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2010

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Recommended Citation

Rappaport, Michael B., "The Obama Administration. Fundamental Institutional Change, and the Constitutional Lawmaking System" (2010). *Constitutional Commentary*. 779.
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THE OBAMA ADMINISTRATION, FUNDAMENTAL INSTITUTIONAL CHANGE, AND THE CONSTITUTIONAL LAWMAKING SYSTEM

*Michael B. Rappaport**

As a fusionist,[1] or moderate libertarian with conservative influences, I was alarmed by the election of Barack Obama and a largely Democratic Congress. Based on Obama's campaigning and his voting record, I believed that he was likely to strongly favor a variety of programs that would significantly increase the size of government. Combined with a Congress that had large Democratic majorities in both houses, the stage seemed set for a large expansion of government.

Increasing the risk of government growth was the financial crisis that preceded the election. The financial sector's significant problems led many people to anticipate a severe economic downturn, perhaps one approaching that of the Great Depression. With an emergency of that kind, people often look to the government to do something to address the problem. Thus, President Obama and the Congressional Democrats seemed to have both the power and opportunity to significantly grow the government. Moreover, the Administration appeared to recognize this too, as suggested by Chief of Staff Rahm Emmanuel's infamous statement that "[y]ou never want a serious crisis to go to waste."[2]

The possibility of another New Deal is a scary thought to someone with small government views. Yet, this was certainly not the only possible result. The last time there was a

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1. My fusionism derives primarily from Friedrich Hayek's works. *See, e.g.*, FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY (1960). Another form of fusionism is associated with the works of Frank Meyer. *See* FRANK MEYER, IN DEFENSE OF FREEDOM: A CONSERVATIVE CREDO (1962).

2. *See* Gerald F. Seib, *In Crisis, Opportunity for Obama*, WALL ST. J., Nov. 21, 2008, at A2.

Democratic President, with large Democratic congressional majorities, who sought to restructure health care, the result was not larger, but smaller government. The two years when President Clinton and the Congressional Democrats governed led to a rejection of health care restructuring and a Republican takeover of Congress. Thus, one possibility is that the Obama presidency might lead the country to reject big government ideas and to replace them with the smaller government notions. I have called this "the Carter/Clinton scenario"—a reference to the last two times that Democrats controlled all three lawmaking branches, which led to the smaller government victories of Ronald Reagan and Newt Gingrich.[3]

Reflections on these different possible results—of a Second New Deal, of the Carter/Clinton scenario, and of something in between—naturally leads one to ponder the forces in the political system that determine whether one party rule leads to fundamental institutional change, like the New Deal, or to a rejection by the voters. It also leads one to ponder the normative question of whether, and how much, a constitutional system should place limits on a majority's ability to enact fundamental change.

In this short essay, I explore fundamental institutional change and argue that a desirable constitution should constrain such change. I argue that many of the reasons that justify strict limitations on the passage of constitutional amendments also justify constraints on fundamental institutional change. I then show that the modern American constitutional system does place significant limits on basic institutional change. Far from allowing a single election in which a short term majority can secure power to enact enormous change, it employs several limitations on radical change, including the American tri-cameral lawmaking system and the institution of midterm elections. I then examine three historical periods, that of the New Deal, the Great Society, and the early Clinton Administration, to support my analysis. I conclude by applying the analysis to the Obama Administration and suggesting that if it does enact fundamental institutional change, it will do so only by surmounting the not insubstantial checks that the American constitutional system places on such change. Finally, I should

3. While the Republican Party generally embraces smaller government than the Democrats, it certainly has its big government wing of which George W. Bush and John McCain were recent leaders. If the Carter/Clinton scenario places Republicans in control of the lawmaking branches, it would likely be the Republicans' smaller government wing.

note that this essay was completed, except for minor style edits, at the end of October, 2009, when it was not clear whether, and if so, in what form, the Democrat's health care restructuring would pass. I have not changed the essay to reflect subsequent developments.

I. THE TWO SENSES OF CONSTITUTIONAL CHANGE

In examining the ability of a majority to effect fundamental change, it is useful to distinguish two different senses of the constitution of a country and two corresponding senses of constitutional change. The first meaning of a constitution is a document that contains the fundamental law of the nation. Under this meaning, constitutional change occurs when the document's provisions are altered. The most obvious way to alter them is through constitutional amendments, but sometimes the courts can as a functional matter, if not a formal one, effect constitutional change by reinterpreting the constitution's meaning.

The second meaning of a constitution is an older one. One can understand the constitution of a nation as "the basic principles and laws of a nation . . . that determine the powers and duties of the government and guarantee certain rights to the people in it."[4] There is nothing in this definition about a written document.[5] Instead, it refers to the basic principles and laws of a nation. Under this definition, the most important legal and political institutions would count as the constitution of the nation, even though they were not described in a single document. Constitutional change would then occur when those fundamental principles and laws were altered. To distinguish this type of constitutional change from the previous one, I shall call this type "fundamental institutional change."

The New Deal involved both types of constitutional change. First, during the New Deal, the Supreme Court altered its interpretation of the Constitution to vastly expand federal power and to relax other constitutional limitations, such as the separation of powers and the protection of economic liberties.

4. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 248 (10th ed. 1997).

5. In fact, the dictionary goes on to state as a distinct definition, "a written instrument embodying the rules of a political or social organization." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 248 (10th ed. 1997). For a recent discussion of one version of this understanding of a constitution, see Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

While the document was not formally amended, the functional meaning of the Constitution was dramatically changed.

Second, the New Deal changed the nation's fundamental institutions, moving us from a country of limited government and federalism to one with a larger government, at both the state and federal level, that regulated the economy and provided an economic safety net. It is true that an interpretive change of the document's meaning was necessary to effect these changes in fundamental institutions. Without those interpretive changes, most of the institutional changes might have been deemed unconstitutional, as the National Industrial Recovery Act was.[6] But even if no interpretive changes had been necessary, the large number of significant institutions that the New Deal enacted, including the Social Security Retirement Program, unemployment insurance, federal deposit insurance, the Tennessee Valley Authority, the Works Progress Administration, the securities acts, and the National Labor Relations Act, transformed the nature of American government and society.[7]

Of these two types of constitutional change, it is the second type that is raised by the election of Barack Obama. It is true that President Obama could have significant effects on the Supreme Court, since the Court is now often split 5–4, with Justice Kennedy as a swing vote. If Justice Kennedy or one of the four more conservative justices were to step down, then the replacement that Obama appoints could be quite important, shifting the Court's balance of power. But as significant as this might seem, it is not what now appears most consequential for the nation. The Court has been closely divided for a long time. Moreover, it seems unlikely that Justice Kennedy or the four more conservative justices would voluntarily step down to allow Obama an appointment. Thus, a vacancy of this kind, although not impossible, seems unlikely, at least during Obama's first term.

Rather, it is the possibility of the second type of constitutional change that is the prime concern. There is a range of legislation that the Obama Administration seems to support that would effect dramatic change. To mention just the most important examples, the Obama Administration, first, favors a substantial restructuring of health care, with a significant public

6. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

7. *See infra* notes 25–39 and accompanying text.

option that is often discussed by both left and right as a means of moving towards a governmental system.[8] Second, the Administration also favors a substantial cap and trade law that would significantly restrict greenhouse gases by allocating allowances to businesses.[9] Third, the Administration has proposed large changes to the financial regulatory system, with new agencies and additional regulatory powers.[10] Fourth, the Administration seems likely to support the Employee Free Choice Act.[11] Under this legislation, which Obama co-sponsored as a Senator,[12] unions could be formed by a majority of workers signing a card, rather than through a secret ballot, and mandatory arbitration could be used to resolve the first union contract. Finally, the Administration supports a large number of programs that increase government involvement in education at levels ranging from preschool to higher education.[13]

If all of these programs were enacted, they would establish quite dramatic, perhaps radical, change in government institutions. The basic laws, institutions, and principles of the American system of government—its constitution—would have been altered.

II. HOW SHOULD A CONSTITUTIONAL SYSTEM GOVERN FUNDAMENTAL INSTITUTIONAL CHANGE?

The possibility of such dramatic change raises the question of what limitations a constitutional system should place on such fundamental institutional change. In this section, I argue that fundamental institutional changes, like changes of the

8. Robert Pear, *Doctors' Group Opposes Public Insurance Plan*, N.Y. TIMES, June 11, 2009, at A19.

9. Helene Cooper & John M. Broder, *At M.I.T., Obama Presses Case for Focus on Using Renewable Energy*, N.Y. TIMES, Oct. 24, 2009, at A13.

10. *See* U.S. DEPT. OF TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 10–18 (2009), *available at* http://www.financialstability.gov/docs/regs/FinalReport_web.pdf.

11. H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009).

12. *See* GovTrack: Senate Vote on Cloture to Motion to Proceed: H.R. 800 [110th]: Employee Free Choice Act of 2007, *available at* http://www.govtrack.us/congress/vote.xpd?vote=s2007-227.

13. *See generally* Transcript of The President's Remarks to the Hispanic Chamber of Commerce (Mar. 10, 2009), http://www.whitehouse.gov/the_press_office/Remarks-of-the-President-to-the-United-States-Hispanic-Chamber-of-Commerce/ (discussing support for numerous government programs including Early Head Start, Head Start, the Early Learning College Grant, the Teacher's Advancement Program, and increased Pell Grants); *see also* Libby Quaid, *Obama Backs Teacher Merit Pay, Charter Schools*, ASSOCIATED PRESS, Mar. 10, 2009, *available at* http://abcnews.go.com/Politics/wireStory?id=7044733.

constitutional document, should be significantly constrained to further important goals, such as consensus, nonpartisanship, and more accurate decision making. Such fundamental institutional change should only occur if it can surmount significant procedural hurdles.

To analyze limitations on institutional change, we can imagine a system in which no significant limits on such change exist. Assume, then, a stylized version of the political system of Great Britain. Under this system, laws are enacted by a single legislative house that operates under parliamentary principles with the same party controlling both the legislature and executive. Because there are no additional constitutional constraints, a majority of the legislature could theoretically pass any law (except perhaps a law that changes this arrangement). Moreover, a majority, absent losing a vote of no confidence, could govern for five years without holding an election. Clearly, such a system would allow enormous institutional change—the second type of constitutional change—to be passed with a simple majority.

