

Cozen Currents: One Nation, Deeply Divided, But Evenly Split

The Cozen Lens

- In a divided America, few issues seem to cut through the partisan chasm between Democrats and Republicans. But that chasm is on a razor's edge in close races that can determine control of Congress.
- The history of partisan legislative agendas is strewn with failure and the party in power suffering the electoral consequences for that. This year is expected to be no different, even if Democrats are on track to achieve some partial success before Congress leaves town for the rest of the summer.
- The lame duck session is generally thought to be unproductive. That perception doesn't always match reality, however, and this year, there's a chance that lawmakers could get a lot done between Election Day and year end. This could include both perennial legislation like a tax extenders package, appropriations, and other bills delayed until after the midterms.

A Divided and Close Midterm

Do Issues Matter?: American politics is polarized with events viewed through red- or blue-tinted glasses. Midterms are less about swaying voters and more about bolstering turnout among the diehard supporters.

- Issues are meant to confirm a preexisting narrative rather than change one's views of how things are going. Republicans attacked President Biden and Democrats for gas prices going up. They are now attacking them for gas prices going down. Critical Race Theory was a defining issue of the Virginia gubernatorial election last year but there's hardly a peep about it today. Despite another wave of Covid cases, voters have moved on.
- There's no rally around the flag issue. The Russian invasion of Ukraine saw both Democrats and Republicans sporting yellow and blue during the State of the Union address. Yet the resolute response from the United States has brought no bump to Biden's approval ratings.
- Issue focus has underscored a potential change of political coalitions. A *New York Times* poll showed that Democrats are getting a larger share of college-educated white voters than they are of nonwhite voters. On non-economic issues like guns, abortions, and capital "D" democracy issues, Democrats lead over Republicans. These are issues that animate the college-educated class. But most voters, especially nonwhite voters, care more about the economy and inflation. They see the Democratic Party as "woke" and not in touch with bread and butter issues. That's where Republicans hold the advantage.

Marginal Issues Can Make a Meaningful Difference: America is historically polarized but also historically close in the vote share between the two parties. That can make specific issues determinative in close races.

- Congressional majorities are fragile. In every midterm in the 21st century, one or both chambers of Congress have flipped party control.
- In close races, mobilizing events can sway elections and control of Congress. In 2018, that October surprise was Brett Kavanaugh's confirmation hearing to the Supreme Court. The conservative backlash to the attacks on him led to a "Kavanaugh effect" benefitting the GOP. This included red-state Senate races where Democrats lost close races, like Florida and Texas. A red state where Democrats won a close race was Senator Joe Manchin's (D-WV) reelection, and he was the only Democrat to support Kavanaugh's confirmation.
- Mobilizing events can exacerbate other election variables. Republicans have or will likely



Howard Schweitzer

CEO, Cozen
O'Connor
Public
Strategies

hschweitzer@cozen.com
Phone: (202) 912-4855
Fax: (202) 640-5932

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nominate a series of controversial candidates for competitive Senate seats, including in Arizona, Georgia, and Pennsylvania. Issues like abortion came to define already controversial candidates in races past, like failed GOP Senate nominees Todd Akin and Richard Mourdock in 2012. Abortion and other issues can tip the scales in close races.

Building Back Bigger Isn't Better, Electorally Speaking

The Bigger They Are, The Harder They Fall. Partisan legislative agendas have a history of being overly ambitious, which has tended to result with the majority coming up short as it navigates the intra-party squabbles.

- Build Back Better is not the first time Democrats have tried and failed to pass a sprawling partisan bill. Environmental legislation has been especially difficult with the party failing in the early 1990's to pass the BTU tax, a large, broad-based energy tax, and then again in 2009 when they tried to push through cap-and-trade, which would have put mandatory limits on greenhouse gas emissions and was seen as a large tax increase on energy.
- Bipartisan environmental bills have tended to see more success than these partisan measures. The most recent example of this was the Energy Act from Senators Joe Manchin (D-WV) and Lisa Murkowski (R-AK). The bill was "the first comprehensive modernization" of energy policy in 13 years and covered issues ranging from smart manufacturing to critical minerals but at least was squarely focused on the energy sector. The package was considered non-controversial enough to be attached to the FY2021 appropriations bill, one of the annual "must-pass" bills Congress takes up.
- The other area in which it has often been a challenge to pass partisan legislation is healthcare, as Republicans experienced in trying to achieve their repeal-and-replace bill in 2017. While Democrats were able to ultimately pass the Affordable Care Act, they still compromised on their original agenda by dropping the public option and cutting a deal with Big Pharma to back the legislation. This did not come before previously failing to pass Hillarycare in the 1990's.

