread support for significant change in the country at large, it's not enough to have a congressional majority." Robert Kuttner, *A Conversation With Doris Kearns Goodwin*, AMER. PROSPECT, Dec. 19, 2007, [http://www.prospect.org/cs/articles?article=a\\_conversation\\_with\\_doris\\_kearns\\_goodwin\\_](http://www.prospect.org/cs/articles?article=a_conversation_with_doris_kearns_goodwin_). Or in Lincoln's words, "With public sentiment, nothing can fail; without it nothing can succeed." First Lincoln-Douglas Debate, Ottawa, Ill. (Aug. 21, 1858), *in* ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1832-1858, at 487, 525 (Don E. Fehrenbacher ed., 1989).

<sup>50</sup> *See supra* note 16.

<sup>51</sup> *See* Melling, *supra* note 5, at 1707.

there will still be questions about how best to design specific negotiations. It may be that in many cases, the inclusion of radical ideological opponents at an early stage of negotiation would be counterproductive.

But if interest-based negotiation has the potential to improve the outcomes of legislative bargaining, there are at least two reasons to practice it now. First, a period of dominance by one political party offers a rare occasion to push the culture of legislative negotiation toward an interest-based approach. It is true that an enlarged Democratic majority after the 2010 elections might find itself in a position to impose its legislative agenda without any Republican support. But such dominance might argue in favor of practicing interest-based negotiation rather than against it. There is little to lose in the short term, because a failure to reach bipartisan agreement on a bill would not prevent the bill from being passed; and there is a great deal that might be gained in the long term, because overwhelming single-party dominance tends to be short-lived.

Second, many of the most prominent national debates of the past two decades, from affirmative action to gays in the military to federal funding for stem cell research, involved divisive cultural issues that left few obvious opportunities for welfare-maximization through the satisfaction of compatible underlying interests. In some cases, to believe in one side's position was simply to believe that the other side's stated interest was not legitimate and should not be satisfied. As a result, there was a great deal to be gained politically by staking out a strict ideological position and refusing to depart from it, even if the result was gridlock. The problems facing the new administration, however, are largely of a different kind. Whether with regard to financial reform, energy policy, or health care, the underlying interests of the majority of Americans are for the time being squarely aligned.

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