In the United States, it is generally thought undesirable to allow constitutional change of the first type—of the constitutional document—to be made by legislative majorities. To pass a constitutional amendment at the federal level, one needs to surmount a double supermajority rule of two thirds to propose and then three quarters to ratify.[14] In my view, these supermajority rules generate desirable constitutional amendments, because they promote several important features of a good constitution, such as consensus support, nonpartisanship, and being based on accurate factual beliefs.[15]

But these rules do not apply to the second type of constitutional change—fundamental institutional change. Yet, many of the same reasons for restricting changes in the constitutional document also suggest restricting changes in fundamental institutions. Provisions in the constitutional document are generally entrenched against repeal through the ordinary legislative process and therefore they last for long periods. It is this characteristic of constitutional provisions that generally justifies employing supermajority rules. While basic

14. *See* U.S. CONST. art. V. While many commentators believe these supermajority rules are too strict, they often favor some supermajority rule, just a more lenient one.

15. *See* John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115, 1170–82 (2007).

institutional changes are not formally entrenched, they nonetheless are difficult to repeal and therefore share some of the functional characteristics of entrenchments. First, many of the fundamental institutions enacted during the New Deal as well as those proposed by the Obama Administration operate as entitlement legislation.[16] They grant people a right to certain benefits, usually at a cost significantly below what they would otherwise have to pay. Once these entitlements are enacted, the beneficiaries typically fight hard to protect their "rights" from being repealed or reduced.

The functional characteristics of entrenchments are also shared by other types of legislation, such as regulatory laws. Such regulatory laws can also benefit significant interest groups, such as organized business or labor interests. Moreover, the regulatory agency that administers the law is an important beneficiary, with significant knowledge and access to the lawmakers to lobby against its repeal. It is striking that so few administrative agencies have been eliminated over the years.

Given the difficulties of reversing fundamental institutional change, strong arguments exist for placing checks on a simple majority's ability to enact it. The arguments for these checks are similar to but distinct from those for constitutional amendments. Thus, there are strong benefits from employing supermajority rules and from using other mechanisms that limit short term majorities from enacting fundamental institutional change.

First, one reason to check fundamental institutional change is to increase the chances that it is supported by a consensus of the country. Enacting fundamental institutional change under simple majority rule would be problematic because it allows a mere majority to enact basic changes that might be strongly opposed by a large minority. Requiring a supermajority rule here would necessitate more of a consensus to enact such basic changes.

Second, another reason to check fundamental institutional change is to promote its enactment based on the public interest rather than on partisan considerations such as what will help the majority's political party. Unfortunately, legislators often support programs that would promote key constituents of their party, such as labor unions or corporations, even if that would not be good policy. Requiring a supermajority to enact basic

16. The paradigmatic New Deal example is Social Security. Presumably, both health care and cap and trade would function much like entitlements.

provisions, however, will often require one party to secure support from the other party to pass legislation, thereby reducing the partisanship involved.

A third reason to place limits on fundamental institutional change is to promote enactment through procedures that make it likely to lead to good results. One problem with fundamental institutional change that cannot easily be repealed is that it lasts for a long period. Enacting desirable long term provisions is difficult because it requires hard-to-acquire knowledge of how these institutions will operate over time. Moreover, people have a tendency to assume that existing circumstances that might support these programs will continue in the future.[17] People also tend to be too prone to believe that programs designed to achieve certain results will actually do so. If people, then, are too quick to enact such provisions, then one might want to require additional support for such programs to increase the likelihood that the programs that are enacted actually have the effects they are intended to have.

A final reason to limit fundamental changes it that it prevents a short term majority from making relatively permanent changes. Sometimes a party can gain a large majority because of a scandal (such as Watergate) or an aberrational issue, but not have the nation's support on other issues. In this situation, it is useful to have mechanisms, other than supermajority rules, that limit that majority from passing laws the public does not support. One such mechanism that I discuss here is to require the majority to secure support again in an upcoming election.

III. RESTRICTING FUNDAMENTAL INSTITUTIONAL CHANGE: THE SIMPLE MODEL

How, then, does the American constitutional system restrain basic institutional change? One central feature of that system, which differs from our stylized British system, is that the American system employs three separate lawmaking entities: the House, the Senate, and the President. Each of these entities is elected in a different way. As Buchanan and Tullock pointed out nearly a half century ago, this system operates as a kind of supermajority rule.[18] It requires more support from the populace

17. McGinnis & Rappaport, *supra* note 15, at 1173.

18. JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 233–48 (1962).

to secure a majority in each of these lawmaking institutions than to do so in a single legislative house.

This check requires that the lawmaking institutions differ from one another, which they do in a variety of ways. First, they are selected by different electorates, with House members elected by districts, but Senators and the President elected by the entire state. Second, they are elected at different times for different periods, with all House members standing for election every two years, the President every four years, and Senators every six years, with one third of the Senate standing every two years. Thus, the lawmakers will reflect the views of electors from different periods and will have different degrees of insulation from the electorate. Finally, the lawmakers will often be elected based on distinct considerations, with the President often being selected for his foreign policy expertise and House members for more domestic considerations. Overall, then, the differences in the lawmaking branches operate to establish a relatively weak supermajority rule.