The Price of Failure (or Success). There is a cost to every political decision, even if it results in legislative success. With respect to partisan legislative efforts, that has often tended to coincide with losing the majority, and sometimes in overwhelming fashion.

- As beneficial as partisan legislation is pitched to the electorate, there are electoral consequences for failing to pass these bills. In 1993, after Democrats failed to pass their BTU tax due to Senate disagreement, the following midterm cycle became what is known as the "Republican Revolution." Though the bill failed to become law, Republicans seized upon the votes in favor of it in the House and attacked Democrats for the "Big Tax on U."
- Even when successful on these partisan bills, the majority is still likely to face electoral blowback as passing the legislation means rolling the minority. This dynamic emerged in the 2010 midterm elections when Republicans attacked Democrats for passage of the Affordable Care Act. Many members who had supported the legislation were defeated by Republicans promising to repeal it while those like Manchin and "Blue Dog" Democrats in the House that opposed the bill survived the Republican wave.
- One of the reasons that these large bills can backfire is the challenge presented by trying to clearly message the benefits of the sprawling proposals. When there is a bill that does everything, it becomes less tangible and more difficult to understand for voters. This was a challenge for President Biden's original Build Back Better proposal where voters fixated on the whopping cost, \$3.5 trillion, rather than the measures that were largely popular when viewed on their own.

Something is Greater Than Nothing. Democrats had an undeniably large legislative agenda once they won unified control last year, but managing that has proven more difficult, particularly given their razor-thin majorities, and the result has been to accept partial successes where they can get them.

- Build Back Better has been reduced to a narrow healthcare-focused package, that while still transformative, will feel like a let down from initial expectations. Similarly, the bipartisan China competition bill has been slimmed down to a semiconductor and research and development

package. It is still a meaningful piece of legislation with authorizations and appropriations totaling nearly \$250 billion, but it is a far cry from what was under consideration to comprise the comprehensive Bipartisan Innovation Act.

- Simplifying these bills will make messaging easier for Democrats as they can offer more tangible examples of the issues they are addressing, like drug pricing and supply chains, rather than an amorphous mega-package. In addition, taking the legislative victories now rather than prolonging negotiations into the fall will give members more time to campaign on these fixes, but it will still not be enough for voters to feel a difference in their pocketbooks.
- The midterms are traditionally seen as a referendum on how the party in power has performed for the last two years and these bills will likely not change that perception enough to alter the expected midterms outcome. Where they could help though is perhaps in stemming the scale of GOP victories on the margins, particularly in the House.

A Preview of The Un-Lame Duck Session

Background of the Lame Duck Session. Conventional wisdom holds that not much gets done during the lame duck session of Congress, but is that really the case?

- The term “lame duck” originated in the 18th century and was initially used to describe those who defaulted on debts in the context of London stock trading. In the 19th century, the term made its way into US politics, and in the 20th century, it acquired its current meaning of an elected official who has lost reelection but whose term hasn’t yet expired. It’s generally thought that Congress in the lame duck session isn’t as productive, but recent history suggests otherwise.
- Last year, the [Pew Research Center](#) published data on congressional activity and found that since 2000, lame duck sessions have become a matter of routine. Before 2000, lame duck sessions were relatively rare. Between 1974 to 2000 inclusively, Congress met in the lame duck period only four times to consider legislation (a fifth lame duck session took place in 1998 for the impeachment of President Clinton). Since 2000, Congress has met between Election Day and the start of the new Congress during every election year. Over time, Congress has increasingly done more of its work during lame duck sessions. In 2000, the 106th Congress passed 10.3 percent of its total legislative output in the lame duck session, a percentage that rose to an all-time high of 43.9 percent for the 116th Congress in 2020.

Perennial Legislation. The lame duck session is the time when bills that come up every year, generally deemed “must-pass” legislation, often become law.