In addition to this implicit supermajority rule, there is also the express supermajority requirement of overcoming the Senate filibuster. Ending a filibuster has required three-fifths of the Senate since 1975, but generally required two thirds of the Senate for much of the twentieth century. It is true that the filibuster is not a constitutional requirement, but Senators have strong incentives to keep the filibuster, since it enhances their individual power.

As a result of the filibuster, the majority party needs not only the presidency and a House majority, but at least 60 Senators to enact its agenda. This requirement makes it even less likely that a party will be able to secure the requisite support. It is not so easy to secure 60 percent of the Senate along with control of the presidency and the House of Representatives.

Of course, even if a single party does secure a dominant majority, that would not necessarily result in fundamental institutional change. It would also be necessary for the key players in that party—the President and a majority of the party's caucus in each house—to be in favor of such change. But that will not always be the case. For example, President Carter had a dominant majority in 1976, but did not seem to pursue basic institutional change.[19]

19. While the Democrats have had dominant majorities at various times since the New Deal, these numbers often overstate the party's power because on issues, such as

If one party does secure the requisite majorities, it then has two years to enact its agenda before having to face the voters again. But after two years, the entire House of Representatives and one third of the Senate would stand for reelection. Thus, if the fundamental institutional change sought by the majority party was popular, the majority party would retain its power and could continue with its agenda. But if the voters disapproved of the radical agenda, they could put an end to it. They could do this by providing control of the House to the other party or reducing the majority control of the Senate below the level necessary to end a filibuster. Thus, the constitutional system places a two year limit on a temporary majority's ability to enact fundamental institutional change without facing the voters.

IV. RESTRICTING FUNDAMENTAL INSTITUTIONAL CHANGE: THE MORE COMPLEX MODEL

While the simple model presented in the previous section suggests that there is a check on fundamental institutional change, this model actually understates the check. A more complex model suggests that the American constitutional system imposes a greater check that derives from two additional sources: from a more realistic analysis of the actual power of legislative majorities and from the shadow of the midterm elections.

While the simple model assumes that a majority of sixty percent in the Senate and fifty one percent in the House is necessary to pass large institutional change, this prediction may understate the requisite degree of support. Suppose that the Democrats hold 60 Senate seats and therefore require every Democratic Senator's vote to end a filibuster. To pass sweeping legislation, the Democrats will certainly need the support of a majority of their party. But having the support of the majority does not mean that they will also have the support of the most moderate members of their party. The most conservative Democratic Senators are likely to have different political preferences and may not, despite the forces of party loyalty, go along with the bulk of their party's agenda. In this situation, the dominant party may not be able to enact the sweeping legislation.

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civil rights, the party was split, with Southern Democrats being strongly opposed. Democratic opponents of expansion of the New Deal also appeared to have placed a break on fundamental change during Roosevelt's second term.

To pass this sweeping legislation, the dominant party may need a comfortable margin over the minimum necessary to pass a law. If the Democrats in the above example had 68 Senators, then they could lose 8 Senators and still pass the legislation. In this situation, none of the Senators would enjoy the monopoly power to hold out his support in return for undue benefits. Moreover, with 68 Senators, the Democrats would be more likely to find 60 Senators who ideologically favor the legislation. Thus, enacting fundamental institutional change would be much easier with majorities larger than the minimum necessary to pass a law.

The second feature of the more complex model involves the time during which the dominant majority can enact its agenda.[20] While the simple model implies that the majority party has two years to enact its agenda before the midterm election, a more subtle analysis suggests that there is less time before the voters may make their opinions known. As the majority party proceeds to enact its agenda, the voters can express their views through public opinion polls. If the country dislikes the measures that the majority party is enacting, the popularity of the President and the congressional majority will decline. The members of this party who are up for reelection and are most vulnerable to losing their seats may then refuse to go along with these unpopular measures.

In this way, the shadow of the midterm elections operates to constrain the dominant majority. Thus, there is not even a two year period before the majority must face the voters. Instead, it might be as short as six months or a year before the public can make their feelings known and begin to cut back on a radical agenda.[21]

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20. A temporal dimension enters into the analysis in another way. To secure the large supermajorities necessary to pass enormous institutional change would ordinarily require more than a single congressional election. By largely requiring a party to obtain the support of the voters at more than one election, the political system makes it more difficult for a temporary majority to enact radical change.

21. These models assume that only a single party enacts radical change, but this is an oversimplification. Sometimes members of the two parties may be split on issues and controversial legislation can be enacted through a coalition, as occurred with enactment of the Civil Rights Act of 1964. *See* Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417 (2003). At other times, a majority party may have significant, but not dominant control of the lawmaking branches, and may secure additional support for popular legislation from members of the other party. An example of this situation is the Reagan Administration's enactment in 1981 of substantial tax cuts with the support of a significant number of Democrats. *See* STEVEN F. HAYWARD, THE AGE OF REAGAN: THE CONSERVATIVE COUNTERREVOLUTION

The various mechanisms highlighted in these two models operate to place limits on fundamental institutional change at the federal level. While these mechanisms are certainly desirable for the reasons discussed above, I do not argue that they are ideal, because other considerations might favor different mechanisms.[22] One additional complication concerning these mechanisms is that they apply to both ordinary legislation and legislation that effects fundamental change. As a result, they are not ideal for either type of legislation.[23] If one makes the mechanisms ideal for fundamental institutional change, then they will block too much ordinary legislation. If one makes them ideal for ordinary legislation, they will permit too much fundamental institutional change. Thus, the mechanisms need to be a compromise between the ideals for basic institutional change and for ordinary legislation.[24]

V. HISTORICAL EXAMPLES SUPPORTING THE ANALYSIS

We can illustrate and support this analysis by examining three diverse historical examples. These examples involve one dominant majority that passed enormous institutional change for two years and then secured the approval of the voters for more substantial change; another dominant majority that passed enormous institutional change during its initial years and then was stopped by the midterm elections; and a third, smaller dominant majority that was not even able to enact substantial change during its initial two years.

1980–1989, at 144–66 (2009). Ultimately, the mechanisms that limit fundamental change also work when that change is effected through a bipartisan coalition.

22. Unfortunately, I do not have space to address these other considerations. To mention just one example, if one favors small government, then one might advocate strict limits on federal power, as existed under the original Constitution, so that most fundamental change has to occur at the state level under a system of state competition. *See also* McGinnis & Rappaport, *supra* note 15, at 1126–40 (discussing use of more focused supermajority rules to protect against biases in favor of certain types of legislation).

23. It may be necessary that the mechanisms apply to both ordinary legislation and legislation that effects fundamental change, because it is difficult to draw a clear distinction between these two types of legislation.

24. For a discussion of the proper mechanisms for enacting ordinary legislation, see McGinnis & Rappaport, *supra* note 15, at 1126–40.

A. THE NEW DEAL

The paradigmatic example of fundamental institutional change is the New Deal. While the New Deal transformed the nation's institutions, it did so because of its electoral triumphs.

In 1932, Franklin Roosevelt won a landslide election following Herbert Hoover's unpopular response to the Great Depression. The 1932 election also produced enormous gains for the Democrats in Congress with the Democrats picking up 97 seats in the House and 12 in the Senate. See Figure 1.[25] This translated into 73 percent of the House and 62 percent of the Senate. Significantly, in the 1934 midterm elections, the Democrats did not lose seats, but gained 9 additional Representatives and 8 more Senators. Democratic gains continued in the 1936 elections, with the party finally suffering losses only in the 1938 midterm elections.

Year	House	% Dem	Senate	% Dem
1930	220D 214R	51	47D 48R	49
1932	313D 117R	73	59D 36R	62
1934	322D 103R	76	69D 25R	73

Figure 1

These dramatic and consistent electoral victories translated into enormous institutional change. The initial victories allowed Congress in 1933 to enact Federal Deposit Insurance,[26] the Glass-Steagall Act,[27] the Civilian Conservation Corps.,[28] the Public Works Administration,[29] and the Tennessee Valley Authority.[30] Congress also passed securities laws in 1933[31] and 1934.[32] In addition, the 1933 Congress also passed the National Industrial Recovery Act[33] and the Agricultural Adjustment Act,[34] which allowed the federal government tremendous power over industrial and agricultural production. Both of these statutes,

25. These totals and those in the other figures in this essay are derived from 2 GUIDE TO CONGRESS 1307–08 (6th ed. 2008).

26. Emergency Banking Act, Pub. L. No. 73-1, 48 Stat. 1 (1933).

27. Banking Act of 1933, ch. 89, 48 Stat. 162 (1933).

28. Pub. L. No. 73-15, 48 Stat. 22 (1933).

29. The Public Works Administration was created by The National Industrial Recovery Act of 1933, ch. 90, 48 Stat. 195 (1933).

30. Tennessee Valley Authority Act, ch. 32, 48 Stat. 58 (1933).

31. Securities Act of 1933, ch. 38, 48 Stat. 74 (1933).

32. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (1934).

33. The National Industrial Recovery Act of 1933, ch. 90, 48 Stat. 195 (1933).

34. Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 (1933).

however, were subsequently declared unconstitutional by the Supreme Court.[35]

Had the Democrats lost a substantial number of seats in the 1934 midterm elections, the New Deal might have ended. But instead, they gained seats, allowing for the Second New Deal. In 1935, Congress was able to enact further fundamental change, including the Social Security Retirement Program,[36] Unemployment Insurance,[37] Aid to Families with Dependent Children,[38] and the National Labor Relations Act.[39] These extremely important programs became largely permanent changes to the American political landscape.

The New Deal experience thus supports my analysis. First, the New Deal was able to enact radical institutional change by securing very large majorities. These majorities were huge in 1932 and grew over time, with the Democrats enjoying approximately 75 percent of Congress in 1934. Second, the New Deal kept the confidence of the people. While the voters could have placed a brake on the Democrats in 1934 (or 1936), they endorsed the New Deal with Democratic electoral victories. The New Deal was not the result of a short term majority, but of a significant change in the beliefs of the American people.