- Whether due to congressional procrastination or a fact of timing, yearend is usually a busy time for Congress to pass legislation. One major lame duck bill this year could potentially be a tax extenders package. Near the top of the list is likely to be delaying the start of amortization of R&D expenditures from after December 31, 2021 until after December 31, 2025. There’s critical mass of bipartisan and bicameral support to extend the important tax credit, and with Democrats’ budget reconciliation legislation slimmed down to drug pricing reforms and extending Affordable Care Act subsidies, lawmakers will need to find another vehicle for it. A year-end tax package could also include some clean energy tax credits, although likely smaller than what Democrats would have included in a version of Build Back Better. This could include the extension and expansion of production tax credits (PTCs) and investment tax credits (ITCs) for clean energy projects and properties, as well as the creation of an ITC for advanced manufacturing facilities and equipment. Other tax provisions that have enjoyed bipartisan support in the past include expanding the Low Income Housing Tax Credit and creating a new Neighborhood Homes Credit to benefit developers and rehabbers of homes in distressed neighborhoods, and the House-passed Securing a Strong Retirement (SECURE 2.0) Act of 2022. This bill would expand automatic enrollment in retirement plans, raise the age for required distributions from 72 to 75, increase the amount and age limit for IRA catch-up contributions, and expand options for annuities in retirement plans.
- Another major piece of legislation to watch in the lame duck period will be FY23 appropriations. With the midterm elections in the rearview mirror, the lame duck provides Democratic and Republican appropriators an opportunity to forge a compromise before the end of the year. Rising inflation gives lawmakers, particularly defense hawks, an incentive to strike a deal on funding the government sooner rather than later to minimize the duration of a

continuing resolution (CR). The flat budget of a CR would essentially impose a budget cut in real terms. Ultimately, the decision to finalize FY23 appropriations before year end will likely rest with GOP leadership. It's likely that Republicans will retake control of the House and possibly the Senate after the midterms. An incoming House Speaker Kevin McCarthy (R-CA) and/or an incoming Senate Majority Leader Mitch McConnell (R-KY) will face a choice between holding out to leverage their power in the next Congress or getting appropriations out of the way and clearing the deck for the new GOP majority.

Targets of Opportunity. Due to political factors, some legislation may be more likely to pass during the lame duck session than at an earlier time.

- The SAFE Banking Act, which would allow cannabis companies access to the financial system, is one such example. Last week, Senate Majority Leader Chuck Schumer (D-NY) and Senators Cory Booker (D-NJ) and Ron Wyden (D-OR) introduced the [Cannabis Administration and Opportunity Act \(CAOA\)](#), a bill that would legalize cannabis on the federal level. The Senate Judiciary Committee Subcommittee on Criminal Justice and Counterterrorism is scheduled to hold a [hearing](#) on cannabis today. With Schumer focused on comprehensive cannabis reform for the time being, he's unlikely to advance the SAFE Banking Act. Going into the midterms, Democrats may not want to give up on their push to legalize the drug just yet, considering legal marijuana a winning issue. (In April 2022, a [CBS News poll](#) found that 66 percent of Americans support legalizing the drug). Nevertheless, Schumer is unlikely to find enough votes in the evenly divided Senate for legal cannabis to reach the 60-vote threshold to defeat a filibuster. During the lame duck period, however, with the pressure of the campaign over, he could potentially be more willing to make an incremental compromise on cannabis reform that could include SAFE Banking. A Democratic Senate staffer said in an interview with [Politico](#) last month that "Schumer has changed from a more defensive posture against something smaller that would take away from comprehensive reform, and is now interested in what could get done by the end of the year."
 - Children's online safety and privacy is another area that could see action after the midterms. At the moment, comprehensive data privacy legislation is advancing in the House, yet it has lacked key support in the Senate, notably from Senate Commerce Committee Chair Maria Cantwell (D-WA). In the event that the broader bill fails, lawmakers could turn to children's privacy during the lame duck session as a way to get something done this year. On Wednesday, the Senate Commerce Committee will hold a [markup](#) on two bills in this area. The first is sponsored by Senator Ed Markey (D-MA), who was the chief architect of the Children's Online Privacy Protection Act (COPPA), and Senator Bill Cassidy (R-LA). It's considered to be a "COPPA 2.0" that would expand children's privacy protections from children under 13 to a higher age threshold of 16, among other provisions. Senator Richard Blumenthal (D-CT) and Marsha Blackburn (R-TN) have also introduced the [Kids Online Safety Act](#), a bill which would impose new design requirements on internet platforms focused on children's safety and privacy online. These more narrowly tailored measures could potentially gain greater support than comprehensive privacy legislation, particularly once it's clear the latter has no time left for passage
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