B. THE GREAT SOCIETY

The second example of fundamental institutional change is the Great Society (including the Civil Rights Laws) passed during the Johnson Administration. With the assassination of President Kennedy in 1963, Lyndon Johnson became President, inheriting a significant Democratic House and Senate. See Figure 2.[40] But in the 1964 election, Johnson and the congressional Democrats demolished Barry Goldwater and the Republicans, gaining 37 seats in the House and 1 in the Senate. The election left the Democrats with over two thirds of both the House and Senate. In the 1966 midterm elections, however, the Democrats suffered significant defeats, losing 47 seats in the House and 4 in the Senate.

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35. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding the National Industrial Recovery Act unconstitutional); United States v. Butler, 297 U.S. 1 (1936) (holding the Agricultural Adjustment Act to be unconstitutional).

36. Social Security Act, Pub. L. No. 74-271, §§ 201-210, 49 Stat. at 622-25.

37. Social Security Act, Pub. L. No. 74-271, §§ 301-303, 49 Stat. at 625-26.

38. Social Security Act, Pub. L. No. 74-271, §§ 401-406, 49 Stat. at 626-28.

39. Pub. L. No. 74-198, 49 Stat. 449 (1935).

40. 2 GUIDE TO CONGRESS, *supra* note 25, at 1308.

Year	House	% Dem	Senate	% Dem
1962	258D 176R	59	67D 33R	67
1964	295D 140R	68	68D 32R	68
1966	248D 187R	57	64D 36R	64

Figure 2

The Great Society began in 1964 after the change from a more moderate President Kennedy to a more aggressive President Johnson. Johnson pushed through the Civil Rights Act of 1964,[41] the Food Stamps program,[42] and the Economic Opportunity Act of 1964.[43] This last law established the office of Economic Opportunity to administer a variety of programs dubbed the War on Poverty, including VISTA, the Model Cities Program, Upward Bound, and Head Start.[44]

While these programs were significant, it was the next Congress—with its enormous majorities—that passed the most extensive and controversial changes. In 1965, Congress enacted both Medicare[45] and Medicaid,[46] the Voting Rights Act,[47] the Elementary and Secondary Education Act,[48] which for the first time provided significant federal aid to public education, the Immigration and Nationality Services Act, which abolished national origin quotas,[49] and legislation creating the National Endowments for the Arts and Humanities.[50]

This fundamental institutional change again supports my analysis. First, the Democrats needed substantial majorities to

41. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

42. Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (codified at 7 U.S.C. §§ 2011 2036 (2000)).

43. Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964), *repealed by* Pub. L. No. 97-35, § 683(a), 95 Stat. 519 (1981).

44. *See* Deborah J. Cantrell, *Common Ground: The Case for Collaboration Between Anti-Poverty Advocates and Public Interest Intellectual Property Advocates*, 15 VA. J. SOC. POL'Y & L. 415, 420 n.19 (2008) (discussing the funding of VISTA as part of the War on Poverty); Jeffrey S. Lehman, *To Conceptualize, to Criticize, to Defend, to Improve: Understanding America's Welfare State*, 101 YALE L.J. 685, 695 (1991) (briefly discussing the Model Cities program, Upward Bound, and Head Start).

45. Social Security Act of 1965 Title XVIII, 42 U.S.C. §§ 1395-1395ccc (2000).

46. Social Security Act of 1965 Title XIX, 42 U.S.C. §§ 1396-1396v (2000).

47. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

48. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

49. Immigration and Nationality Services Act of 1965, Pub. L. No. 89-236, 79 Stat. 911.

50. National Endowment for the Arts and Humanities Act of 1965, Pub. L. No. 89-209, 79 Stat. 845 (codified as amended at 20 U.S.C. §§ 951-68 (1988 & Supp. II 1990)).

pass this legislation, with the huge majorities in 1964 allowing Congress to pass the most controversial and radical changes. Second, the Great Society largely stopped after the 1966 midterm elections, when the nation appeared to record its disapproval of the extent and pace of Democratic governance through large Republican gains. Thus, unlike the New Deal, which gained seats after the midterm elections, the Great Society lost support and was essentially terminated.

C. THE EARLY CLINTON ADMINISTRATION AND HEALTH CARE RESTRUCTURING

The last historical example involves the 1992 election of Bill Clinton. Prior to this election, the Democrats had enjoyed significant control of the Congress, while the Republicans had held the White House. Thus, the election of a Democratic President seemed like it might lead to significant change. The Democrats now had control over all three lawmaking branches, with healthy majorities in the House (59 percent) and Senate (57 percent). See Figure 3.[51] The only real limitation was that Democrats did not enjoy a filibuster proof Senate majority. Two years later in the midterm elections, however, the Democrats lost both the House and the Senate.

Year	House	% Dem	Senate	% Dem
1992	258D 176R	59	57D 43R	57
1994	204D 230R	47	47D 53R	47

Figure 3

During its first two years, the Clinton Administration pursued a variety of legislative proposals, but overall they did not constitute dramatic change.[52] The one potential example of dramatic change involved the Administration's attempt to pass a

51. 2 GUIDE TO CONGRESS, *supra* note 25, at 1308.

52. The Clinton Administration enacted NAFTA, but did so with the assistance of more Republicans than Democrats. *See* Ranko Shiraki Oliver, *In the Twelve Years of NAFTA, the Treaty Gave Me...What, Exactly?: An Assessment of Economic, Social, and Political Developments in Mexico Since 1994 and Their Impact on Mexican Immigration into the United States*, 10 HARV. LATINO L. REV. 53, 65 n.58 (2007). The Administration also was able to have Congress enact a tax increase on higher income individuals and corporations, while expanding the earned income tax credit, but this hardly seems enormous. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312. The Administration also attempted to allow gays to serve in the military, with the result that the Don't Ask, Don't Tell policy was enacted by Congress. Pub. L. No. 103-160 (codified at 10 U.S.C. § 654).

comprehensive health care plan that would have radically changed the health care system.[53] After much debate, the plan was resisted in both the House and Senate, and ultimately defeated.

One way to understand the health care defeat is to see it as the result of overreaching by the Clinton Administration. While the Democrats certainly had a substantial majority, that majority was not of the overwhelming size that the Democrats enjoyed during the New Deal or Great Society. The Clinton Administration may also have overestimated its power due to confusion about the meaning of its election. President Clinton had campaigned as a New Democrat, which led people to believe he would not pursue dramatic leftward change. Moreover, Clinton may have been elected only because there was a three-way race, with Ross Perot taking many votes from George Bush. Thus, the country might have elected President Clinton, even though it did not favor dramatic change toward government health care.

Once again, the failure of the Clinton Administration to enact substantial institutional change supports my analysis. The Democrats, especially the liberal wing of the party, did not have sufficient majorities to secure passage of the Administration's health care plan. Moreover, the midterm elections allowed the voters to express their disapproval of the Democratic Congress's behavior. Thus, what appeared to be a short term majority was eliminated.

VI. THE OBAMA ADMINISTRATION

This brings us to the 2008 election, which placed Barack Obama in the White House and significantly strengthened the Democrats' congressional majorities. Initially, one suspects that both the Obama Administration and many of its critics believed that the Administration would be able to enact a large portion of its agenda and thereby effect fundamental institutional change. But at present[54] it is not clear how much of that agenda, besides the Stimulus Law, will be enacted.

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53. Whether the Clinton Administration's health care plan, by itself, constituted fundamental change might be disputed. Certainly, the Clinton agenda was much less ambitious than the Obama agenda is. But it is unnecessary to answer this question here, because the country rejected the Clinton health care plan, whatever kind of change it represented.

54. The "present" here refers to the end of October, 2009, the point at which the essay was substantially completed.

Clearly, the Democrats have a significant majority. They have 58 Senators plus 2 Independents who caucus with them, making for the 60 Senators necessary to end a filibuster. They also have a 258-177 advantage in the House. While substantial, these majorities fall far short of the Democrats majorities during the New Deal and the Great Society. They are much closer to those enjoyed by the Clinton Administration, with the important exception that the current Democrats are better able to overcome the filibuster.

Another similarity with the Clinton Administration is that it is by no means clear that Obama was elected to pursue a left wing agenda. While Obama famously campaigned on "change" and certainly talked about health care reform, he also appeared to run as a non-partisan candidate who would work with the Republicans—not something that a dramatic move to the left would allow. Moreover, Obama, who also ran as something of a post-racial candidate, seemed to benefit from many people's desire to elect the first African-American President.[55]

Obama also benefited politically from the severe economic downturn that preceded the election. This downtown occurred on George Bush's watch and it was natural for the public to blame the Republicans for the crisis. Voters who supported Obama because of the recession would naturally expect his primary concern to be restoring the economy rather than pursuing other goals.

These factors suggest that there might be strong resistance to Obama's agenda for substantial change. Two of the principal items on the agenda—health care restructuring and cap and trade—are not really attempts to address the downturn. In fact, these proposals may exacerbate the crisis, because they are likely to involve increases in taxes, debt, or costs of production. If these legislative proposals were responding to the downturn, the Obama Administration would probably find it easier to enact them, since it would be addressing a problem widely held to require efforts to solve it.

The Stimulus Law does appear to be directed at the recession,[56] but even this law has been a source of great controversy. Many critics view the law as another example of the

55. Although some people, no doubt, opposed Obama because of his race, it is my judgment that the political benefits far outweighed the costs for him.

56. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

Obama Administration pursuing a big government agenda rather than addressing the recession. They believe that the law is too costly and focuses on expenditures rather than tax cuts.[57] Moreover, they argue that the bulk of the expenditures, which are directed towards government rather than the private sector, do not occur immediately, but only years in the future.[58] In addition, the Obama Administration now seeks to make one third of the Stimulus expenditures permanent.[59] In addition to suggesting that the Stimulus Law was part of a big government approach, the critics also claim that the lack of Republican support for the Stimulus, with no House Republicans and only three Senate Republicans supporting it, indicates that Obama's promises of non-partisanship were hollow.

These concerns about President Obama pursuing an ideological agenda in a partisan manner, combined with a continuing decline in the economy,[60] have had their effect on his popularity. According to the Gallup Poll, Obama's job approval rating was in the low 60s in his first two quarters, but fell 9 points to 53 in the third quarter.[61] This historically large decline[62] left Obama with a relatively low approval rating for this time in his

57. *See generally* H.R. REP. NO. 111-16, at 413-781 (2009); *see also* National Association of Realtors, *American Recovery and Reinvestment Act of 2009*, http://www.realtor.org/government_affairs/gapublic/american_recovery_reinvestment_act_home (noting that roughly 35% of the stimulus package was devoted to tax cuts, with the rest devoted to spending).

58. *See* Edward P. Lazear, Op-Ed, *Do We Need a Second Stimulus?*, WALL ST. J., July 9, 2009, at A15, *available at* http://online.wsj.com/article/SB124709595712615003.html (noting that according to the Congressional Budget Office, the largest amount of the stimulus spending occurs in 2010, and the amount spent in 2011 is nearly as much as spent in 2009).

59. Alex Brill & Amy Roden, *A Sickening Deficit*, FORBES.COM, Oct. 18, 2009, http://www.forbes.com/2009/10/18/health-care-stimulus-deficit-opinions-contributors-alex-brill-amy-roden.html ("All told, the Obama administration's budget seeks to make at least 37% of ARRA's spending and tax cuts permanent on an annual basis.").

60. Between January and September of 2009, the unemployment rose more than 2 points from 7.6 to 9.8 percent. *See* U.S. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNS14000000 (last visited Oct. 25, 2009). At the end of October, however, the Department of Commerce announced that the economy had grown 3.5 percent in the third quarter of 2009, which growth, if sustained, might signal the official end of the recession. *See* Catherine Rampell, *U.S. Economy Began to Grow Again in 3rd Quarter*, N.Y. TIMES, October 30, 2009, at A1, *available at* http://www.nytimes.com/2009/10/30/business/economy/30econ.html?ref=business.

61. *See* Gallup Poll, http://www.gallup.com/poll/123806/Obama-Quarterly-Approval-Average-Slips-Nine-Points.aspx.

62. According to Gallup, "the 9-point drop in the most recent quarter is the largest Gallup has ever measured for an elected president between the second and third quarters of his term, dating back to 1953." Gallup Poll, *supra* note 61.

presidency, and within 5 points of Bill Clinton's low 48 percent at the comparable time in his presidency.[63] Significantly, Obama's approval rating is even lower among independents.[64] These declines in Obama's popularity reduce his ability to enact his agenda. The less popular he and his proposals are, the less likely that marginal legislators will support them.

While these weaknesses raise the possibility that Obama will not enact all or most of his agenda, this is merely a possibility, not a certainty. Obama has many resources, including large congressional majorities and a majority of his party who appear to strongly favor these measures. Moreover, his popularity could improve significantly at any time, especially with an upturn in the economy.

The point of this analysis has not been to predict whether President Obama's agenda will be enacted. At this point, there is no way to know. Instead, it has been, first, to describe the significant limitations on fundamental institutional change that the Obama Administration is now confronting. The mere fact of substantial congressional majorities does not necessarily translate into transformative legislative enactments. One needs political support to enact fundamental institutional change and the degree of Obama's support is now being tested. Perhaps the most that can be said now is that Obama will find it much easier to enact his *full* agenda if he and the Democrats are able to maintain political support in subsequent elections.

Second, the analysis speaks to the legitimacy of Obama either passing or failing to pass fundamental institutional change. If Obama is able to enact his full agenda, then he would have successfully surmounted a system that puts real constraints on the passage of fundamental change. His agenda could not, then, easily be dismissed as that of a short term majority that had exploited its powers. Rather, in a sense, the Democrats would have earned their enactments (whether or not one regards them as desirable). But if Obama fails to enact his full agenda—if he

63. *See* Gallup Poll, *supra* note 61 ("But after the drop in his support during the last quarter, his average now ranks near the bottom for presidents at similar points in their presidencies.") Moreover, President Obama's approval is below 50 percent under the Rasmussen poll, which queries likely voters. *See* Rasmussen Reports, Obama Approval Index History, http://www.rasmussenreports.com/public_content/politics/obama_administration/obama_approval_index_history (last visited October 20, 2009) (Obama approved by 47 percent, while disapproved by 52 percent of likely voters).

64. Gallup Poll, for the week ending February 7, Obama's approval for Independents is 46 percent, at http://www.gallup.com/poll/politics.aspx (last visited February 11, 2010).

enacts only some parts or only watered down versions—then one can say that desirable checks on substantial change had operated to block it.

Of course, that the existing political system places a check on fundamental institutional change does not mean it is the ideal check. One might forcefully argue that the original Constitution's more robust federalism was a superior system because it required that most fundamental change be enacted by states in competition with one another. But unfortunately that system is gone for now, and perhaps, forever. The existing system does a tolerable job and it is that system that the Obama Administration must confront.